UNION OF INDIA
v.
R. GANDHI, PRESIDENT, MADRAS BAR ASSOCIATION
(Civil Appeal No. 3067 of 2004 etc.)

MAY 11, 2010

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

Companies Act, 1956 – Chapters 1B and 1C – Creation of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) – For adjudication of cases which were adjudicated by CLB, BIFR, AAIFR and High court in its company jurisdiction – Validity of – Held: Creation of NCLT and NCLAT and vesting in them jurisdiction of High Court is not unconstitutional – Parliament has the legislative competence to make laws providing for constitution of tribunals to deal with company matters even though it is not mentioned in Articles 323A and 323B – Such legislation is subject to constitutional limitations – It should not encroach upon the independence of judiciary and should not be voilative of doctrines of rule of law and separation of powers – Such legislation is subject to judicial review if the court finds that the tribunalisation would adversely affect the independence of judiciary or the standards of judiciary – Appointment of the Member of Tribunals from civil services who continue to be employee of the Government by maintaining their lien would amount to transfer of judicial function to executive which goes against the doctrine of separation of power and independence of judiciary – In case where jurisdiction is transferred from courts to tribunals for expeditious disposal and where specialized knowledge is not required appointment of Technical Member is not necessary – In such case, if Technical Member is appointed, it would amount to encroachment upon the independence of judiciary and Rule of Law and would be unconstitutional – It is for the

legislature to decide whether the tribunal should have only Judicial Member or a combination of Judicial of Technical Member – When Judges of the High Court are substituted with Members of tribunal, the standards should be approximate to the standards of mainstream judicial functioning – Chapters 1B and 1C presently structured, are unconstitutional as they dilute the independence of tribunal and standards of qualification of Members of the tribunal – They can be made operational on making suitable amendments thereof – Corrections suggested to set right the defect in Chapter 1B and 1C – Constitution of India, 1950 – Articles 226, 323A and 323B; Seventh Schedule, List I Entries 77, 78, 79 and 40 r/w Entry 5, List III Entries 11A r/w Entry 46.

Constitution of India, 1950:

Article 14 – Right to equality – Includes a right to adjudication by a forum exercising judicial power in impartial and independent manner consistent with the recognized principles of adjudication.

Articles 246, 323A and 323B, Seventh Schedule List I – Power of Parliament to enact law in List I is absolute – The power so conferred by Article 246 is not affected or controlled by Article 323A and 323B.

Legislation – Challenge to validity of legislation – Basis for – Held: Legislation can be declared unconstitutional or invalid only on the grounds of legislative competence or for violation of fundamental rights or constitutional provisions including the provisions which enshrine the principles of Rule of Law, separation of power and independence of judiciary – Legislation cannot be held invalid for violating basic structure of the Constitution – Constitution of India, 1950.

Judicial Fora – Courts and Tribunals – Distinction between.

Accepting the recommendations of Eradi Committee,

Government passed Company (Second amendment) Act, 2002 inserting chapters 1B and 1C in Companies Act, 1956 which provided for establishment of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) to take over the functions which were being performed by Company Law Board (CLB), Board of Industrial and Financial Reconstruction (BIFR), Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the High Court.

Madras Bar Association challenged the validity of the Chapters 1B and 1C. High Court held that creation of the tribunal and vesting therein the powers exercised by High Court and Company Law Board was not unconstitutional. However, it held that several provision of chapters 1B and 1C i.e. Sections 10-FD(f)(g)(h), 10-FE, 10-FF, 10-FL(2), 10-FR(3) and 10-FT were defective and thus violative of basic constitutional scheme of separation of power and independence of judiciary; and that unless the provisions were amended by removing the defects, it would be unconstitutional to constitute NCLT and NCLAT.

Pursuant to the judgment of the High Court, Union of India agreed to rectify many of the defects pointed out by the High Court. It has, however, not accepted the defects so far as Sections 10-FD(3)(f), (g) and (h) and 10-FX were concerned.

A three judges Bench of Supreme Court held that the judicial pronouncements by the Supreme Court, holding that Parliament and the State Legislatures possessed legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Court, had not dealt with the issues i.e. (i) To what extent the powers and judiciary of High Court (except judicial review under Article 226 / 227) can be transferred to tribunals; (ii) Is there a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by courts in any tribunal or authority outside the judiciary; and (iii) Whether the "wholesale transfer of powers" as contemplated by the Companies (Second Amendment) Act, 2002 would offend the constitutional scheme of separation of powers and independence of judiciary so as to aggrandize one branch over the other. Therefore, the three judges Bench directed these appeals to be heard by a Constitution Bench.

Partly allowing the appeals, the Court

HELD:

Difference between Courts and Tribunals:

1.1. The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the State for administration of justice that is for exercise of the judicial power of the State to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A of the Constitution and tribunals for other matters under Article 323B) of the constitution or statutory tribunals which are created under a statute. [Para 12] [901-E-H; 902-A]

Harinagar Sugar Mills Ltd. vs. Shyam Sundar

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Jhunjhunwala **– (1962) 2 SCR 339;** *Jaswant Sugar Mills vs. Laxmi Chand* **– 1963 Supp (1) SCR 242;** *Associated Cement Companies Ltd. vs. P. N. Sharma* **– (1965) 2 SCR 366;** *Kihoto Hollohan vs. Zachillhu* **– 1992 Supp (2) SCC 651;** *S. P. Sampath Kumar vs. Union of India* **– (1987) 1 SCC 124, referred to.**

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1.2. Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are: (i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts. (ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding tribunals may have only Technical Members, but they are rare and are exceptions. (iii) While courts are governed by detailed statutory procedural rules, in particular the CPC and Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the CPC only where it is required, and without being restricted by the strict rules of Evidence Act. [Para 14] [907-B-F]

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<u>**Independence of Judiciary and Separation of Powers:**</u>

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2.1. Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is

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the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things – security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the Judiciary) and without (from the Executive). Independence of Judiciary has always been recognized as a part of the basic structure of the Constitution [Para 15 and 16] [907-G-H; 908-A-C; 911-B]

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Union of India vs. Sankalchand Himatlal Sheth **1977 (4) SCC 193;** *Supreme Court Advocates-on-Record Association and Ors. v. Union of India* **(1993) 4 SCC 441;** *L. Chandra Kumar v. Union of India* **(1997) 3 SCC 261;** *State of Bihar vs. Bal Mukund Shah* **2000 (4) SCC 640;** *Shri Kumar Padma Prasad vs. Union of India* **1992 (2) SCC 428;** *All India Judges Association vs. Union of India* **2002 (4) SCC 247, referred to.**

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'The Framing of India's Constitution' by B. Shiva Rao, **volume I-B, Page 196);**

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2.2. The doctrine of separation of powers has also been always considered to be a part of the basic structure of the Constitution. [Para 17] [914-B]

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Rai Sahib Ram Jawaya Kapur vs. The State of Punjab **1955 (2) SCR 225;** *Chandra Mohan vs. State of UP* **AIR 1966 SC 1987;** *Indira Nehru Gandhi vs. Raj Narain* **1975 Supp SCC 1;** *L. Chandra Kumar v. Union of India* **(1997) 3 SCC 261;** *Keshavananda Bharati vs. State of Kerala* **1973 (4) SCC 225,** *State of Bihar vs. Bal Mukund Shah* **2000 (4) SCC 640;** *I. R. Coelho vs. State of Tamil Nadu* **2007 (2) SCC 1, referred to.**

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<u>**Recommendations for better working of Tribunals:**</u>

3.1. Only if continued judicial independence is assured, tribunals can discharge judicial functions. In order to make such independence a reality, it is fundamental that the members of the tribunal shall be independent persons, not civil servants. They should resemble courts and not bureaucratic Boards. Even the dependence of tribunals on the sponsoring or parent department for infrastructural facilities or personnel may undermine the independence of the tribunal. [Para 20] [917-F-G]

3.2. In India tribunals have not achieved full independence. The Secretary of the concerned 'sponsoring department' sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependant on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. [Para 23] [921-D-E]

L. Chandra Kumar v. Union of India **(1997) 3 SCC 261, followed.**

Judicial Review **by De Smith 6th Edn., Page 50;** '*Administrative Law*' **by H. W. R. Wade & C. F. Forsyth (10th Edn., pp. 773, 774 and 777); Leggatt Committee's Report, referred to**

<u>**Extent of power of Government to transfer the judicial functions traditionally performed by courts to tribunals:**</u>

4.1. The legislative competence of Parliament to provide for creation of courts and tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Item 11A r/w Entry 46 of List III of the Seventh Schedule of the Constitution. Articles 323A and 323B of the Constitution are enabling provisions which enable the setting up of tribunals contemplated therein; and that the said Articles, however, cannot be interpreted to mean that they prohibited the legislature from establishing tribunals not covered by those Articles, as long as there is legislative competence under the appropriate Entry in the Seventh Schedule. [Para 28] [926-H; 927-A-C]

Union of India v. Delhi High Court Bar Association **2002 (4) SCC 275;** *State of Karnataka v. Vishwabharathi House Building Co-operative Society and Ors.* **2003 (2) SCC 412;** *Navinchandra Mafatlal vs The Commissioner of Income-Tax* **1955 (1) SCR 829;** *Union of India vs. Harbhajan Singh Dhillon* **1971 (2) SCC 779, relied on**

4.2. The power of Parliament to enact a law which is not covered by an entry in Lists II and III of Seventh Schedule is absolute. The power so conferred by Article 246 is in no way affected or controlled by Article 323A or 323B. Even though revival/rehabilitation/regulation/ winding up of companies are not matters which are mentioned in Article 323A and 323B, the Parliament has the legislative competence to make a law providing for constitution of tribunals to deal with disputes and matters arising out of the Companies Act. [Paras 29 and 31] [928-B; 929-D-E]

Associated Cement Companies Ltd. vs. P. N. Sharma **(1965) 2 SCR 366, relied on.**

4.3. The Constitution contemplates judicial power being exercised by both courts and tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of

provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that Legislature has no power to transfer judicial functions traditionally performed by courts to tribunals. [Para 32] [929-F-H]

4.4. When a tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the tribunals. It is an inevitable consequence of creation of tribunal, for such disputes, and will in no way affect the validity of the law creating the tribunal. [Para 33] [930-C-D]

4.5. When it is said that Legislature has the competence to make laws providing which disputes will be decided by courts and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of Rule of Law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be Technical Members in addition to Judicial Members. Where however jurisdiction to try certain category of cases are transferred from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial Technical Member. In respect of such tribunals, only members of the Judiciary should be the Presiding Officers/members of such tribunals. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for Technical Members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the Judiciary and Rule of Law and would be unconstitutional. [Para 35] [931-E-H; 932-A-C]

R. K. Jain vs. Union of India, **1993 (4) SCC 119, relied on**

L. Chandra Kumar v. Union of India **(1997) 3 SCC 261, referred to.**

4.6. If the Act provides for a tribunal with a Judicial Member and a Technical Member, whether there would be limitations upon the power of the legislature to prescribe the qualifications for such technical member depends upon the nature of jurisdiction that is being transferred from the courts to tribunals. Logically and necessarily, depending upon whether the jurisdiction is being shifted from High Court, or District Court or a Civil Judge, the yardstick will differ. [Para 37] [933-A-C]

4.7. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees. While the Legislature can make a law providing for constitution of tribunals and prescribing the eligibility criteria and qualifications for being appointed

as members, the superior courts in the country can, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members is proper and adequate to enable them to discharge judicial functions and inspire confidence. [Paras 37 and 39] [933-C-D; 934-E-F]

Kesavananda Bharati v. State of Kerala **AIR 1973 SCC 1461, referred to.**

4.8. Legislative measures are not subjected to basic features or basic structure or basic framework. The Legislation can be declared unconstitutional or invalid only on two grounds namely (i) lack of legislative competence and (ii) violation of any fundamental rights or any provision of the Constitution. [Para 40] [935-G-H; 936-A]

Indira Gandhi vs. Raj Narain **1975 Supp SCC 1;** ***Kuldip*** *Nayar vs. Union of India* **2006 (7) SCC 1;** *State of Andhra Pradesh vs. McDowell and Co.* **1996 (3) SCC 709;** *State of Karnataka vs. Union of India* **1977 (4) SCC 608, relied on.**

4.9. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive. Another facet of Rule of Law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the Executive are part of the common law traditions implicit in a Constitution like the Constitution of India which is based on the Westminster model. [Para 40] [938-D-F]

4.10. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the constitution it can be challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary. [Para 41] [938-G-H; 939-A-C]

The State of West Bengal v. Anwar Ali Sarkar **AIR 1952 SC 75, relied on**

"Orderly & Effective Insolvency Procedures – Key Issues" annexed to Eradi Committee Report, **referred to.**

4.11. All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals. [Para 44] [941-B-C]

4.12. The Legislature can re-organize the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting tribunals, the

Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive. [Para 44] [941-G-H; 942-A-B]

Validity of constitution of NCLT and NCLAT under Parts 1B and 1C of Companies Act

5.1. The Legislature has the competence to transfer any particular jurisdiction from courts to tribunals provided it is understood that the tribunals exercise judicial power and the persons who are appointed as President/Chairperson/ Members are of a standard which is reasonably approximate to the standards of main stream judicial functioning. On the other hand, if a tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. [Paras 45 and 46] [942-D-F; H; 943-A]

5.2. When the legislature proposes to substitute a tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the

Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the tribunal relates, will be eligible for appointment as Technical Members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members. [Para 46] [943-A-D]

5.3. A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done. [Para 47] [943-E-F]

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

5.4. As far as the Technical Members are concerned, the officer should be of at least Secretary Level officer with known competence and integrity. Reducing the standards or qualifications for appointment will result in loss of confidence in the tribunals. It is not competence alone but various other factors which make a person suitable. Therefore, when the legislature substitutes the Judges of the High Court with Members of the tribunal, the standards applicable should be as nearly as equal in

the case of High Court Judges. That means only Secretary Level officers (that is those who were Secretaries or Additional Secretaries) with specialized knowledge and skills can be appointed as Technical Members of the tribunal. [Para 48] [944-B-F]

26. It is a matter of concern that there is gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts. [Para 49] [944-G-H; 945-A]

5.5. Such dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a NCLT with a President and a large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of NCLT which is a substitute for the High Court, for hearing winding up matters and other matters which were earlier heard by High Court. A member need not even be a Secretary or Addl. Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has 'dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil

services - Joint Secretary level officers or officers holding Group 'A' posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group 'A' posts to serve up to 65 years in tribunals exercising judicial functions. Further, the proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The speed at which the qualifications for appointment as Members is being diluted is, to say the least, a matter of great concern for the independence of the Judiciary. [Para 49] [946-F-H; 947-A-H]

5.6. The fact that senior officers of civil services could function as Administrative Members of Administrative Tribunals, does not necessarily make them suitable to function as Technical Members in Company Law Tribunals or other tribunals requiring technical expertise. The tribunals cannot become providers of sinecure to members of civil services, by appointing them as Technical Members, though they may not have technical expertise in the field to which the tribunals relate, or worse where purely judicial functions are involved. While one can understand the presence of the members of the civil services being Technical Members in Administrative Tribunals, or Military Officers being members of Armed Forces Tribunals, or Electrical Engineers being members of Electricity Appellate Tribunal, or Telecom Engineers being members of TDSAT, there is no logic in members of general Civil Services being members of Company Law Tribunals. [Para 50] [948-A-E]

5.7. There is also dilution of independence. If any

member of the Tribunal is permitted to retain his lien over his post with the parent cadre or ministry or department in the civil service for his entire period of service as member of the tribunal, he would continue to think, act and function as a member of the civil services. A litigant may legitimately think that such a member will not be independent and impartial. Independence, impartiality and fairness are qualities which have to be nurtured and developed and cannot be acquired overnight. The independence of members discharging judicial functions in a tribunal cannot be diluted. [Para 51] [948-E-H; 949-A]

The Douglas Letters: Selections from the Private Papers of William Douglas, **edited by Melvin L. Urofsky – 1987, Edition page 162 referred to.**

5.8. The only reason given by Eradi Committee for suggesting transfer of the company law jurisdiction from High Courts to tribunals is delay. Tribunals with only Judicial Members would have served the purpose sought to be achieved. It did not suggest that such Tribunals should have technical members. Nor did it suggest introduction of officers of civil services to be made technical members. The jurisdiction relating to company case which the High Courts are dealing with can be dealt with by tribunals with Judicial Members alone. [Para 53] [949-F; 951-C-D]

5.9. Parts IC and ID of the Companies Act proposes to shift the company matters from the courts to tribunals, where a 'Judicial Member' and a 'Technical Member' will decide the disputes. If the members are selected as contemplated in Section 10FD, there is every likelihood of most of the members, including the so called 'Judicial Members' not having any judicial experience or company law experience and such members being required to deal with and decide complex issues of fact and law. Whether

the tribunals should have only Judicial Members or a combination of judicial and technical members is for the Legislature to decide. But if there should be technical members, they should be persons with expertise in company law or allied subjects and mere experience in civil service cannot be treated as Technical Expertise in company law. The candidates falling under sub-section 2(c) and (d) and sub-sections 3(a) and (b) of section 10FD have no experience or expertise in *deciding* company matters. [Para 54] [951-E-H; 952-A]

5.10. The short term of three years, the provision for routine suspension pending enquiry and the lack of any kind of immunity, are aspects which required to be considered and remedied. [Para 55] [952-E]

<u>Corrections to set right the defects in Parts 1B and 1C of Companies Act:</u>

6.1. Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as Technical Members. [Para 56] [952-F-H; 953-A]

6.2. As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can

be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of tribunal is invalid. [Para 56] [953-B-D]

6.3. A 'Technical Member' presupposes an experience in the field to which the tribunal relates. A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as 'experts' qualified to be appointed as Technical Members. Therefore Clauses (a) and (b) of sub-section (3) of Section 10 FD are not valid. [Para 56] [953-E-F]

6.4. The first part of clause (f) of sub-section (3) of Section FD providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in NCLT, is invalid. [Para 56] [953-G]

6.5. Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons

having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as Technical Members. [Para 56] [953-H; 954-A-B]

6.6. In regard to category of persons referred in clause (g) of sub-section (3) of Section 10 FD at least five years experience should be specified. [Para 56] [954-B-C]

6.7. Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal. [Para 56] [954-C-D]

6.8. Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in Section 10FX, the Selection Committee should broadly be on the following lines: (a)Chief Justice of India or his nominee - Chairperson (with a casting vote); (b)A senior Judge of the Supreme Court or Chief Justice of High Court – Member; (c)Secretary in the Ministry of Finance and Company Affairs – Member; and (d) Secretary in the Ministry of Law and Justice – Member. [Para 56] [954-E-H]

6.9. The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and

by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these tribunals to be treated as post-retirement havens. If these tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service. [Para 56] [955-A-C]

6.10. The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of member. Any person appointed as member should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year. [Para 56] [955-D-E]

6.11. To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/ Chairman or member of a tribunal can be only with the concurrence of the Chief Justice of India. The administrative support for all tribunals should be from the Ministry of Law & Justice. Neither the tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department. [Para 56] [955-F-G]

6.12. Two-Member Benches of the tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members. [Para 56] [955-H; 956-A]

Conclusion:

7.1. The creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional. [Para 57] [956-B-C]

7.2. Parts 1B and 1C of the Act as presently structured are unconstitutional. However, Parts IB and IC of the Act may be made operational by making suitable amendments in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court. [Para 57] [956-C-D]

S. P. Sampath Kumar vs. Union of India **(1987) 1 SCC 124;** *L. Chandra Kumar v. Union of India* **(1997) 3 SCC 261,** *Union of India v. Delhi Bar Association* **(2002) 4 SCC 275 and** *State of Karnataka v. Vishwa Bharati Housing Building Cooperative Societies and Anr* **(2003) 2 SCC 412, referred to.**

Case Law Reference:

(1987) 1 SCC 124	Referred to.	Para 5, 13.4 and 47
2002 (4) SCC 275	Referred to.	Para 5 and 10
	Relied on.	Para 28
(1997) 3 SCC 261	Referred to.	Paras 5, 9, 10, 16, 17, 22, 27 and 34
(2003) 2 SCC 412	Referred to.	Paras 5 and 10
	Relied on.	Para 28
(1962) 2 SCR 339	Referred to.	Para 13
1963 Supp (1) SCR 242	Referred to.	Para 13.2
(1965) 2 SCR 366	Referred to.	Para 13.3
	Relied on.	Para 30

1992 Supp (2) SCC 651	**Referred to.**	**Para 13.4**
1977 (4) SCC 193	**Referred to.**	**Para 16**
(1993) 4 SCC 441	**Referred to.**	**Paras 16 and 17**
2000 (4) SCC 640	**Referred to.**	**Para 16**
1992 (2) SCC 428	**Referred to.**	**Para 16**
2002 (4) SCC 247	**Referred to.**	**Para 16**
1955 (2) SCR 225	**Referred to.**	**Para 17**
AIR 1966 SC 1987	**Referred to.**	**Para 17**
1975 Supp SCC 1	**Referred to.**	**Para 17**
	Relied on.	**Para 40**
1973 (4) SCC 225	**Referred to.**	**Para 17**
2007 (2) SCC 1	**Referred to.**	**Para 17**
2003 (2) SCC 412	**Relied on**	**Para 28**
1955 (1) SCR 829	**Relied on**	**Para 28**
1971 (2) SCC 779	**Relied on**	**Para 28**
1993 (4) SCC 119	**Relied on**	**Para 36**
AIR 1973 SCC 1461	**Referred to.**	**Para 39**
2006 (7) SCC 1	**Relied on.**	**Para 40**
1996 (3) SCC 709	**Relied on.**	**Para 40**
1977 (4) SCC 608	**Relied on.**	**Para 40**
AIR 1952 SC 75	**Relied on**	**Para 42**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3067 of 2004.

From the Judgment & Order dated 30.03.2004 of the High Court of Madras in W.P. 2198 of 2003.

WITH

Civil Appeal No. 3717 of 2005.

Parag P. Tripathy, ASG, Arvind P. Datar, Amey Nargolkar, Arti Gupta, Vismai Rao, Gaurav Agarwal, Kunal Bahri, Varun Sarin, Anubha Agarwal, Sushma Suri, Navin Prakash (for P. Parmeswaran), Ananth Padmanabhan, Nikhil Nayyar, TVS Raghavendra Sreyas, Ambuj Agrawal, Suchindran B.N. for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. These appeals arise from the order dated 30.3.2004 of the Madras High Court in WP No. 2198/2003 filed by the President of Madras Bar Association (MBA for short) challenging the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956('Act' for short) inserted by Companies (Second Amendment) Act 2002 ('Amendment Act' for short) providing for the constitution of National Company Law Tribunal ('NCLT' or 'Tribunal') and National Company Law Appellate Tribunal ('NCLAT' or 'Appellate Tribunal').

2. In the said writ petition, Madras Bar Association ('MBA') raised the following contentions :

(i) Parliament does not have the legislative competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any Tribunal outside the Judiciary.

(ii) The constitution of the National Company Law Tribunal and transferring the entire company jurisdiction of the High Court to the Tribunal which is not under the control of the Judiciary, is violative of the doctrine of separation of

powers and independence of the Judiciary which are parts of the basic structure of the Constitution.

(iii) Article 323B of the Constitution enables the appropriate Legislature to provide for adjudication or trial by Tribunals of disputes, complaints or offences with respect to all or any of the matters specified in clause (2). Clause (2) enumerate the matters in regard to which Tribunals can be constituted. The said list is exhaustive and not illustrative. The list does not provide for constitution of Tribunal for insolvency, revival and restructuring of the company. In the absence of any amendment to Article 323B providing for a National Tribunal for revival of companies and winding up companies, there is no legislative competence to provide for constitution of NCLT and NCLAT.

(iv) The various provisions of Chapters IB and IC of the Act (sections 10FB, 10FD, 10FE, 10FF, 10FL(2), 10FO, 10FR(3), 10FT and 10FX) are defective and unconstitutional, being in breach of basic principles of Rule of Law, Separation of Powers and Independence of the Judiciary.

3. The Union of India submitted that it had constituted a High Level Committee on Law relating to Insolvency of Companies under the Chairmanship of Justice V. Balakrishna Eradi, a retired Judge of this Court, with other experts to examine the existing laws relating to winding-up proceedings of the company in order to remodel it in line with the latest developments and innovations in corporate laws and governance and to suggest reforms to the procedures at various stages followed in insolvency proceedings of the company in order to avoid unnecessary delay, in tune with international practices in the field. The said Committee identified the following areas which contributed to inordinate delay in finalisation of winding-up/dissolution of companies : (a) filing statement of affairs; (b) handing over of updated books of accounts; (c) realization of debts; (d) taking over possession

of the assets of the company and sale of assets; (e) non-availability of funds for the Official Liquidator to discharge his duties and functions (f) settlement of the list of creditors; (g) settlement of list of contributories and payment of calls; (h) finalisation of income-tax proceedings; and (i) disposal of misfeasance proceedings. The Committee found that multiplicity of court proceedings is the main reason for the abnormal delay in dissolution of companies. It also found that different agencies dealt with different areas relating to companies, that Board for Industrial & Financial Reconstruction (BIFR) and Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dealt with references relating to rehabilitation and revival of companies, High Courts dealt with winding-up of companies and Company Law Board (CLB) dealt with matters relating to prevention of oppression and mismanagement etc. Considering the laws on corporate insolvency prevailing in industrially advanced countries, the Committee recommended various amendments in regard to the provisions of Companies Act, 1956 for setting-up of a National Company Law Tribunal which will combine the powers of the CLB under the Companies Act, 1956, BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 as also the jurisdiction and powers relating to winding-up presently vested in the High Courts.

4. It is stated that the recommendations of the Eradi Committee were accepted by the Government and Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts. It is submitted that the establishment of NCLT and NCLAT will have the following beneficial effects: (i) reduce the pendency of cases and reduce the period of winding-up process from 20 to 25 years to about two years; (ii) avoid multiplicity of litigation before various fora (High Courts and quasi-judicial Authorities like CLB, BIFR and AAIFR) as all can be heard and decided by NCLT; (iii) the appeals will be

streamlined with an appeal provided against the order of the NCLT to an appellate Tribunal (NCLAT) exclusively dedicated to matters arising from NCLT, with a further appeal to the Supreme Court only on points of law, thereby reducing the delay in appeals; and (iv) with the pending cases before the Company Law Board and all winding-up cases pending before the High Courts being transferred to NCLT, the burden on High Courts will be reduced and BIFR and AAIFR could be abolished.

5. It was contended that the power to provide for establishment of NCLT and NCLAT was derived from Article 245 read with several entries in List I of the Seventh Schedule and did not originate from Article 323B. It was submitted that various provisions in Parts IB and IC of the Act relating to the constitution of NCLT and NCLAT were intended to provide for selection of proper persons to be their President/Chairperson/ members and for their proper functioning. It was submitted that similar provisions relating to establishment of other alternative institutional mechanisms such as Administrative Tribunals, Debt Recovery Tribunals and Consumer fora, had the seal of approval of this Court in *S. P. Sampath Kumar vs. Union of India* – 1987 (1) SCC 124, *L. Chandrakumar v. Union of India* (1997) 3 SCC 261; *Union of India v. Delhi High Court Bar Association* (2002) 4 SCC 275 and *State of Karnataka v. Vishwabharathi House Building Co-operative Society 2003(2) SCC 412.*

6. The Madras High Court by its order dated 30.3.2004 held that creation of the NCLT and vesting the powers hitherto exercised by the High Courts and CLB in the Tribunal was not unconstitutional. It referred to and listed the defects in several provisions (that is mainly sections 10FD(3)(f)(g)(h), 10FE, 10FF, 10FL(2), 10FR(3), 10FT) in Parts IB and IC of the Act. It therefore declared that until the provisions of Part IB and IC of the Act, introduced by the Amendment Act which were defective being violative of basic constitutional scheme (of separation of

judicial power from the Executive and Legislative power and independence of judiciary enabling impartial exercise of judicial power) are duly amended by removing the defects that were pointed out; it will be unconstitutional to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High Court or the Company Law Board.

7. The Union of India has accepted that several of the defects pointed out by the High Court in Parts IB and IC of the Act, require to be corrected and has stated that those provisions will be suitably amended to remove the defects. It has not however accepted the decision of the High Court that some other provisions of Parts IB and IC are also defective. To narrow down the controversy in regard to the appeal by the Union, we note below the defects pointed out by the High Court in regard to various provisions in Parts IB and IC of the Act and the stand of Union of India in respect of each of them.

Sections 10FE and 10FT : Tenure of President/Chairman and Members of NCLT and NCLAT fixed as three years with eligibility for re-appointment

(7.1.) The High Court held that unless the term of office is fixed as at least five years with a provision for renewal, except in cases of incapacity, misconduct and the like, the constitution of the Tribunal cannot be regarded as satisfying the essential requirements of an independent and impartial body exercising judicial functions of the state.

The Union Government has accepted the finding and agreed to amend section 10FE and 10FT of the Act to provide for a five year term for the Chairman/President/Members. However, the Government proposes to retain the provision for reappointment instead of 'renewal', as the reappointments would be considered by a Selection Committee which would be headed by the Chief Justice of India or his nominee. As the Government proposes to have minimum eligibility of 50 years for first appointment as a Member of the Tribunal, a Member

will have to undergo the process of re-appointment only once or twice.

Section 10FE – second proviso : Enabling the President/ Members of NCLT to retain their lien with their parent cadre/Ministry/Department while holding office

(7.2) The High Court held that in so far as the President is concerned, there is no question of holding a lien and the reference to President must be deleted from the second proviso to section 10FE.

The Union Government has accepted the decision and has stated that it proposes to amend the proviso and delete the reference to the President in the second proviso.

(7.3) The High Court also held that the period of lien in regard to the members of NCLT should be restricted to only one year instead of the entire period of service as a Member of NCLT.

The Union Government has submitted that in view of the proposed longer tenure of five years as against the three years, the government proposes to permit the members to retain their lien with their parent cadre/Ministry/Department for a period of three years, as one year may be too short for the members to decide whether to give up the lien or not.

Section 10FD(1) : Qualification for appointment as President

(7.4) The High Court has suggested that it would be appropriate to confine the choice of persons to those who have held the position of a Judge of a High Court for a minimum period of five years instead of the existing provision which provides that Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court, for the post of President of the Tribunal.

The Government has agreed in part and proposes to amend the Act for appointment of a retired or serving High Court Judge alone as the President of the Tribunal. It however feels that minimum length of service as experience, need not be fixed in the case of High Court Judges, as the Selection Committee headed by the Chief Justice of India or his nominee would invariably select the most suitable candidate for the post.

Section 10FD(3)(f) : Appointment of Technical Member to NCLT

(7.5) The High Court has held that appointment of a member under the category specified in section 10FD(3)(f), can have a role only in matters concerning revival and rehabilitation of sick industrial companies and not in relation to other matters. The High Court has therefore virtually indicated that NCLT should have two divisions, that is an Adjudication Division and a Rehabilitation Division and persons selected under the category specified in clause (f) should only be appointed as members of the Rehabilitation Division.

The Union Government contends that similar provision exists in section 4(3) of the Sick Industrial Companies (Special Provisions) Act, 1985; that the provision is only an enabling one so that the best talent can be selected by the Selection Committee headed by the Chief Justice of India or his nominee; and that it may not be advisable to have Division or limit or place restrictions on the power of the President of the Tribunal to constitute appropriate benches. It is also pointed out that a Technical Member would always sit in a Bench with a Judicial Member.

Section 10FD(3)(g) : Qualification for appointment of Technical Member

(7.6) The High Court has observed that in regard to Presiding Officers of Labour Courts and Industrial Tribunals or National Industrial Tribunal, a minimum period of three to five

years experience should be prescribed, as what is sought to be utilized is their expert knowledge in Labour Laws.

The Union Government submits that it may be advisable to leave the choice of selection of the most appropriate candidate to the Committee headed by the Chief Justice of India or his nominee.

(7.7) The High Court has also observed that as persons who satisfy the qualifications prescribed in section 10FD(3)(g) would be persons who fall under section 10FD(2)(a), it would be more appropriate to include this qualification in section 10FD(2)(a). It has also observed in section 10FL dealing with "Benches of the Tribunal", a provision should be made that a 'Judicial Member' with this qualification shall be a member of the special Bench referred to in section 10FL(2) for cases relating to rehabilitation, restructuring or winding up of Companies.

The Union Government has not accepted these findings and contends that the observations of the High Court would amount to judicial legislation.

Section 10FD(3)(h) : Qualification of technical member of NCLT

(7.8) The High Court has observed that clause (h) referring to the category of persons having special knowledge of and experience in matters relating to labour, for not less than 15 years is vague and should be suitably amended so as to spell out with certainty the qualification which a person to be appointed under clause (h) should possess.

The Union Government contends that in view of the wide and varied experience possible in labour matters, it may not be advisable to set out the nature of experience or impose any restrictions in regard to the nature of experience. It is submitted that the Selection Committee headed by the Chief Justice of India or his nominee would consider each application on its own merits.

(7.9) The second observation of the High Court is that the member selected under the category mentioned in clause (h) must confine his participation only to the Benches dealing with revival and rehabilitation of sick companies and should also be excluded from functioning as a single Member Bench for any matter.

The Union Government contends that it may not be advisable to fetter the prerogative of the President of the Tribunal to constitute benches by making use of available members. It is also pointed out that it may not be proper to presume that a person well-versed in labour matters will be unsuitable to be associated with a Judicial Member in regard to adjudication of winding-up matters.

Section 10FL(2) – Proviso : Winding up proceedings by single Member

(7.10) The High Court has held that it is impermissible to authorize a single member Bench to conduct the winding up proceedings after a special three Members Bench passes an order of winding up; and if such single member happens to be a labour member appointed under section 10FD(3)(f), it would be a mockery of a specialist Tribunal.

The Union Government has accepted the finding and has agreed to amend the proviso to section 10FL(2) to provide that a winding up proceedings will be conducted by a Bench which would necessarily include a judicial member.

Sections 10FF and 10FK(2) : Power of Central Government to designate any member to be a Member (Administration)

(7.11) The High Court has held that sections 10FF and 10FK(2) should be suitably amended to provide that a member may be designated as Member (Administration) only in

consultation with the President, and further provide that the Member (Administration) will discharge his functions in relation to finance and administration of the Tribunal under the overall control and supervision of the President.

The Union Government has accepted the decision and has agreed to drop the provision for Member Administration. It was stated that the Act would be amended to provide that the administration and financial functions would be discharged under the overall control and supervision of the President. It was stated that the Act would be further amended to provide for creation of the posts of Vice-Presidents.

Section 10 FR(3) : Appointment of members of the Appellate Tribunal

(7.12) The High Court has observed that section 10FR(3) must be suitably amended to delete the reference to all subjects other than law and accountancy. It has also stated that it would be more appropriate to incorporate a provision similar to that in section 5(3) of the SICA which provides that a member of the Appellate Authority shall be a person who is or has been a Judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government who has been a member of the Board for not less than three years.

The Union Government contends that the provision is only an enabling one; and since the Chairperson of the Appellate Tribunal would be a former Judge of the Supreme Court or former Chief Justice of High Court, it may not be advisable to limit the scope of eligibility criteria for members especially when a Selection Committee headed by the Chief Justice of India or his nominee would make the selection.

Section 10FX – Selection Process for President/ Chairperson

(7.13) The High Court has expressed the view that the

selection of the President/Chairperson should be by a Committee headed by the Chief Justice of India in consultation with two senior Judges of the Supreme Court.

The Union Government has submitted that it would not be advisable to make such a provision in regard to appointment of President/Chairperson of statutory Tribunals. It is pointed out no other legislation constituting Tribunals has such a provision.

The challenge in the appeals

8. Union of India contends that the High Court having held that the Parliament has the competence and power to establish NCLT and NCLAT, ought to have dismissed the writ petition. It is submitted that some of the directions given by the High Court to reframe and recast Parts IB and IC of the Act amounts to converting judicial review into judicial legislation. However, as Union of India has agreed to rectify several of the defects pointed out by the High Court (set out above), the appeal by the Union Government is now restricted to the findings of the High Court relating to sections 10FD(3)(f), (g) and (h) and 10FX.

9. On the other hand, MBA in its appeal contends that the High Court ought not to have upheld the constitutional validity of Parts IB and IC of the Act providing for establishment of NCLT and NCLAT; that the High Court ought to have held that constitution of such Tribunals taking away the entire Company Law jurisdiction of the High Court and vesting it in a Tribunal which is not under the control of the Judiciary, is violative of doctrine of separation of powers and the independence of Judiciary which are parts of the basic structure of the Constitution. MBA also contends that the decisions of this Court in *Union of India vs. Delhi High Court Bar Association* – 2002 (4) SCC 275, with reference to constitutional validity of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 providing for constitution of the Debt Recovery Tribunals and *State of Karnataka vs.*

Vishwabharathi House Building Co-op., Society – 2003 (2) SCC 412 in regard to the constitutional validity of Consumer Protection Act, 1986 providing for constitution of consumer fora require reconsideration.

10. When these civil appeals came up for hearing before a three-Judge Bench of this Court, the Bench was of the view that the decisions in *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261, *Union of India v. Delhi Bar Association* (2002) 4 SCC 275 and *State of Karnataka v. Vishwa Bharati Housing Building Cooperative Societies & Anr* (2003) 2 SCC 412 holding that Parliament and State legislatures possessed legislative competence to effect changes in the original jurisdiction in the Supreme Court and High Court, had not dealt with the following issues:

(i) To what extent the powers and judiciary of High Court (excepting judicial review under Article 226/227) can be transferred to Tribunals?

(ii) Is there a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by courts in any Tribunal or authority outside the judiciary?

(iii) Whether the "wholesale transfer of powers" as contemplated by the Companies (Second Amendment) Act, 2002 would offend the constitutional scheme of separation of powers and independence of judiciary so as to aggrandize one branch over the other?

Therefore the Three Judge Bench, by order dated 13.5.2007 directed the appeals to be heard by a Constitution Bench, observing that as the issues raised are of seminal importance and likely to have serious impact on the very structure and independence of judicial system.

11. We may first refer to the relevant provisions of the Companies Act, 1956 as amended by the Companies (Second Amendment) Act, 2002 relating to the constitution of NCLT and NCLAT :

Part IB – National Company Law Tribunal

10FB. Constitution of National Company Law Tribunal: The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

10FC. Composition of Tribunal: The Tribunal shall consist of a President and such number of Judicial and Technical Members not exceeding sixty-two, as the Central Government deems fit, to be appointed by that Government, by notification in the Official Gazette.

10FD. Qualifications for appointment of President and Members: (1) The Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court as the President of the Tribunal.

(2) A person shall not be qualified for appointment as Judicial Member unless he-

(a) has, for at least fifteen years, held a judicial office in the territory of India; or

(b) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has been partly in practice as an advocate for a total period of fifteen years; or

(c) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a

State Government including at least three years of service as a Member of the Indian Company Law Service (Legal Branch) in Senior Administrative Grade in that service; or

(d) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government (including at least three years of service as a Member of the Indian Legal Service in Grade I of that service).

(3) A person shall not be qualified for appointment as Technical Member unless he-

(a) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that Service]; or

(b) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or

(c) is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or

(d) is, or has been, for at least fifteen years in practice as a cost accountant under , the Costs and Works Accountants Act, 1959 (23 of 1959); or

(e) is, or has been, for at least fifteen years working experience as a Secretary in whole-time practice as defined in clause (45A) of section 2 of this Act and is a member of the Institute of the Companies Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980); or

(f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty years in, science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be in the opinion of the Central Government useful to the Tribunal; or

(g) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947); or

(h) is a person having special knowledge of, and experience of not less than fifteen years in, the matters relating to labour.

Explanation.-For the purposes of this Part,-

(i) "Judicial Member" means a Member of the Tribunal appointed as such under sub-section (2) of section 10FD and includes the President of the Tribunal;

(ii) "Technical Member" means a Member of the Tribunal appointed as such under sub-section (3) of section 10FD.

10FE. Term of office of President and Members: The President and every other Member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office but shall be eligible for re-appointment:

Provided that no President or other Member shall hold office as such after he has attained,-

(a) in the case of the President, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years:

Provided further that the President or other Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such.

10FF. Financial and administrative powers of Member Administration: The Central Government shall designate any Judicial Member or Technical Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:

Provided that the Member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the Tribunal subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member Administration.

10FK. Officers and employees of Tribunal: (1) The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.

(2) The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.

(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Tribunal shall be such as may be prescribed.

10FL. Benches of Tribunal: (1) Subject to the provisions

of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal; out of which one shall be a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD:

Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD :

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.

(3) If the Members of a Bench differ in opinion on any point

or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points shall be decided according to the other of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.

(4) There shall be constituted such number of Benches, as may be notified by the Central Government.

(5) In addition to the other Benches, there shall be a Principal Bench at New Delhi presided over by the President of the Tribunal.

(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

10FO. Delegation of powers: The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any Member or officer or other employee of the Tribunal or other person authorized by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary.

Part IC - APPELALTE TRIBUNAL

10FR. Constitution of Appellate Tribunal: (1) The Central Government shall, by notification in the Official Gazette,

constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

10FT. Term of office of Chairperson and Members: The Chairperson or a Member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of three years:

Provided that no Chairperson or other member shall hold office as such after he has attained,-

(a) in the case of the Chairperson, the age of seventy years;

(b) in the case of any other Member, the age of sixty-seven years.

10FX. Selection Committee: (1) The Chairperson and Members of the Appellate Tribunal and President and

Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of:

(a) Chief Justice of India or his nominee Chairperson;

(b) Secretary in the Ministry of Finance and Company Affairs Member;

(c) Secretary in the Ministry of Labour Member;

(d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;

(e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.

(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.

xxx xxx xxx

(5) Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.

(6) No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any

vacancy or any defect in the constitution of the Selection Committee.

10G. Power to punish for contempt: The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971 (70 of 1971), shall have the effect subject to modifications that-

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such law officers as the Central Government may specify in this behalf.

10GB. Civil court not to have jurisdiction: (1) No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force.

10GF. Appeal to Supreme Court: Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Section 10FJ relates to removal and suspension of President or members of the NCLT. Section 10FV relates to removal and suspension of Chairman or members of NCLAT. Sub-section (2) of those sections provide that the President/Chairman or a member shall not be removed from his office except by an order made by the Central Government on the ground of proven misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which the President/Chairman or member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Sub-section (3) provides that the Central Government may suspend from office, the President/Chairman or Member of the Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

Difference between Courts and Tribunals

12. The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory

Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc).

13. This court had attempted to point out the difference between Court and Tribunal in several decisions. We may refer a few of them.

(13.1) In *Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala* – (1962) 2 SCR 339, Hidayatullah J., succinctly explained the difference between Courts and Tribunals, thus:

> "All Tribunals are not courts, though all courts are Tribunals". The word "courts" is used to designate those Tribunals which are set up in an organized state for the administration of justice. By administration of justice is meant the exercise of juridical power of the state to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the vinculum juris, which is disturbed……..
>
> When rights are infringed or invaded, the aggrieved party can go and commence a querela before the ordinary Civil Courts. These Courts which are instrumentalities of Government, are invested with the judicial power of the State, and their authority is derived from the Constitution or some Act of Legislature constituting them. Their number is ordinarily fixed and they are ordinarily permanent, and can try any suit or cause within their jurisdiction. Their numbers may be increased or decreased, but they are almost always permanent and go under the compendious name of "Courts of Civil Judicature". There can thus be no

doubt that the Central Government does not come within this class.

With the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence. These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art.136, 227, or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.

By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. *Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different.* What distinguishes them has never been successfully established."

In my opinion, a Court in the strict sense is a Tribunal which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its constitution to exercise the judicial power of the State. *These Courts perform all the judicial functions of the State except those*

that are excluded by law from their jurisdiction. The word "judicial", be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 Q.B. 431, in these words :

> "The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to being to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration."

That an officer is required to decide matters before him "judicially" in the second sense does not make him a Court or even a Tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest.

Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included'.

(emphasis supplied)

(13.2) In *Jaswant Sugar Mills vs. Laxmi Chand* – 1963 Supp (1) SCR 242, this Court observed that in order to be a Tribunal, a body or authority must, besides being under a duty to act judicially, should be invested with the judicial power of the state.

(13.3) In *Associated Cement Companies Ltd. vs. P. N. Sharma* – (1965) 2 SCR 366, another Constitution Bench of this Court explained the position of Tribunals thus:

"The expression "court" in the context denotes a Tribunal

constituted by the State as a part of the ordinary hierarchy of courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as legislative, executive and judicial powers. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions. The Constitution recognised a hierarchy of courts and their adjudication are normally entrusted all disputes between citizens and citizens as well as between the citizens and the State. These courts can be described as ordinary courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which in described as judicial process. The powers which these courts exercise, are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions.

In every State there are administrative bodies or authorities which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. In reaching their administrative decisions, administrative bodies can and often to take into consideration questions of policy. It is not unlikely that even in this process of reaching administrative divisions, the administrative bodies or authorities are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority to reach decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decision pronounced by courts.

Tribunals which fall under the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the court one common characteristic; both the courts and the Tribunals are constituted by the state and are invested with judicial as distinguished from purely administrative or executive functions (vide *Durga Shankar Mehta v. Raghuraj Singh* - 1955 (1) SCR 267). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. *The procedure which the Tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the Tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of Tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge*."

(emphasis supplied)

(13.4) In *Kihoto Hollohan vs. Zachillhu* – 1992 Supp (2) SCC 651, a Constitution Bench reiterated the above position and added the following :

Where there is a lis – an affirmation by one party and denial by another – and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a court".

In *S.P. Sampath Kumar vs. Union of India* – (1987) 1 SCC

124, this Court expressed the view that the Parliament can without in any way violating the basic structure doctrine make effective alternative institutional mechanisms or arrangements for judicial review.

14. Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals. They are :

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

Re: Independence of judiciary

15. Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to

do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things – security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the Judiciary) and without (from the Executive).

16. In *Union of India vs. Sankalchand Himatlal Sheth* – 1977 (4) SCC 193, a Constitution Bench of this Court explained the importance of 'Independence of Judiciary' thus :

> "Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise……….
>
> The Constitution makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control,……………
>
> ……..even with regard to the Subordinate Judiciary the framers of the Constitution were anxious to secure that it should be insulated from executive interference and once appointment of a Judicial Officer is made, his subsequent

career should be under the control of the High Court and he should not be exposed to the possibility of any improper executive pressure."

In *Supreme Court Advocates-on-Record Association & Ors. v. Union of India* (1993) 4 SCC 441, J.S. Verma, J. (as he then was) speaking for the majority, described the attributes of an independent judge thus :

> " ...Only those persons should be considered fit for appointment as Judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. *Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge*.".
>
> (emphasis supplied)

In his concurring opinion, Pandian J. stated that "it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours." He further stated :

> "..that to have an independent judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always wedded only to the principles of the Constitution and 'Rule of Law'. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of

> his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity. Though it is illogical to spin out a new principle that the keynote is not the judge but the judiciary especially when it is accepted in the same breath that an erroneous appointment of an unsuitable person is bound to produce irreparable damage to the faith of the community in the administration of justice and to inflict serious injury to the public interest and that the necessity for maintaining independence of judiciary is to ensure a fair and effective administration of justice."

The framers of the Constitution stated in a Memorandum ("See *The Framing of India's Constitution – B.Shiva Rao*, volume I-B, Page 196) :

> "We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive ... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view."

In *L. Chandra Kumar*, the seven Judge Bench of this Court held:

> "The Constitution of India while conferring power of judicial review of legislative action upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would

indicate that they were very greatly concerned with securing the independence of the judiciary."

Independence of Judiciary has always been recognized as a part of the basic structure of the Constitution (See : *Supreme Court Advocates-on-Record Association vs. Union of India* – 1993 (4) SCC 441, *State of Bihar vs. Bal Mukund Shah* – 2000 (4) SCC 640, *Shri Kumar Padma Prasad vs. Union of India* – 1992 (2) SCC 428, and *All India Judges Association vs. Union of India* – 2002 (4) SCC 247).

Separation of Power

17. In *Rai Sahib Ram Jawaya Kapur vs. The State of Punjab* – 1955 (2) SCR 225, this Court explained the doctrine of separation of powers thus :

"The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."

In *Chandra Mohan vs. State of UP* – AIR 1966 SC 1987, this Court held :

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most

closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. *Simply stated, it means that there shall be a separate judicial service free from the executive control.*"

(emphasis supplied)

In *Indira Nehru Gandhi vs. Raj Narain* – 1975 Supp SCC 1, this Court observed that the Indian Constitution recognizes separation of power in a broad sense without however their being any rigid separation of power as under the American Constitution or under the Australian Constitution. This Court held thus :

"It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial power as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the

hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.

"The Constitution has a basic structure comprising the three organs of the Republic: the Executive, the Legislature and the Judiciary. It is through each of these organs that the sovereign will of the people has to operate and manifest itself and not through only one of them. None of these three separate organs of the Republic can take over the functions assigned to the other. This is the basic structure or scheme of the system of Government of Republic…………

"But no constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought to enter into problems entwined in the 'political thicket", Parliament must also respect the preserve of the court. The principle of separation of powers is a principle of restraint ………"

In *L. Chandra Kumar*, the seven-Judge Bench of this Court referred to the task entrusted to the superior courts in India thus :

"The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. *It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations*. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall

foul of strict standards of legal correctness and judicial and judicial independence."

(emphasis supplied)

The doctrine of separation of powers has also been always considered to be a part of the basic structure of the Constitution (See : *Keshavananda Bharati vs. State of Kerala* – 1973 (4) SCC 225, *Indira Gandhi vs. Raj Narain* – 1975 Supp SCC 1, *State of Bihar vs. Bal Mukund Shah* – 2000 (4) SCC 640 and *I.R. Coelho vs. State of Tamil Nadu* – 2007 (2) SCC 1).

The argument in favour of Tribunals

18. The argument generally advanced to support tribunalisation is as follows : The courts function under archaic and elaborate procedural laws and highly technical Evidence Law. To ensure fair play and avoidance of judicial error, the procedural laws provide for appeals, revisions and reviews, and allow parties to file innumerable applications and raise vexatious objections as a result of which the main matters get pushed to the background. All litigation in courts get inevitably delayed which leads to frustration and dissatisfaction among litigants. In view of the huge pendency, courts are not able to bestow attention and give priority to cases arising under special legislations. Therefore, there is a need to transfer some selected areas of litigation dealt with by traditional courts to special Tribunals. As Tribunals are free from the shackles of procedural laws and Evidence Law, they can provide easy access to speedy justice in a 'cost-affordable' and 'user-friendly' manner. Tribunals should have a Judicial Member and a Technical Member. The Judicial Member will act as a bulwark against apprehensions of bias and will ensure compliance with basic principles of natural justice such as fair hearing and reasoned orders. The Judicial Member would also ensure impartiality, fairness and reasonableness in consideration. The presence of Technical Member ensures the availability of expertise and experience related to the field of adjudication for

which the special Tribunal is created, thereby improving the quality of adjudication and decision-making.

19. United Kingdom has a rich experience of functioning of several types of Tribunals as dispute resolution-and-grievance settlement mechanisms in regard to varied social welfare legislations. Several Committees were constituted to study the functioning of the Tribunals, two of which require special mention. The first is the Franks Report which emphasized that Tribunals should be independent, accessible, prompt, expert, informal and cheap. The second is the report of the Committee constituted to undertake the review of delivery of justice through Tribunals, with Sir Andrew Leggatt as Chairman. The Leggatt Committee submitted its report to the Lord High Chancellor of Great Britain in March, 2001. The Committee explained the advantages of Tribunals, provided they could function independently and coherently, thus :

> "Choosing a tribunal to decide disputes should bring two distinctive advantages for users. First, tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills. Secondly, tribunals' procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms. Most users ought therefore to be capable of preparing and presenting their cases to the tribunal themselves, providing they have the right kind of help. Enabling that kind of direct participation is an important jurisdiction for establishing tribunals at all. x x x x x

De Smith's *Judicial Review*, (6th Edn., Page 50 Para 1.085) sets out the advantages of Tribunals thus :

> "In the design of an administrative justice system, a Tribunal may be preferred to an ordinary court because its members have specialized knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Many of the decisions given to Tribunals concern the merits of cases with relatively little legal content, and in such cases a Tribunal, usually consisting of a legally qualified Tribunal judge and two lay members, may be preferred to a court. Indeed dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards social welfare legislation led to a transfer of functions to special Tribunals; the Workmen's Compensation Acts were administered by the ordinary courts, but the National Insurance (Industrial Injuries) scheme was applied by Tribunals. *It is, however, unrealistic to imagine that technicalities and difficult legal issues can somehow be avoided by entrusting the administration of complex legislation to Tribunals rather than the courts.*"

(emphasis supplied)

H. W. R. Wade & C. F. Forsyth also refer to the advantage of Tribunals in their '*Administrative Law*' (10th Edn., pp.773-774):

> "The social legislation of the twentieth century demanded Tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the best article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit

of the public purse as well as for that of the claimant. Thus when in 1946 workmen's compensation claims were removed from the courts and brought within the Tribunal system much unproductive and expensive litigation, particularly on whether an accident occurred in the course of employment, came to an end. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise.

An accompanying advantage is that of expertise. Qualified surveyors sit on the Lands Tribunal and experts in tax law sit as Special Commissioners of Income Tax. Specialized Tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialized Tribunal quickly builds up expertise in its own field. Where there is a continuous flow of claims of a particular class, there is every advantage in a special jurisdiction."

Recommendations for better working of Tribunals

20. Only if continued judicial independence is assured, Tribunals can discharge judicial functions. In order to make such independence a reality, it is fundamental that the members of the Tribunal shall be independent persons, not civil servants. They should resemble courts and not bureaucratic Boards. Even the dependence of Tribunals on the sponsoring or parent department for infrastructural facilities or personnel may undermine the independence of the Tribunal (vide : Wade & Forsyth : '*Administrative Law'* – 10th Edn., pp.774 and 777).

21. The Leggatt Committee's Report explained the task of improving the Tribunals thus :

"There are 70 different administrative tribunals in England

and Wales, leaving aside regulatory bodies. Between them they deal with nearly one million cases a year, and they employ about 3,500 people. But of these 70 tribunals only 20 each hear more than 500 cases a year and many are defunct. Their quality varies from excellent to inadequate. Our terms of reference require them to be rendered coherent. So they have to be rationalized and modernized; and this Review has as its four main objects: first, to make the 70 tribunals into one Tribunals System that its members can be proud of; secondly, to render the tribunals independent of their sponsoring departments by having them administered by one Tribunals Service; thirdly, to improve the training of chairmen and members in the interpersonal skills peculiarly required by tribunals; and fourthly, to enable unrepresented users to participate effectively and without apprehension in tribunal proceedings."

The Leggatt Committee explained what the users of the system expected from an alternative public adjudication system:

"We do not believe that the current arrangements meet what the modern user needs and expects from an appeal system running in parallel to the courts. *First, users need to be sure, as they currently cannot be, that decisions in their cases are being taken by people with no links with the body they are appealing against.* Secondly, a more coherent framework for tribunals would create real opportunities for improvement in the quality of services that can be achieved by tribunals acting separately. Thirdly, that framework will enable them to develop a more coherent approach to the services which users must receive if they are to be enabled to prepare and present cases themselves. Fourthly, a user-oriented service needs to be much clearer than it is now in telling users what services they can expect, and what to do if the standards of these services are not met."

The Leggatt Committee expressed the view that a single structure for all Tribunals would achieve independence and effective functioning of the Tribunal. It stated :

> "There is only one way to achieve independence and coherence: to have all the tribunals supported by a Tribunals Service, that is, a common administrative service. It would raise their status, while preserving their distinctness from the courts. In the medium term it would yield considerable economies of scale, particularly in relation to the provision of premises for all tribunals, common basic training, and the use of IT. It would also bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centres, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunals Service. It should be committed by Charter to provide a high quality, unified service, to operate independently, to deal openly and honestly with users of tribunals, to seek to maintain public confidence, and to report annually on its performance.

The report expressed the view that the independence of tribunals would best be safeguarded by having their administrative support provided by the Lord Chancellor's Department as he is uniquely placed to protect the independence of those who sit in tribunals as well as of the judiciary, through a Tribunals Service and a Tribunals System analogous with, but separate from, the Court Service and the courts. Most of the recommendations of the Leggatt Report were accepted and culminated in the 'Tribunals, Courts & Enforcement Act, 2007'. The Act recognizes that Tribunals do not form part of administration, but are machinery of adjudication. As a result of the said Act, the appointments to Tribunals are on the recommendations of a Judicial

Appointments Commission. The sponsoring Department (that generates the disputes that the Tribunal will have to decide) has no say in the appointments. Neither the infrastructure nor the staff are provided to the Tribunals by the sponsoring Parent Department. The Tribunals have become full-fledged part of Judicial system with no connection or link with the 'parent department'. A common Tribunal service has been established as an executing agency in the Ministry of Law & Justice.

22. This Court, in *L. Chandra Kumar,* made similar suggestions for achieving the independence of Tribunals :

> "It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements........ The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer

of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds arc allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out."

23. But in India, unfortunately Tribunals have not achieved full independence. The Secretary of the concerned 'sponsoring department' sits in the Selection Committee for appointment. When the Tribunals are formed, they are mostly dependant on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting Tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the Tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by *Chandra Kumar* are brought about, Tribunals in India will not be considered as independent.

Whether the Government can transfer the judicial functions traditionally performed by courts to Tribunals?

24. It is well settled that courts perform all judicial functions of the State except those that are excluded by law from their jurisdiction. Section 9 of Code of Civil Procedure, for example, provides that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

25. Article 32 provides that without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) of the said Article, Parliament may by law, empower any other court

to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) of Article 32. Article 247 provides that notwithstanding anything contained in Chapter I of Part XI of the Constitution, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 deals with the subject matter of laws made by Parliament and by the legislatures of States. The Union List (List I of Seventh Schedule) enumerates the matters with respect to which Parliament has exclusive powers to make laws. Entry 77 of List I refers to Constitution, organization, jurisdiction and powers of the Supreme Court. Entry 78 of List I refers to constitution and organization of the High Courts. Entry 79 of List I refers to extension or exclusion of the jurisdiction of a High Court, to or from any Union Territory. Entry 43 of List I refers to incorporation, regulation and winding up of trading corporations and Entry 44 of List I refers to incorporation, regulation and winding up of corporations. Entry 95 of List I refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in Union List. The Concurrent List (List III of the Seventh Schedule) enumerates the matters with respect to which a Parliament and legislature of a state will have concurrent power to make laws. Entry 11A of List III refers to administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts. Entry 46 of List III refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III.

26. Part XIV-A was inserted in the Constitution with effect from 3.1.1977 by the Constitution (Forty-second Amendment) Act, 1976. The said part contains two Articles. Article 323A

relates to Administrative Tribunals and empowers the Parliament to make a law, providing for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Government or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Article 323B empowers the appropriate Legislature to make a law, providing for the adjudication or trial by Tribunals of any disputes, complaints, or offences with respect to all or any of the following matters specified in clause (2) with respect to which such Legislature has power to make laws:

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;

(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

(h) rent, its regulation and control and tenancy issues including the rights, title and interest of landlords and tenants,

(i) offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters;

(j) any matter incidental to any of the matters specified in sub-clauses (a) to (i)."

Clause (2) of Article 323A and clause (3) of Article 323B lay down that a law made under sub-clause (1) of the respective Articles may provide for the following :

	Article 323A	Article 323B
(a)	provide for the establishment of an administrative Tribunal for the Union and a separate administrative Tribunal for each State or for two or more States;	Provide for the establishment of a hierarchy of Tribunals;
(b)	specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals;	Specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals

(c)	provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;	provide for the procedure(including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;
(d)	exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);	exclude the jurisidiction of all courts except the jurisdiction of the Supreme Court under article 136 with respect to all or any of the matters falling within the jurisdiction of the said Tribunals;
(e)	provide for the transfer to each such administrative Tribunal of any cases pending before any court or other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal if the cause of action on which such suits or proceedings are based had arisen after such establishment;	provide for the transfer to each such Tribunal of any cases pending before any court or any other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal if the cause of action on which such suits or proceedings are based had arisen after such establishment;
(f)	repeal or amend any order made by the President under clause (3) of article 371D;	-----

(g)	contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such Tribunals.	contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such Tribunals.

27. In *L. Chandra Kumar v. Union of India* [1997 (3) SCC 261], this Court held that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they empower Parliament and State Legislature to totally exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136, in regard to the disputes and complaints referred to in Article 323A(1) and the matters specified in Article 323B(2), offended the basic and essential features of the Constitution and were unconstitutional. This Court also held that "exclusion of jurisdiction" clause enacted in any legislation, under the aegis of Articles 323A [2(d)] and 323B[3(d)] are also unconstitutional. It was declared that the jurisdiction conferred upon the High Court under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution.

28. The legislative competence of Parliament to provide for creation of courts and Tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Item 11A read with Entry 46 of List III of the Seventh Schedule. Referring

to these Articles, this Court in two cases, namely, *Union of India v. Delhi High Court Bar Association* [2002 (4) SCC 275] and *State of Karnataka v. Vishwabharathi House Building Cooperative Society & Ors*. [2003 (2) SCC 412] held that Articles 323A and 323B are enabling provisions which enable the setting up of Tribunals contemplated therein; and that the said Articles, however, cannot be interpreted to mean that they prohibited the legislature from establishing Tribunals not covered by those Articles, as long as there is legislative competence under the appropriate Entry in the Seventh Schedule.

29. In *Navinchandra Mafatlal vs The Commissioner of Income-Tax* – 1955 (1) SCR 829, this Court held:

> ".. As pointed out by Gwyer C.J. in *United Provinces v. Atiqa Begum* - 1940 F.C.R. 110 none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear-and it is acknowledged by Chief Justice Chagla-that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

In *Union of India vs. Harbhajan Singh Dhillon* – 1971 (2) SCC 779, this Court held :

> "It seems to us that the function of Article 246(1), read with Entries 1 to 96 of List I, is to give positive power to Parliament to legislate in respect of those entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so."

The power of Parliament to enact a law which is not covered by an entry in Lists II and III is absolute. The power so conferred by Article 246 is in no way affected or controlled by Article 323 A or 323 B. MBA contends that if the power to enact a law to constitute tribunals was already in existence with reference to the various fields of legislation enumerated in the Seventh Schedule, there was no need for enacting Articles 323A or 323B conferring specific power to Legislatures to make laws for constitution of Tribunals. It is their contention that the very fact that Articles 323A and 323B have been specifically enacted empowering the concerned legislature to make a law constituting tribunals in regard to the matters enumerated therein, demonstrated that tribunals cannot be constituted in respect of matters other than those mentioned in the said Articles 323A and 323B. The contention is not sound. It is evident that Part XIV-A containing Articles 323A and 323B was inserted in the Constitution so as to provide for establishment of tribunals which can exclude the jurisdiction of all courts including the jurisdiction of High Courts and Supreme Court under Articles 226/227 and 32, in respect of disputes and complaints covered by those Articles. It was thought that unless such enabling power was vested in the Legislatures by a constitutional provision, it may not be possible to enact laws excluding the jurisdiction of the High Courts and Supreme Court. However, this is now academic because clause 2(d) of Article 323A and clause 3(d) of Article 323B have been held to be unconstitutional in *Chandra Kumar.*

30. In *ACC* (supra), this Court recognized the competence of the State to transfer a part of the judicial power from courts to Tribunal :

> "Judicial functions and judicial powers are one of the

essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; *but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to Tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties*. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the Tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the Tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State."

(emphasis supplied)

31. Therefore, even though revival/rehabilitation/regulation/ winding up of companies are not matters which are mentioned in Article 323A and 323B, the Parliament has the legislative competence to make a law providing for constitution of Tribunals to deal with disputes and matters arising out of the Companies Act.

32. The Constitution contemplates judicial power being exercised by both courts and Tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create Tribunals with reference to specific enactments and

confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to Tribunals.

33. The argument that there cannot be 'whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.

34. We will next consider the question whether provision for a Technical Member along with the Judicial Member making any difference to decide the validity of the provision for constitution of Tribunals. This Question is covered by the decision in *L. Chandra Kumar* (supra), this Court held :

"We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where

they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

35. But when we say that Legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by Tribunals, it is subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of Rule of Law and separation of powers. If Tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such Tribunals should possess the independence, security and capacity associated with courts. If the Tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be Technical Members in addition to Judicial Members. Where however jurisdiction to try certain category of cases are transferred from Courts to Tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural

laws, there is obviously no need to have any non-judicial Technical Member. In respect of such Tribunals, only members of the Judiciary should be the Presiding Officers/members. Typical examples of such special Tribunals are Rent Tribunals, Motor Accident Tribunals and Special Courts under several Enactments. Therefore, when transferring the jurisdiction exercised by Courts to Tribunals, which does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the Judiciary and Rule of Law and would be unconstitutional.

36. In *R. K. Jain vs. Union of India* – 1993 (4) SCC 119, this Court observed :

> "The Tribunals set up under Articles 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision."

37. Having held that Legislation can transfer certain areas

of litigation from Courts to Tribunals and recognizing that the legislature can provide for technical members in addition to judicial members in such Tribunals, let us turn our attention to the question as to who can be the members. If the Act provides for a Tribunal with a judicial member and a technical member, does it mean that there are no limitations upon the power of the legislature to prescribe the qualifications for such technical member? The question will also be whether any limitations can be read into the competence of the legislature to prescribe the qualification for the judicial member? The answer, of course, depends upon the nature of jurisdiction that is being transferred from the Courts to Tribunals. Logically and necessarily, depending upon whether the jurisdiction is being shifted from High Court, or District Court or a Civil Judge, the yardstick will differ. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees. We may examine this question with reference to the company jurisdiction exercised by the High Court for nearly a century being shifted to a tribunal on the ground that tribunal consisting of a judicial and technical members will be able to dispose of the matters expeditiously and that the availability of expertise of the technical members will facilitate the decision making to be more practical, effective and meaningful. Does this mean that the Legislature can provide for persons not properly qualified to become members? Let us take some examples. Can the legislature provide that a law graduate with a masters' degree in company law can be a judicial member without any experience as a lawyer or a judge? Or can the legislature provide that an Upper Division Clerk having fifteen years experience in the company law department but with a Law Degree is eligible to become a Judicial Member? Or can the legislature provide that a 'social worker' with ten years experience in social work can become a technical member? Will it be beyond scrutiny by way of judicial review?

38. Let us look at it from a different angle. Let us assume that three legislations are made in a state providing for constitution of three types of Tribunals: (i) Contract Tribunals; (ii) Real Estate Tribunals; and (iii) Compensation Tribunals. Let us further assume that those legislations provide that all cases relating to contractual disputes, property disputes and compensation claims hitherto tried by civil courts, will be tried by these tribunals instead of the civil courts; and that these tribunals will be manned by members appointed from the civil services, with the rank of Section Officers who have expertise in the respective field; or that a businessman in the case of Contract Tribunal, a Real Estate Dealer in regard to Property Tribunal, and any social worker in regard to compensation Tribunal, having expertise in the respective field will be the members of the Tribunal. Let us say by these legislations, all cases in civil courts are transferred to Tribunal (as virtually all cases in civil courts will fall under one or the other of the three Tribunals). Merely because the Legislature has the power to constitute tribunals or transfer jurisdiction to tribunals, can that be done?

39. The question is whether a line can be drawn, and who can decide the validity or correctness of such action. The obvious answer is that while the Legislature can make a law providing for constitution of Tribunals and prescribing the eligibility criteria and qualifications for being appointed as members, the superior courts in the country can, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members is proper and adequate to enable them to discharge judicial functions and inspire confidence. This issue was also considered in *Sampath Kumar* (supra) and it was held that where the prescription of qualification was found by the court, to be not proper and conducive for the proper functioning of the Tribunal, it will result in invalidation of the relevant provisions relating to the constitution of the Tribunal. If the qualifications/ eligibility criteria for appointment fail to ensure that the members of the Tribunal are able to discharge judicial

functions, the said provisions cannot pass the scrutiny of the higher Judiciary. We may in this context recall the words of Mathew J in *Kesavananda Bharati v. State of Kerala* [AIR 1973 SCC 1461] in a different context:

> "I am not dismayed by the suggestion that no yardstick is furnished to the Court except the trained judicial perception for finding the core or essence of a right, or the essential features of the Constitution. Consider for instance, the test for determining citizenship in the United States that the alien shall be a person of "good moral character" the test of a crime involving "moral turpitude", the test by which you determine the familiar concept of the "core of a contract", the "pith and substance" of a legislation or the "essential legislative function" in the doctrine of delegation. Few Constitutional issues can be presented in black and white terms. What are essential features and non essential features of the Constitution ? Where does the core of a right end and the periphery begin? These are not matters of icy certainty; but, for that reason, I am not persuaded to hold that they do not exist, or that they are too elusive for judicial perception. Most of the things in life that are worth talking about are matters at degree and the great judges are those who are most capable of discerning which of the gradations make genuine difference".

40. MBA contended that constitution of a Tribunal to transfer the entire company law jurisdiction of the High Court was violative of the doctrine of separation of power and independence of judiciary which are parts of basic structure of the Constitution. The Union of India countered it by contending that a Legislation cannot be challenged on the ground it violates the basic structure of the Constitution. It is now well settled that only constitutional amendments can be subjected to the test of basic features doctrine. Legislative measures are not subjected to basic features or basic structure or basic framework. The Legislation can be declared unconstitutional or invalid only on

two grounds namely (i) lack of legislative competence and (ii) violation of any fundamental rights or any provision of the Constitution [See : *Indira Gandhi vs. Raj Narain* - 1975 Supp SCC 1; *Kuldip Nayar vs. Union of India* – 2006 (7) SCC 1; and *State of Andhra Pradesh vs. McDowell & Co.* – 1996 (3) SCC 709]. The reason for this was given by Chandrachud J., in *Indira Gandhi*, thus:

> "Basic structure", by the majority judgment [in *Keshavanda Bharati vs. State of Kerala* – 1973 (4) SCC 225], is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features' - this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution…….
>
> There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations."

The view was also reiterated and explained by Beg. CJ in his leading judgment of a seven-Judge Bench in the *State of Karnataka vs. Union of India* – 1977 (4) SCC 608. He held that in every case where reliance is placed upon the doctrine of basic structure, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an

amendment to the Constitution) what is put forward as part of a basic structure must be justified by reference to the express provision of the Constitution. He further held:

> "The one principle, however, which is deducible in all the applications of the basic structure doctrine, which has been used by this Court to limit even the power of Constitutional amendment, is that whatever is put forward as a basic limitation upon legislative power must be correlated to one or more of the express provisions of the Constitution from which the limitation should naturally and necessarily spring forth. The doctrine of basic structure, as explained above, requires that any limitation on legislative power must be so definitely discernible from the provisions of the Constitution itself that there could be no doubt or mistake that the prohibition is a part of the basic structure imposing a limit on even the power of Constitutional amendment. And, whenever we construe any document, by reading its provisions as a whole, trying to eliminate or resolve its disharmonies, do we not attempt to interpret it in accordance with what we find in its "basic structure" or purposes ? The doctrine is neither unique nor new.
>
> No doubt, as a set of inferences from a document (i.e. the Constitution), the doctrine of "the basic structure" arose out of and relates to the Constitution only and does not, in that sense, appertain to the sphere of ordinary statutes or arise for application to them in the same way. But, if, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution's 'basic structure", just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.
>
> Thus, it is clear that whenever the doctrine of the basic structure has been expounded or applied it is only as a doctrine of interpretation of the Constitution as It actually exists and not of a Constitution which could exist only subjectively in the minds of different individuals as mere theories about what the Constitution is. The doctrine did not add to the contents of the Constitution. It did not, in theory, deduct anything from what was there. It only purported to bring out and explain the meaning of what was already there. It was, in fact, used by all the judges for only this purpose with differing results simply because their assessments or inferences as to what was part of the basic structure in our Constitution differed. This, I think is the correct interpretation of the doctrine of the basic structure of the Constitution. It should only be applied if it is clear, beyond the region of doubt, that what is put forward as a restriction upon otherwise clear and plenary legislative power is there as a Constitutional imperative."

Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive. Another facet of Rule of Law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the Executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

41. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce

such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary.

42. In *The State of West Bengal v. Anwar Ali Sarkar* [AIR 1952 SC 75], Bose J., made a classic exposition regarding Article 14 :

> "What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be." Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in article 14 does not mean the "legal precepts which are actually recognised and applied in tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them." (Dean Pound in 34 Harvard Law Review 449 at 452).
>
> "However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like article 14 into a concrete concept."

43. MBA relied upon the following extract from Chapter 2 of "Orderly & Effective Insolvency Procedures – Key Issues" annexed to Eradi Committee Report in support of its contention that the adjudication of disputes relating to insolvency should be conducted by Judges :

> "An insolvency law will need to provide for an institutional framework for its implementation. Since the adjudication of disputes is a judicial function, insolvency proceedings should be conducted under the authority of a court of law where judges will, at a minimum, be required to adjudicate disputes between the parties on factual issues and, on occasion, render interpretations of the law. The judiciary will only be able to fulfil this function if it is made up of independent judges with particularly high ethical and professional standards."

Learned counsel for MBA also referred to certain decisions of foreign Courts which may not be relevant in the Indian constitutional context. In particular, the decisions of US courts may not be relevant as Indian Constitution does not envisage a strict separation of powers which require judicial power to be exclusively vested in courts. In India, certain amount of overlapping exists and the Executive has been discharging judicial functions in several identified areas.

44. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial

review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

Whether the constitution of NCLT and NCLAT under Parts 1B & 1C of Companies Act are valid

45. We may now attempt to examine the validity of Part 1B and 1C of the Act by applying the aforesaid principles. The issue is not whether judicial functions can be transferred from courts to Tribunals. The issue is whether judicial functions can be transferred to Tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. We have already held that the Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided it is understood that the Tribunals exercise judicial power and the persons who are appointed as President/Chairperson/ Members are of a standard which is reasonably approximate to the standards of main stream Judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary.

46. Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaning ful only if there is an independent and impartial judiciary to render justice.

An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.

47. A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done. We may refer to the following words of Bhagwati CJ., in *Sampath Kumar* (supra) :

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

48. As far as the Technical Members are concerned, the officer should be of at least Secretary Level officer with known competence and integrity. Reducing the standards, or qualifications for appointment will result in loss of confidence in the Tribunals. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post. As, for example, for the post of a Judge of the High Court, 10 years' practice as an Advocate is prescribed. There may be Advocates who even with 4 or 5 years' experience, may be more brilliant than Advocates with 10 years' standing. Still, it is not competence alone but various other factors which make a person suitable. Therefore, when the legislature substitutes the Judges of the High Court with Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary Level officers (that is those who were Secretaries or Additional Secretaries) with specialized knowledge and skills can be appointed as Technical Members of the Tribunal.

49. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by

the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts. Let us take stock.

(49.1) To start with, apart from jurisdiction relating to appeals and revisions in civil, criminal and tax matters (and original civil jurisdiction in some High Courts). The High Courts were exercising original jurisdiction in two important areas; one was writ jurisdiction under Articles 226 and 227 (including original jurisdiction in service matters) and the other was in respect to company matters.

(49.2) After constitution of Administrative Tribunals under the Administrative Tribunals Act, 1985 the jurisdiction in regard to original jurisdiction relating to service matters was shifted from High Courts to Administrative Tribunals. Section 6 of the said Act deals with qualifications for appointment as Chairman, and it is evident therefrom that the Chairman has to be a High Court Judge either a sitting or a former Judge. For judicial member the qualification was that he should be a judge of a High Court or is qualified to be a Judge of the High Court (i.e. an advocate of the High Court with ten years practice or a holder of a judicial office for ten years) or a person who held the post of Secretary, Govt. of India in the Department of Legal Affairs or in the Legislative Department or Member Secretary, Law Commission of India for a period of two years; or an Additional Secretary to Government of India in the Department of Legal Affairs or Legislative Department for a period of five years. For being appointed as Administrative Member, the qualification was that the candidate should have served as Secretary to the Government of India or any other post of the Central or State Government carrying the scale of pay which is not less than as of a Secretary of Government of India for atleast two years, or should have held the post of Additional Secretary to the Government of India or any other post of Central or State Government carrying the scale of pay which is not less than that

of an Additional Secretary to the Government of India at least for a period of five years. In other words, matters that were decided by the High Courts could be decided by a Tribunal whose members could be two Secretary level officers with two years experience or even two Additional Secretary level officers with five years experience. This was the first dilution. The members were provided a term of office of five years and could hold office till 65 years and the salary and other perquisites of these members were made the same as that of High Court Judges. This itself gave room for a comment that these posts were virtually created as sinecure for members of the executive to extend their period of service by five years from 60 to 65 at a higher pay applicable to High Court Judges. Quite a few members of the executive thus became members of the "Tribunals exercising judicial functions".

(49.3) We may next refer to Information Technology Act, 2000 which provided for establishment of Cyber Appellate Tribunal with a single member. Section 50 of that Act provided that a person who is, or has been, or is qualified to be, a Judge of a High Court, or a person who is, or has been, a member of the India Legal Service and is holding or has held a post in Grade I of that service for at least three years could be appointed as the Presiding Officer. That is, the requirement of even a Secretary level officer is gone. Any member of Indian Legal Service holding a Grade-I Post for three years can be a substitute for a High Court Judge.

(49.4) The next dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a National Company Law Tribunal with a President and a large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of National Company Law Tribunal which is a substitute for the High Court, for hearing winding up matters and other matters which were earlier heard by High Court. A member need not even be a Secretary or Addl.

Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years (which means anyone belonging to Indian P&T Accounts & Finance Service, Indian Audit and Accounts Service, Indian Customs & Central Excise Service, Indian Defence Accounts Service, Indian Revenue Service, Indian Ordnances Factories Service, Indian Postal Service, Indian Civil Accounts Service, Indian Railway Traffic Service, Indian Railway Accounts Service, Indian Railway Personal Service, Indian Defence Estates Service, Indian Information Service, Indian Trade Services, or other Central or State Service) with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has 'dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil services - Joint Secretary level officers or officers holding Group 'A' posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group 'A' posts to serve up to 65 years in Tribunals exercising judicial functions.

(49.5) The dilution of standards may not end here. The proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The speed at which the qualifications for appointment as Members is being diluted is, to say the least, a matter of great concern for the independence of the Judiciary.

50. When Administrative Tribunals were constituted, the presence of members of civil services as Technical (Administrative) Members was considered necessary, as they were well versed in the functioning of government departments and the rules and procedures applicable to Government servants. But the fact that senior officers of civil services could function as Administrative Members of Administrative Tribunals, does not necessarily make them suitable to function as Technical Members in Company Law Tribunals or other Tribunals requiring technical expertise. The Tribunals cannot become providers of sinecure to members of civil services, by appointing them as Technical Members, though they may not have technical expertise in the field to which the Tribunals relate, or worse where purely judicial functions are involved. While one can understand the presence of the members of the civil services being Technical Members in Administrative Tribunals, or Military Officers being members of Armed Forces Tribunals, or Electrical Engineers being members of Electricity Appellate Tribunal, or Telecom Engineers being members of TDSAT, we find no logic in members of general Civil Services being members of Company Law Tribunals.

51. Let us now refer to the dilution of independence. If any member of the Tribunal is permitted to retain his lien over his post with the parent cadre or ministry or department in the civil service for his entire period of service as member of the Tribunal, he would continue to think, act and function as a member of the civil services. A litigant may legitimately think that such a member will not be independent and impartial. We reiterate that our observations are not intended to cast any doubt about the honesty and integrity or capacity and capability of the officers of civil services in particular those who are of the rank of Joint Secretary or for that matter even junior officers. What we are referring to is the perception of the litigants and the public about the independence or conduct of the Members of the Tribunal. Independence, impartiality and fairness are qualities which have to be nurtured and developed and cannot

be acquired overnight. The independence of members discharging judicial functions in a Tribunal cannot be diluted.

52. The need for vigilance in jealously guarding the independence of courts and Tribunals against dilution and encroachment, finds an echo in an advice given by Justice William O. Douglas to young lawyers (*The Douglas Letters: Selections from the Private Papers of William Douglas*, edited by Melvin L. Urofsky – 1987 Edition, page 162 - Adler and Adler.) :

"… The Constitution and the Bill of Rights were designed to get Government off the backs of people – all the people. Those great documents did not give us the welfare state. Instead, they guarantee to us all the rights to personal and spiritual self-fulfillment.

But that guarantee is not self-executing. *As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air – however slight — lest we become unwitting victims of the darkness."*

(emphasis supplied)

53. The only reason given by Eradi Committee for suggesting transfer of the company law jurisdiction from High Courts to Tribunals is delay, as is evident from the following :

"Long drawn court proceedings

24. Multiplicity of court proceedings is the main reason for abnormal delay in dissolution of companies. The proceedings are filed by OL under sections 446,454,468 and 542/543 for non-submission of Statement of Affairs, non production of books of account and assets as also realization of debts and misfeasance proceedings. Similarly, the settlement of list of creditors and contributories take a long time. Disposal of suits or claims

filed by the company or against the company in which OL is always a party, take a very long time.

25. Normally, there is a company court with one Company Judge in each High Court and it is not possible for the court to cope with the work relating to companies under liquidation. Apart from company matters, the court also attends to other cases in the High Court. The orders passed by Company Judge are appealable under section 483. Normal delays and adjournments sought in court proceedings further aggravate the problem and unless all the pending cases are not finally disposed of. OL cannot move the court for dissolution of a company.

26. Under section 457, OL can exercise the powers with the sanction and subject to the control of the court. Any creditor or contributory may apply to the Court with respect to the exercise of any such power. Elaborate procedure has been prescribed under the Companies (Court) Rules, 1959 relating to Statement of Affairs (Rules 124-134), Preliminary Report (Rules 135-139), Settlement of list of creditors (Rules 147-149), Settlement of list of contributories and payment of calls (Rules 180-196,232-242), examination under section 477/478 (Rule 234-259), Misfeasance proceedings under sections 542 and 543 (Rules 260-262), Disclaimer of property under section 535((Rules 263-269), Compromise and abandonment of claims (Rules 270-271), Sale of assets (Rules 272-274), Declaration of dividend (payment to creditors) and turn of capital to contributories (Rules 275-280), dissolution (rules 281-285), Maintenance of Registers and books by OL (Rules 286-292), Investment of surplus funds (Rules 293-297), Half yearly and yearly Accounts and audit (Rules 298-311), Unclaimed dividend and undistributed assets (Rules 335-338).

27. It is significant to note that under the Act and the aforesaid Companies (Courts) Rules made by Hon'ble

Supreme Court, after consulting the High Courts under section 643, OL has to seek sanction of the Court at each and every stage during the course of winding up proceedings. For the purpose, OL has to submit reports from time to time for consideration of the Company Judge on the administrative as well as judicial side. This entails delays due to normal court proceedings. In contract, by and large, there is hardly any interference by the court in case of companies under voluntary winding up."

Eradi Committee merely recommended setting up separate Tribunals to exclusively deal with company matters and transfer of company law jurisdiction from High Court to such Tribunals. Tribunals with only Judicial Members would have served the purpose sought to be achieved. It did not suggest that such Tribunals should have 'Technical Members'. Nor did it suggest introduction of officers of civil services to be made technical members. The jurisdiction relating to company case which the High Courts are dealing with can be dealt with by Tribunals with Judicial Members alone. Be that as it may.

54. Parts IC and ID of the Companies Act proposes to shift the company matters from the courts to Tribunals, where a 'Judicial Member' and a 'Technical Member' will decide the disputes. If the members are selected as contemplated in section 10FD, there is every likelihood of most of the members, including the so called 'Judicial Members' not having any judicial experience or company law experience and such members being required to deal with and decide complex issues of fact and law. Whether the Tribunals should have only judicial members or a combination of judicial and technical members is for the Legislature to decide. But if there should be technical members, they should be persons with expertise in company law or allied subjects and mere experience in civil service cannot be treated as Technical Expertise in company law. The candidates falling under sub-section 2(c) and (d) and sub-sections 3(a) and (b) of section 10FD have no experience or expertise in *deciding* company matters.

55. There is an erroneous assumption that company law matters require certain specialized skills which are lacking in Judges. There is also an equally erroneous assumption that members of the civil services, (either a Group-A officer or Joint Secretary level civil servant who had never handled any company disputes) will have the judicial experience or expertise in company law to be appointed either as Judicial Member or Technical Member. Nor can persons having experience of fifteen years in science, technology, medicines, banking, industry can be termed as experts in Company Law for being appointed as Technical Members. The practice of having experts as Technical Members is suited to areas which require the assistance of professional experts, qualified in medicine, engineering, and architecture etc.

Lastly, we may refer to the lack of security of tenure. The short term of three years, the provision for routine suspension pending enquiry and the lack of any kind of immunity, are aspects which require to be considered and remedied.

56. We may tabulate the corrections required to set right the defects in Parts IB and IC of the Act :

(i) Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service

or Indian Legal service will at best enable them to be considered for appointment as technical members.

(ii) As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.

(iv) A 'Technical Member' presupposes an experience in the field to which the Tribunal relates. A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as 'experts' qualified to be appointed as Technical Members. Therefore Clauses (a) and (b) of sub-section (3) are not valid.

(v) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.

(vi) Persons having ability, integrity, standing and special

knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as Technical Members.

(vii) In regard to category of persons referred in clause (g) of sub-section (3) at least five years experience should be specified.

(viii) Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal.

(ix) Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);

(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;

(c) Secretary in the Ministry of Finance and Company Affairs – Member; and

(d) Secretary in the Ministry of Law and Justice – Member.

(x) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(xi) The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.

(xii) To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xiii) The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.

(xiv) Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special

benches are constituted, the number of Technical Members shall not exceed the Judicial Members.

57. We therefore dispose of these appeals, partly allowing them, as follows:

(i) We uphold the decision of the High Court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional.

(ii) We declare that Parts 1B and 1C of the Act as presently structured, are unconstitutional for the reasons stated in the preceding para. However, Parts IB and IC of the Act, may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court.

K.K.T. Appeals partly allowed.

MADRAS BAR ASSOCIATION
v.
UNION OF INDIA
(Transferred Case (Civil) No. 150 of 2006 etc.)

MAY 11, 2010

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

Constitution of India, 1950:

Article 323-B – Enabling appropriate Legislature to provide for adjudication or trial by Tribunals – Enactment of National Tax Tribunal Act, 2005 – Validity of – HELD: The petitions relating to validity of the NTT Act and the challenge to Article 323-B raises issues which did not arise in CA No. 3067/2004 and CA No. 3717/2005[1] – Therefore, the instant cases cannot be disposed of in terms of the decision in the two civil appeals, but require to be heard separately – These matters are, therefore, directed to be de-linked and listed separately for hearing – National Tax Tribunal Act, 2005 – Validity of.

CIVIL ORIGINAL JURISDICTION : Transfered Case (C) No. 150 of 2006.

Under Article 139 of the Constitution of India.

WITH

T.C. (C) No. 116, 117 & 118 of 2006,

W.P. (C) No. 697 of 2007.

Parag P. Tripathy, ASG, Arvind P. Datar, Ananth Padmanabhan, Nikhil Nayyar, TVS Raghavendra Sreyas, Ambuj Agrawal, Suchindran B.N., E.C. Vidya Sagar, Amey

1. *Union of India vs. R. Gandhi* (2010) 6 SCR 857.

Nargolkar, Arti Gupta, Vismai Rao, Gaurav Agarwal, Kunal Bahri, Varun Sarin, Anubha Agarwal, Sushma Suri, Navin Prakash (for P. Parmeswaran), Sanjeev Sachdeva, Saurabh Sharma, Preet Pal Singh, Parmanand Gaur, Gagan Gupta, Achin Gupta for the appearing parties.

The following order of the Court was delivered

O R D E R

In all these petitions, the constitutional validity of the National Tax Tribunal Act, 2005 ('Act' for short) is challenged. In TC No.150/2006, additionally there is a challenge to section 46 of the Constitution (Forty-second Amendment) Act, 1976 and Article 323B of Constitution of India. It is contended that section 46 of the Constitution (Forty-second Amendment) Act, is ultra vires the basic structure of the Constitution as it enables proliferation of Tribunal system and makes serious inroads into the independence of the judiciary by providing a parallel system of administration of justice, in which the executive has retained extensive control over matters such as appointment, jurisdiction, procedure etc. It is contended that Article 323B violates the basic structure of the Constitution as it completely takes away the jurisdiction of the High Courts and vests them in the National Tax Tribunal, including trial of offences and adjudication of pure questions of law, which have always been in the exclusive domain of the judiciary.

2. When these matters came up on 9.1.2007 before a three Judge Bench, the challenge to various sections of the Act was noticed.

(2.1) The first challenge was to section 13 which permitted "any person" duly authorized to appear before the National Tax Tribunal. Union of India submitted that the appropriate amendment will be made in the Act to ensure that only lawyers, Chartered Accountants and parties in person will be permitted to appear before the National Tax Tribunal.

(2.2) The second challenge was to section 5(5) of the Act which provided that the Central Government may, in consultation with the Chairperson, transfers a Member from headquarters of one Bench in one State to the headquarters of another Bench in another State or to the headquarters of any other Bench within a State. Union of India submitted that having regard to the nature of the functions to be performed by the Tribunal and the constitutional scheme of separation of powers and independence of judiciary, the expression "consultation with the Chairperson" occurring in section 5(5) of the Act should be read and construed as "concurrence of the Chairperson".

(2.3) The third challenge was to Section 7 which provided for a Selection Committee comprising of the Chief Justice of India or a Judge of the Supreme Court nominated by him, (b) Secretary in the Ministry of Law & Justice, and (c) Secretary in the Ministry of Finance. It was contended by the petitioners that two of the Members who are Secretaries to the Government forming the majority may override the opinion of the Chief Justice or his nominee which was improper. It was stated on behalf of the Union of India that there was no question of two Secretaries overriding the opinion of the Chief Justice of India or his nominee since primacy of the Chairperson was inbuilt in the system and this aspect will be duly clarified.

(2.4) In regard to certain other defects in the Act, pointed out by the petitioners, it was submitted that the Union Government will examine them and wherever necessary suitable amendments will be made.

In view of these submissions, on 9.1.2007, this Court made an order reserving liberty to the Union Government to mention the matter for listing after the appropriate amendments were made in the Act.

3. On 21.1.2009, when arguments in CA No. 3067 of 2004 and CA No. 3717/2005, which related to the challenge to Parts 1B and 1C of Companies Act, 1956 were in progress before

the Constitution Bench, it was submitted that these matters involved a similar issue and they could be tagged and disposed of in terms of the decision in those appeals. Therefore the Constitution Bench directed these cases to be listed with those appeals, even though there is no order of reference in these matters.

4. CA No. 3067 of 2004 and CA No. 3717 of 2005 were subsequently heard at length and were reserved for judgment. These matters which were tagged were also reserved for judgment.

5. We have disposed of CA No.3067/2004 and CA No. 3717/2005 today by a separate order. In so far as these cases are concerned, we find that TC (Civil) No. 150/2006 involves the challenge to Article 323B of the Constitution. The said Article enables appropriate legislatures to provide by law, for adjudication or trial by tribunals or any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) thereof. Sub-clause (i) of Clause 2 of Article 323B enables such tribunals to try offences against laws with respect to any of the matters specified in clauses (a) to (h) of clause (2) of the said Article.

6. One of the contentions urged in support of the challenge to Article 323B relate to the fact that Tribunals do not follow the normal rules of evidence contained in Evidence Act. In criminal trials, an accused is presumed to be innocent till proved guilty beyond reasonable doubt, and Evidence Act plays an important role, as appreciation of evidence and consequential findings of facts are crucial. The trial would require experience and expertise in criminal law, which means that the Judge or the adjudicator to be legally trained. Tribunals which follow their own summary procedure, are not bound by the strict rules of evidence and the members will not be legally trained. Therefore it may lead to convictions of persons on evidence which is not sufficient in probative value or on the basis of inadmissible evidence. It is submitted that it would thus be a retrograde step

for separation of executive from the judiciary.

7. Appeals on issues on law are traditionally heard by courts. Article 323B enable constitution of Tribunals which will be hearing appeals on pure questions of law which is the function of courts. In L. *Chandra Kumar* v. *Union of India* (1997) 3 SCC 261, this court considered the validity of only Clause 3(d) of Article 323B but did not consider the validity of other provisions of Article 323B.

8. The appeals relating to constitutional validity of National Company Law Tribunals under the Companies Act, 1956 did not involve the consideration of Article 323B. The constitutional issues raised in TC (Civil) No. 150/2006 were not touched as the power to establish Company Tribunals was not traceable to Article 323B but to several entries of Lists I and III of Seventh Schedule and consequently there was no challenge to this Article.

9. The basis of attack in regard to Part 1B and 1C of Companies Act and the provisions of NTT Act are completely different. The challenge to Part IB & IC of Companies Act, 1956 seeks to derive support from Article 323B by contending that Article 323B is a bar for constitution of any Tribunal in respect of matters not enumerated therein. On the other hand the challenge to NTT Act is based on the challenge to Article 323B itself.

10. We therefore find that these petitions relating to the validity of the NTT Act and the challenge to Article 323B raises issues which did not arise in the two civil appeals. Therefore these cases can not be disposed of in terms of the decision in the civil appeals but requires to be heard separately. We accordingly direct that these matters be delinked and listed separately for hearing.

R.P. Transferred cases delinked and to be listed separately for hearing

GOVINDAPPA & ORS.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 1469 of 2008)

MAY 11, 2010

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

Penal Code, 1860: ss.498-A/34, 302/34 – Conviction under – Accused persons poured kerosene on deceased-daughter-in-law and lit fire on her – Dying declaration recorded by Magistrate – Certificate of doctor that the deceased was in fit state of mind to give dying declaration –Conviction based on dying declaration – Interference with – Held: Not called for – The evidence of doctor clearly showed that the deceased was in a sound state of mind while giving the dying declaration before Magistrate – Such a dying declaration has got due weight in the evidence – Further, evidence of eye-witnesses proved that accused ill-treated the deceased and subjected her to cruelty and that they were involved in the commission of the offences – Conviction upheld – Crime against Women – Evidence Act, 1872 – s.32 – Dying declaration.

Prosecution case was that the accused persons who were the in-laws of the deceased burnt her by pouring kerosene and lighting fire on her. The neighbors extinguished the fire and took the deceased to the hospital. The doctor, PW-7 treated the deceased and informed the police. The magistrate PW-12 recorded the dying declaration of the deceased in the presence of PW-7. Trial court convicted the appellants A-1, A-2, A-4 as also A-3, mother-in-law and A-5, grandmother-in-law for offences under Section 498-A/34 IPC and Section 302/34 IPC. On appeal, High Court upheld conviction of appellants; however it acquitted A-3 and A-5. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. It is essential that the person who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind. The certification by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise. The evidence of doctor (PW-7) clearly showed that the deceased was in a sound state of mind while giving the statement before the Tahsildar PW-12. In such circumstances, such a dying declaration has got due weight in the evidence. Further, the doctor explained that though the deceased sustained 100% burn injuries, she was in a position to talk. In such circumstances, her statement cannot be rejected on the ground that she sustained severe burn injuries. Normally, the person on the verge of death would not implicate somebody falsely. In the light of dying declaration coupled with the evidence of eye-witnesses, there was ample evidence on record to hold that the appellants ill-treated the deceased and subjected her to cruelty by giving both mental and physical torture and in furtherance of their common intention only to commit the murder of the deceased, poured kerosene and set fire on her who ultimately succumbed to the injuries. The dying declaration fully corroborated the evidence of Doctor and Tahsildar who recorded it. [Para 15] [970-F-H; 971-A-D]

2. The analysis of the prosecution witnesses, particularly, PW-3, PW-4, PW-10 elderly person of the village and PW-12 Taluk Executive Magistrate who recorded the dying declaration of the deceased clearly proved the involvement of appellants in the commission of offence as charged and they were rightly awarded sentence of life imprisonment. Though, it was pointed out that there were certain discrepancies, they all were minimal and did not affect the case of the prosecution.

In view of the oral evidence of PW-3, PW-4, PW-6, PW-7, PW-9, PW-10, PW-12 coupled with dying declaration Ex. P-9, the prosecution fully established its case against the appellants. [Para 16] [971-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1469 of 2008.

From the Judgment & Order dated 04.10.2007 of the High Court of Karnataka, Bangalore in Criminal Appeal No. 2573 of 2006.

Sanjay Jain, Vinay Arora, Mukesh Kumar for the Appellants.

Sanjay R. Hegde, A. Rohen Singh, Ramesh K. Mishra, Vikrant Yadav, Ramesh Kr. Mishra 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 04.10.2007 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No. 2573 of 2006 whereby the High Court partly allowing the appeal acquitted Laxmibai – A-3, the mother of the appellants herein and Bhagirathi-A-5, the grandmother of appellants and affirming the sentence passed by the trial Court convicted A-1, A-2 and A-4, appellants herein, for offences under Section 498-A/34 IPC and Section 302/34 IPC.

2. The facts leading to the present appeal are as follows: The deceased - Renuka, was married to appellant No.1 about 10 years prior to the date of the incident. As per the prosecution case, on 10.12.2005, at about 12 noon, the appellants herein, along with their mother and grandmother tried to pour kerosene oil and lit fire on the deceased and because of that she raised hue and cry. On hearing her noise, five neighbours came and requested them not to do so but the accused persons asked them not to interfere in their family matter. Appellant No.3

poured kerosene on the deceased and appellant No.2 set fire in the presence of the neighbours. After pouring kerosene, the accused persons ran away from the house and the neighbours extinguished the fire and covered the deceased with blanket and had taken her immediately to the Government Hospital Bagalkot. At about 2.30 p.m., the Doctor (PW-7) informed the police and the Magistrate (Tehsildar) (PW 12) came to the Hospital at 4.30 p.m. and recorded the dying declaration of the deceased which is filed as Ex. P-9. The Police Officer came to the hospital after 7 p.m. and taken the statement of the deceased which was written by Govindagowda Patil – PW-11, the neighbour, and F.I.R. was registered at the police station at 7.15 p.m. which is Ex. P-10. The Investigating Officer, PW-17 came to the hospital at 8.30 p.m. and again tried to take the statement of the deceased but she was not in a position to give any statement and at 9.00 p.m., she died. The Inquest Panchnama was prepared at about 11.00 p.m. On 11.12.2005, post mortem was conducted by the Doctor, PW-7, the report of which is Ex. P-5. The Investigating Officer filed the charge sheet on 23.01.2006. On 26.06.2006, the Fast Track Court, Bagalkot framed the charges against all the five accused persons under Sections 498-A, 143, 147, 341, 302 read with Section 149 I.P.C. By order dated 03.10.2006, the Fast Track Court, Bagalkot convicted all the five accused for the offence punishable under Sections 498-A, 143, 147, 341, 302 read with Section 149 I.P.C. and sentenced them to undergo rigorous imprisonment for two years and also sentenced them to pay a fine of Rs.2000/- each in default, simple imprisonment for three months for the offence punishable under Section 498-A read with Section 149 I.P.C. and further convicted them for the offences punishable under Section 302/149 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.10,000/- each in default, simple imprisonment for one year. All of them filed a Criminal Appeal being Appeal No. 2573 of 2006 before the High Court. By order dated 04.10.2007, the High Court by partly allowing the appeal acquitted A-3 and A-5 of all the charges leveled against them and affirming the

sentence passed by the trial Court on A-1, A-2 and A-4 convicted them for the offence punishable under Section 498-A/34 I.P.C. and Section 302/34 I.P.C. Aggrieved by the said order, accused Nos. 1, 2 and 4 have preferred this appeal by way of special leave petition.

3. We have heard Mr. Sanjay Jain, learned counsel for the appellants-accused and Mr. Sanjay R. Hegde, learned counsel for the respondent-State.

4. Points for consideration in this appeal are:-

(i) Whether the Trial Court was justified in convicting the appellants-accused A-1, A-2, and A-4 for offences punishable under Section 498A, read with Section 34 IPC and Section 302 read with Section 34 IPC?

(ii) Whether the sentence imposed upon the appellantsaccused is justifiable?

(iii) Whether the High Court is right in confirming the conviction and sentence imposed on the appellants?

5. In this appeal, we are concerned only with A-1, A-2 and A-4, since the other accused A-3 and A-5 were acquitted by the High Court.

6. Apart from various materials in the form of oral and documentary evidence, the Trial Court accepted the evidence of eye-witnesses, namely, PW-3, PW-4, PW-5, PW-6 as well as Dr. Uma Kant PW-7 who treated Renuka, father of the deceased PW-9, one elderly person of the village PW-10 and Taluk Executive Magistrate PW-12 who had recorded the dying declaration of Renuka. Learned counsel for the appellants-accused pointed out that as per the prosecution, there were five witnesses present at the spot of incident, even before the victim was burnt, but none of them stopped the accused or tried to prevent the incident. He also submitted that the Trial Court and the High Court committed an error in relying upon the dying

declaration recorded by PW-12 since PW-12 has neither taken the certificate from the Doctor nor asked any question to verify the mental condition of the deceased Renuka, particularly, when she suffered 100% burns as shown in the post-mortem report.

7. At the foremost, let us verify the evidence of Dr. Uma Kant PW-7 who treated the injured Renuka when she was brought to the hospital. Though, he had stated that injured Renuka had sustained 100% burn injuries, at about 4.45 p.m., according to him, she was in a fit state of mind to give statement. Based on the statement of doctor PW-7, Taluka Executive Magistrate PW-12 recorded her statement in the presence of PW-7. It is further seen that after recording the statement, her left thumb impression was taken on the statement, the doctor PW-7 also subscribed his signature. It is true that in the crossexamination it was elicited that the tongue of the deceased was swollen and protruded and lips were burnt. Though this suggestion has been admitted by PW-7, the fact remains at the time of recording her statement PW-7 was satisfied that Renuka was in a fit condition and in a fit state of mind to make a statement. There is no reason to disbelieve the version of PW-7 who made initial treatment and he was very well present during the entire period of recording the statement (Ex. P-9). We hold that the evidence of PW-7 coupled with PW-12 are acceptable and support the case of the prosecution.

8. Now, let us discuss the other eye-witnesses, first and foremost is PW-3. According to him, he is residing in a house adjacent to the deceased Renuka. He explained that he knew the family members of the appellants and the deceased. He also explained that sister-in-law of the deceased A-4 desired to give her elder daughter in marriage to A-1 and because of that Renuka was being assaulted by the appellants. He deposed that on 10.12.2005 at 12.00 o'clock he heard a crying sound from the house of the appellants. He along with others went to the house of the appellants and they found A-1, A-3 and A-5 holding Renuka. A-2 had a match-box in his hand and A-

4 was holding kerosene can. Though he requested not to cause any harm to Renuka, according to him, the accused person were holding Renuka and sister-in-law (A-4) poured kerosene. He further asserted that after setting fire by pouring kerosene accused A-1 to A-4 ran away from the scene of occurrence. Though, he also implicated A-3 and A-5 in the commission of offence but in the absence of further corroboration, the High Court has rightly acquitted them. However, there is no reason to disbelieve the evidence of PW-3 insofar as A-1, A-2 and A-4 appellants herein that they were responsible for the cause of the death of Renuka.

9. The next witness is Govindappa PW-4, who witnessed the incident and partly supported the case of the prosecution. He explained how the deceased was humiliated and harassed by the appellants. According to him, this was narrated to him by Renuka during her lifetime and on several occasions she had gone to her native place due to ill-treatment meted out to her at the hands of the appellants. He also explained that on 10.12.2005 at about 12.00 o'clock, when he was in his house, he heard cries from the house of the appellants. He rushed to their house and saw in the first floor Renuka was in ablaze. As rightly observed by the High Court, though, PW-4 did not support the entire case of prosecution and he had been treated as hostile witness, his evidence to the extent A-2 and A-4 participating in the commission of offence is proved. To this extent, the High Court has rightly accepted his testimony.

10. The next eye-witness examined by the prosecution is one - Prakash PW-6. He explained how Renuka was humiliated and harassed by the appellants and on the relevant date and time and after hearing the cries he went to the first floor and found A-1, A-2 and A-5 were holding Renuka, A-4 was holding kerosene can and A-2 was holding a matchstick. He further deposed that the accused informed him that it is their family matter and none should interfere. At that time, A-4 poured kerosene on the body of Renuka and A-2 lighted match stick

and lit fire to Renuka and immediately all the accused ran away from the scene of occurrence. As observed by the High Court, the evidence of PW-6 shows that A-4 poured kerosene and A-2 lit fire. The above statement of PW-6 finds support from the dying declaration Ex. P-7. His assertion that A-1 was holding Renuka also finds corroboration from the dying declaration Ex. P-9. In other words, the evidence of PW-6 clearly proves the participation of A-1, A-2 and A-4 in the commission of offence.

11. Krishnappa, father of the deceased was examined as PW-9. He explained how his daughter was harassed and humiliated by the appellants. He also explained the desire of A-4 sister-in-law of the deceased to give her elder daughter to A-1. His evidence gets support from the dying declaration Ex. P-9 and to this extent the same is acceptable and rightly relied on by the High Court.

12. An elderly person from the same village had been examined as PW-10 and he also narrated how the deceased Renuka was humiliated and harassed at the instance of the appellants.

13. Other important witness is H.N. Nagaraj, PW-12, Taluka Executive Magistrate. He deposed before the Court that he had recorded the dying declaration of Renuka and the same was recorded after ascertaining her condition from PW-7 Dr. Uma Kant. After noting that Renuka was in a fit state of mind from Dr. Uma Kant PW-7 and she was in a position to make the statement, in the presence of PW-7 he recorded her statement on 10.12.2005 at 4.45 p.m. He denied the suggestion that Renuka was not in a position to make a statement.

14. About dying declaration Ex. P-9, we have already adverted to the evidence of Dr. Uma Kant (PW-7), Government District Hospital Bagalkot. He explained that on 10.12.2005 at 2.20 p.m. injured Renuka w/o Govindappa Macha was brought with history of burns on the same day at 1.00 p.m. and she was

admitted in the hospital and treatment was given to her. When Taluka Executive Magistrate (PW-12) came to the hospital at about 4.45 p.m., he enquired about the mental conditionof the patient and whether she is capable of giving statement for which PW-7 informed that the patient is in a fit state of mind to give statement. Accordingly, the statement was recorded in his presence and then Renuka put her left thumb impression on the said statement and both the Doctor and the Magistrate also signed on the said statement. It is true that on the same night at 9.00 p.m. the injured expired due to burn injuries and post-mortem was conducted. On examination of body, he found superficial (epidermal burn) all over the body. Hyperaemic skin, singeing of hair present, burn 100% few small blisters are seen over the face containing serous ferrous fluids, skin is red and hyperaemic, singeing of hair present on head, duramater is leathery, brain is shrunken and yellow. All the internal organs were congested, coal particles are seen in nose, mouth, trachea and oseophagus. Found smell of kerosene oil on her body. He is of the opinion that death is due to shock as a result of 100% burn, time since death is within 4 to 24 hours. Accordingly, he issued the post-mortem report as per Ex. P-5, which bears his signature. PW-7 has also denied the suggestion that the deceased-Renuka was in the semicoma till the death.

15. Though, it was argued that PW-12 Tahsildar has not obtained the certificate from the Medical Officer regarding condition of the deceased, that itself is not sufficient to discard the dying declaration (Ex. P-9). What is essential required is that the person who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind. The certification by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise. The evidence of doctor (Pw-7) clearly shows that the deceased was in a sound state of mind while giving the statement before the Tahsildar (PW-12). In such circumstances, we are of the view that such a dying declaration

has got due weight in the evidence. Further, as stated earlier, the doctor has explained that though the deceased Renuka sustained 100% burn injuries, she was in a position to talk. In such circumstances, her statement cannot be rejected on the ground that she sustained severe burn injuries. Normally, the person on the verge of death will not implicate somebody falsely. Even if we accept some contradiction in Ex. P-7 complaint, in the light of Ex. P-9 dying declaration coupled with the evidence of eye-witnesses, there is ample evidence on record to hold that the appellants ill-treated the deceased Renuka and subjected her to cruelty by giving both mental and physical torture and in furtherance of their common intention only to commit the murder of the deceased, poured kerosene and set fire on her who ultimately succumbed to the injuries on the same day in the District Hospital, Bagalkot. In our view, dying declaration (Ex. P-9) fully corroborates the evidence of Doctor and Tahsildar who recorded it.

16. The analysis of the prosecution witnesses, particularly, PW-3, PW-4, PW-10 elderly person of the village and PW-12 Taluk Executive Magistrate who recorded the dying declaration of Renuka clearly proves the involvement of appellants in the commission of offence as charged and they were rightly awarded sentence of life imprisonment. Though, it was pointed out that there were certain discrepancies, according to us, they all are minimal and it had not affected the case of the prosecution. As discussed earlier, in view of the oral evidence of PW-3, PW-4, PW-6, PW-7, PW-9, PW-10, PW-12 coupled with dying declaration Ex. P-9, we hold that the prosecution has fully established its case against the appellants and we are in entire agreement with the conclusion arrived by the High Court.

17. In the light of the above discussion, we do not find any merit in the appeal, consequently, the same is dismissed.

D.G. Appeal dismissed.

DR. K. KRISHNA MURTHY & ORS.
v.
UNION OF INDIA & ANR.
(Writ Petition (Civil) No. 356 of 1994)

MAY 11, 2010

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

Constitution of India, 1950 – Constitution (Seventy-third) Amendment Act, 1992 – Constitution (Seventy-fourth) Amendment Act, 1992:

Articles 243-D(4) and 243-T(4) – Elected local self-government institutions – Reservation of Chairperson posts under – Constitutional validity of – Held: Is constitutionally valid – Said posts cannot be equated with solitary posts in the context of public employment – Article 243-D(4) provides a clear constitutional basis for reserving Chairperson positions in favour of SC and STs (in proportionate manner) and one-third of all chairperson positions in each tier of the Panchayati Raj Institutions in favour of women.

Articles 243-D(6) and 243-T(6) – Reservations in favour of backward classes for occupying seats and Chairperson positions in Panchayat and Municipalities – Constitutional validity of – Held: Are constitutionally valid – Provisions merely enable State Legislatures to reserve seats and chairperson posts in favour of backward classes – They do not provide guidance on how to identify backward classes and neither do they specify any principle for quantum of such reservations – Concerns about disproportionate reservations should be raised by way of specific challenges against the State Legislations – Karnataka Panchayati Raj Act, 1993 – Uttar Pradesh Panchayat Raj Act, 1947 – Uttar Pradesh Kshetra Panchayat and Zilla Panchayat Act, 1961.

Articles 243-D(6) and 243-T(6) – Reservations for OBCs under the State Legislations – Claims as regard overbreadth in quantum of reservation – Held: Cannot be examined since there is no contemporaneous empirical data – Onus is on executive to conduct rigorous investigation into the patterns of backwardness that act as barriers to political participation – Aggrieved party can challenge any State legislation enacted in pursuance to Articles 243-D(6) and 243-T(6) before High Court.

Articles 243-D(6) and 243-T(6) – Upper ceiling – 50 % vertical reservations in favour of SC/ST/OBCs – Held: Not to be breached in context of local self-government – Exceptions can only be made in order to safeguard the interests of Scheduled Tribes in the matter of their representation in Panchayats located in Scheduled Areas.

Articles 243-D(6) and 243-T(6) – Reservations in favour of backward classes – 'Backward classes' in Articles 243-D(6) and 243-T(6), whether co-extensive with the 'socially and educationally backward classes' (SEBCs) contemplated under Articles 15(4) and 15(5) or with under-represented backward classes as contemplated under Article 16(4) – Held: Identification of 'backward classes' under Articles 243-D(6) and 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16 (4) – Social and economic backwardness does not necessarily coincide with political backwardness.

Articles 243-D and 243-T – Reservations in elected local self government – Nature and purpose of – Held: Is considerably different from that of higher education and public employment, as contemplated under Articles 15(4) and 16(4) – Articles 243-D and 243-T form a distinct and independent constitutional basis for affirmative action and principles that have been evolved in relation to reservation

policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government.

Articles 243-D and 243-T – Reservations in local self-government – Exclusion of 'creamy layer' – Held: There cannot be exclusion of creamy layer in the context of local self-government – Reservations in local self-government are intended to directly benefit the community as a whole, rather than just the elected representatives – Exclusion of 'creamy layer' may be feasible as well as desirable in the context of reservations for education and employment.

Right to vote and contest elections – Nature of – Held: Does not have the status of fundamental rights – They are in the nature of legal rights which can be controlled through legislative means – Constitution empowers the Election Commission to prepare electoral rolls for identifying the eligible voters in elections for Lok Sabha and Vidhan Sabha – Right to vote is not an inherent right and cannot be claimed in an abstract sense –1951 Act includes grounds that render persons ineligible from contesting elections – Thus, there is no inherent right to contest elections since there are explicit legislative controls over the same – Representation of the People Act, 1951.

By way of the 73rd and 74th Amendments to the Constitution of India, 1950, Articles 243-D(4) and 243-T(4) as well as Articles 243-D(6) and 243-T(6), were inserted. In the instant writ petition, the petitioner has challenged the constitutional validity of Article 243-D(6) and Article 243-T(6) of the Constitution of India, 1950 since they enable reservations in favour of backward classes for the purpose of occupying seats and chairperson positions in Panchayats and Municipalities respectively, and also Article 243-D(4) and Article 243-T(4) since they enable the reservation of chairperson positions in Panchayats and Municipalities respectively.

Disposing of the Writ Petition, the Court

HELD: 1.1 The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. Article 243-D and Article 243-T of the Constitution of India, 1950 form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for purposes of Articles 15(4) and 16(4), but can be much shorter. [Para 48] [1026-D-G]

1.2. Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable State Legislatures to reserve seats and chairperson posts in favour of backward classes and it would be quite improper to strike them down as violative of the equality clause. Concerns about disproportionate reservations should be raised by way of specific challenges against the State Legislations. [Para 48] [1026-G-H; 1027-A]

1.3. The claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State Legislations cannot be examined since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. It will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of Articles 243-D(6) and 243-T(6) before the High Court. The identification of

'backward classes' under Articles 243-D(6) and 243-T(6) should be distinct from the identification of 'socially and educationally backward classes'-SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16 (4). [Para 48] [1027-B-E]

1.4. The upper ceiling of 50% vertical reservations in favour of SC/ST/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of STs in the matter of their representation in Panchayats located in the Scheduled Areas. [Para 48] [1027-E-F]

1.5. The reservation of chairperson posts in the manner contemplated by Articles 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment. [Para 48] [1027-F-G]

2.1. The principles that have been evolved for conferring the reservation benefits contemplated by Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Articles 243-D and 243-T. Articles 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions, the nature and purpose of which is different from the reservation policies designed to improve access to higher education and public employment, as contemplated under Articles 15(4) and 16(4) respectively. [Para 30] [1013-C-E]

Vinayakrao Gangaramji Deshmukh v. P.C. Agrawal & Ors, **AIR 1999 Bom 142, approved.**

2.2. It is partly accepted that the nature of disadvantages which restrict access to education and employment cannot be readily equated with disadvantages in the realm of political representation. To

be sure, backwardness in the social and economic sense does not necessarily imply political backwardness. However, the petitioner's emphasis on the distinction between 'selection' (in case of education and employment) and 'election' (in case of political representation) does not adequately reflect the complexities involved. It is undeniable that in determining who can get access to education and employment, due regard must be given to considerations of merit and efficiency which can be measured in an objective manner. Hence, admissions to educational institutions and the recruitment to government jobs is ordinarily done through methods such as examinations, interviews or assessment of past performance. Since it is felt that applicants belonging to the SC/ST/OBC categories among others are at a disadvantage when they compete through these methods, a level-playing field is sought to be created by way of conferring reservation benefits. [Para 31] [1014-C-G]

2.3. In the domain of political participation, there can be no objective parameters to determine who is more likely to get elected to representative institutions at any level. The choices of voters are not guided by an objective assessment of a candidate's merit and efficiency. Instead, they are shaped by subjective factors such as the candidate's ability to canvass support, past service record, professed ideology and affiliations to organised groups among others. It is quite possible that candidates belonging to the SC/ST/OBC categories could demonstrate these subjective qualities and win elections against candidates from the relatively better-off groups. However, such a scenario cannot be presumed in all circumstances. It is quite conceivable that in some localized settings, backwardness in the social and economic sense can also act as a barrier to effective political participation and representation. When it comes

to creating a level-playing field for the purpose of elections to local bodies, backwardness in the social and economic sense can indeed be one of the criteria for conferring reservation benefits. [Para 32] [1014-H; 1015-A-D]

2.4. There is an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. While access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local-self government is intended as a more immediate measure of empowerment for the community that the elected representative belongs to. The objectives of democratic decentralisation are not only to bring governance closer to the people, but also to make it more participatory, inclusive and accountable to the weaker sections of society. In this sense, reservations in local self-government are intended to directly benefit the community as a whole, rather than just the elected representatives. Thus, there cannot be an exclusion of the 'creamy layer' in the context of political representation. There are bound to be disparities in the socio-economic status of persons within the groups that are the intended beneficiaries of reservation policies. While the exclusion of the 'creamy layer' may be feasible as well as desirable in the context of reservations for education and employment, the same principle cannot be extended to the context of local self-government. At the level of panchayats, the empowerment of the elected individual is only a means for pursuing the larger end of advancing the interests of weaker sections. Hence, it would be counter-intuitive to exclude the relatively better-off persons among the intended beneficiaries from the reservation benefits that are designed to ensure diversity

in the composition of local bodies. It is quite likely that such persons may be better equipped to represent and protect the interests of their respective communities. [Para 33] [1015-D-H; 1016-A-C]

3.1. Articles 243-D(6) and 243-T(6) do not provide guidance on how to identify the backward classes and neither do they specify any principle for the quantum of such reservations. Instead, discretion has been conferred on State Legislatures to design and confer reservation benefits in favour of backward classes. It is but natural that questions will arise in respect of the exercise of a discretionary power. [Para 34] [1016-E-F]

3.2. There is no doubt that excessive and disproportionate reservations provided by State legislations can indeed be the subject-matter of specific challenges before the Courts. However, the same does not justify the striking down of Articles 243-D(6) and 243-T(6) which are Constitutional provisions that enable reservations in favour of backward classes in the first place. As far as the challenge against the various State legislations is concerned, no adequate materials is provided nor argumentation that could help to make a decision about the same. The identification of backward classes for the purpose of reservations is an executive function and as per the mandate of Article 340, dedicated commissions need to be appointed to conduct a rigorous empirical inquiry into the nature and implications of backwardness. It is also incumbent upon the executive to ensure that reservation policies are reviewed from time to time so as to guard against overbreadth. In respect of the objections against the Karnataka Panchayati Raj Act, 1993, the Chinnappa Reddy Commission Report (1990) is referred to which reflects the position as it existed twenty years ago. In the absence of updated empirical data, it is well nigh impossible for the Courts to decide

whether the reservations in favour of OBC groups are proportionate are not. Similarly, in the case of the State of Uttar Pradesh, the claims about the extent of the OBC population are based on the 1991 census. The petitioners are at liberty to raise specific challenges against the State legislations if they can point out flaws in the identification of backward classes with the help of updated empirical data. [Para 35] [1017-B-H]

3.3. The social and economic backwardness does not necessarily coincide with political backwardness. In the said respect, the State Governments are well advised to reconfigure their reservation policies, wherein the beneficiaries under Articles 243-D(6) and 243-T(6) need not necessarily be co-terminus with the Socially and Educationally Backward Classes (SEBCs) [for the purpose of Article 15(4)] or even the Backward classes that are under-represented in government jobs [for the purpose of Article 16(4)]. It would be safe to say that not all of the groups which have been given reservation benefits in the domain of education and employment need reservations in the sphere of local self-government. This is because the barriers to political participation are not of the same character as barriers that limit access to education and employment. This calls for some fresh thinking and policy-making with regard to reservations in local self-government. [Para 36] [1018-A-D]

3.4. In the absence of explicit constitutional guidance as to the quantum of reservation in favour of backward classes in local self-government, the rule of thumb is that of proportionate reservation. However, stress must be laid on the fact that the upper ceiling of 50% (quantitative limitation) with respect to vertical reservations in favour of SC/ST/OBCs should not be breached. On the question of breaching this upper ceiling, the arguments made by the petitioners were a little misconceived since they had

accounted for vertical reservations in favour of SC/ST/ OBCs as well as horizontal reservations in favour of women to assert that the 50% ceiling had been breached in some of the States. This was clearly a misunderstanding of the position since the horizontal reservations in favour of women are meant to intersect with the vertical reservations in favour of SC/ST/OBC, since one-third of the seats reserved for the latter categories are to be reserved for women belonging to the same. This means that seats earmarked for women belonging to the general category are not accounted for if one has to gauge whether the upper ceiling of 50% has been breached. [Para 37] [1018-D-H]

Indra Sawhney v. Union of India **1992 Supp 3 SCC 217, referred to.**

3.5. Reservations in excess of 50% does exist in some exceptional cases, when it comes to the domain of political representation. The Legislative Assemblies of the States of Arunachal Pradesh, Nagaland, Meghalaya, Mizoram and Sikkim have reservations that are far in excess of the 50% limit. However, such a position is the outcome of exceptional considerations in relation to these areas. Similarly, vertical reservations in excess of 50% are permissible in the composition of local self-government institutions located in the Fifth Schedule Areas. However, such exceptional considerations cannot be invoked when the quantum of reservations is examined in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SC/ ST/OBCs cannot exceed the upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs. [Para 39] [1019-F-H; 1020-A-C]

Union of India v. Rakesh Kumar **(2010) 1 SCALE 281, referred to.**

4.1. Article 243-D(4) provides a clear Constitutional basis for reserving the Chairperson positions in favour of SC and STs (in a proportionate manner) while also providing that one-third of all chairperson positions in each tier of the Panchayati Raj Institutions would be reserved in favour of women. The considerations behind the provisions of Article 243-D cannot be readily compared with those of Article 16(4) which is the basis for reservations in public employment. In the domain of service law that single posts cannot be reserved under the scheme of Article 16(4). The Chairperson position should not be viewed as solitary seats by themselves for the purpose of reservation. Instead, the frame of reference is the entire pool of Chairperson position in each tier of the three levels of Panchayati Raj Institutions in the entire State. Out of this pool of seats which is computed across panchayats in the whole state, the number of offices that are to be reserved in favour of Scheduled Castes and Scheduled Tribes is to be determined on the basis of the proportion between the population belonging to these categories and the total population of the State. This interpretation is clearly supported by a bare reading of the first proviso to Article 243-D(4). [Para 40] [1020-E-H; 1021-A-C]

Janardhan Paswan v. State of Bihar, **AIR 1988 Pat 75;** *Krishna Kumar Mishra v. State of Bihar* **AIR 1996 Pat 112, referred to.**

4.2. When the frame of reference is the entire pool of chairperson positions computed across each tier of Panchayati Raj institutions in the entire state, the possibility of cent-per-cent reservation does not arise. For this purpose, a loose analogy can be drawn with

reservations in favour of Scheduled Castes and Scheduled Tribes for the purpose of elections to the Lok Sabha and the respective Vidhan Sabhas. Before elections to these bodies, the Election Commission earmarks some electoral constituencies as those which are reserved for candidates belonging to the SC/ST categories. For the purpose of these reservations, the frame of reference is the total number of Lok Sabha or Vidhan Sabha seats in a State and not the single position of an MP or MLA respectively. Regarding the Chairperson positions in Panchayats, it is therefore permissible to reserve a certain number of these offices in favour of Scheduled Castes, Scheduled Tribes and women, provided that the same is done in accordance with the provisos to Article 243-D(4). [Para 41] [1021-H; 1022-A-D]

4.3. In the case of urban local bodies, Article 243-T(4) also enables reservation of chairperson posts in favour of Scheduled Castes, Scheduled Tribes and women. However, there are no further specifications to guide the reservation of chairperson positions in urban areas. While it is not possible to ascertain the legislative intent behind the same, one can perhaps theorise that there was an assumption that the intended beneficiaries are in a relatively better-off position to overcome barriers to political participation in urban local bodies, when compared with rural local bodies. [Para 42] [1022-E-F]

4.4. It was also submitted that since chairpersons of Panchayats and Municipalities are entrusted with executive powers, reserving these posts could prove to be the precursor for reservations of executive offices at higher levels of government. It was even suggested that the reservation of chairperson posts was akin to reserving the posts of Chief Minister and Prime Minister at the State and National level, respectively. This analogy with the higher levels of government is misplaced. The

offices of chairpersons in Panchayats and Municipalities are reserved as a measure of protective discrimination, so as to enable the weaker sections to assert their voice against entrenched interests at the local level. The patterns of disadvantage and discrimination faced by persons belonging to the weaker sections are more pervasive at the local level. Unlike elected representatives in the Lok Sabha and the Vidhan Sabha who can fall back on the support of mainstream political parties as well as media scrutiny as a safeguard against marginalization and unjust discrimination, elected representatives from the disadvantaged sections may have no such support-structures at the local level. In the said respect, the Union Parliament thought it fit to enable reservations of Chairperson positions in order to ensure that not only are the weaker sections adequately represented in the domain of local self-government, but that they also get a chance to play leadership roles. [Para 43] [1022-G-H; 1023-A-D]

4.5. While the exercise of electoral franchise is an essential component of a liberal democracy, it is a well-settled principle in Indian law, that the right to vote and contest elections does not have the status of fundamental rights. Instead, they are in the nature of legal rights which can be controlled through legislative means. The Constitution empowers the Election Commission of India to prepare electoral rolls for the purpose of identifying the eligible voters in elections for the Lok Sabha and the Vidhan Sabha. This suggests that the right to vote is not an inherent right and it cannot be claimed in an abstract sense. Furthermore, the Representation of People Act, 1951 gives effect to the Constitutional guidance on the eligibility of persons to contest elections. This includes grounds that render persons ineligible from contesting elections such as that of a person not being a citizen of India, a person being

of unsound mind, insolvency and the holding of an 'office of profit' under the executive among others. Thus, there is no inherent right to contest elections since there are explicit legislative controls over the same. [Para 45] [1024-G-H; 1025-A-B]

Mohan Lal Tripathi v. District Magistrate, Rai Bareilly, **(1992) 4 SCC 80, referred to**

4.6. It cannot be accepted that in view of the standard of reasonableness, fairness and non-discrimination required of governmental action under Article 21 of the Constitution, there is a case for invalidating the restrictions placed on the rights of political participation as a consequence of reservations in local self-government. In the instant case, an affirmative action measure and hence the test of proportionality is a far more appropriate standard for exercising judicial review. It cannot be denied that the reservation of chairperson posts in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and women does restrict the rights of political participation of persons from the unreserved categories to a certain extent. However, the test of reasonable classification is met in view of the legitimate governmental objective of safeguarding the interests of weaker sections by ensuring their adequate representation as well as empowerment in local self-government institutions. The asymmetries of power require that the Chairperson should belong to the disadvantaged community so that the agenda of such Panchayats is not hijacked for majoritarian reasons. [Para 46] [1025-C-G]

4.7. Irrespective of the concerns about the efficacy of reservations in local self-government, it is not proper for the judiciary to second-guess a social welfare measure that has been incorporated by way of a constitutional amendment. [Para 47] [1026-C]

I.R. Coelho v. State Tamil Nadu **(2007) 2 SCC 1;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* **(1973) 4 SCC 225;** *M.R. Balaji v. State of Mysore* **AIR 1963 SC 649;** *Indra Sawhney v. Union of India* **1992 Supp 3 SCC 217;** *Post Graduate Institute of Medical Education and Research v. K.L. Narasimhan* **(1997) 6 SCC 283;** *Janardhan Paswan v. State of Bihar* **AIR 1988 Pat 75;** *Krishna Kumar Mishra v. State of Bihar* **AIR 1996 Pat. 112;** *M. Nagaraj v. Union of India* **(2006) 8 SCC 212;** ***N.P.*** *Ponnuswamy v. Returning Officer* **1952 SCR 218;** *Jyoti Basu v. Debi Ghosal* **(1982) 1 SCC 691;** *Mohan Lal Tripathi v. District Magistrate, Rai Bareilly* **(1992) 4 SCC 80;** *Rama Kant Pandey v. Union of India* **(1992) 2 SCC 438;** *Kuldip Nayar v. Union of India* **(2006) 7 SCC 1;** *Indira Gandhi vs. Raj Narain* **1975 Supp SCC 1, referred to.**

Case Law Reference:

(2007) 2 SCC 1	Referred to.	Para 9
(1973) 4 SCC 225	Referred to	Para 9
AIR 1963 SC 649	Referred to	Para 13
1992 Supp 3 SCC 217	Referred to	Para 13,26, 38
(1997) 6 SCC 283	Referred to.	Para 14
AIR 1988 Pat 75	Referred to.	Para 19, 40
AIR 1996 Pat. 112	Referred to.	Para 19, 40
(2006) 8 SCC 212	Referred to.	Para 21
1952 SCR 218	Referred to.	Para 21
(1982) 1 SCC 691	Referred to.	Para 21
(1992) 4 SCC 80	Referred to.	Para 21
(1992) 2 SCC 438	Referred to.	Para 21

(2006) 7 SCC 1	**Referred to.**	**Para 21**
1975 Supp SCC 1	**Referred to.**	**Para 21**
AIR 1999 Bom 142	**Approved.**	**Para 30**
(2010) 1 SCALE 281	**Referred to.**	**Para 39**
(1992) 4 SCC 80	**Referred to**	**Para 45**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 356 of 1994.

Petition Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 245 of 1995

W.P. (C) No. 517 of 2005

Gopal Subramanium, ASG, Uday Holla, Rama Jois, Salman Khurshid, Rakesh K. Khanna, K. Radhakrishnan, A.Mariarputham, R. Shanmugasundaram, Dinesh Dwivedi, Hetu Arora, Anita Abrahim Dr. Rajeev Dhavan, Shail Kr. Dwivedi, AAG, Naveen R. Nath, Lalit Mohini Bhat, Govind Goyal, Imtiaz Ahmed, Naghma Imtiaz, Dr. Rashmi Khanna, Faizi Ahmed Sayed, Vinay Kumar Garg, Rekha Pandey, S.W.A.Qadri, Aman Ahluwalia, D.S. Mahra, B. Krishna Prasad, Sushma Suri, B.V. Balram Das, Anil Katiyar, Prashant Bhushan, Meenakshi Arora, Jayshree Anand, K.K. Mahalik, Ajay Pal, A.Subhashini, Vishwajit Singh, Ashok K. Mahajan, Pramod Dayal, Sumita Hazarika, T. Harish Kumar, R. Ayyam Perumal, Dinesh Kumar Garg, Aruneshwar Gupta, Anis Suhrawardy, Hemantika Wahi, Pinky, K. Enatoli Sema, Somnath, Janaranjan Das, Swetaketu Mishra, Kamini Jaiswal, Naresh K. Sharma, Tara Chandra Sharma, Neelam Sharma, Ajay Sharma, Kishan Datta, Rajeev Sharma, Rupesh Kumar, S. Thananjayan, Aruna Mathur, Akhilesh Kumar (for Arputham, Aruna & Co.), Ranjan Mukherjee, V.G. Pragasam, S.J. Aristotle,

Prabhu Ramasubramanian, Sanjay R. Hegde, Vikrant Yadav, A. Rohen Singh, Amit Kr. Chawla, Riku Sarma, Krishna Sharma (for Corporate Law Group) Vibha Datta Makhija, P.V. Dinesh, Niranjana Singh, Abhishek Chaudhary, Prateek Dwivedi, Manish Srivastava, (for Kamlendra Mishra), Kh. Nobin Singh, K.N. Madhusoodhanan, R. Sathish, B.S. Banthia, Vikas Upadhyay, Suparna Srivastava (NP), Neeraj Gupta, Ram Swarup Sharma, Rajesh Srivastava, Manish Kumar Saran, Nirmal Kumar Ambastha, Gopal Singh, Manish Kumar, Pallavi for the appearing parties.

The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, CJI. 1. In these writ petitions, we are required to examine the constitutional validity of some aspects of the reservation policy prescribed for the composition of elected local self-government institutions. In particular, the contentions have concentrated on the provisions that enable reservations in favour of backward classes and those which contemplate the reservation of chairperson positions in the elected local self-government institutions. These provisions have been challenged as being violative of principles such as equality and democracy, which are considered to be part of the 'basic structure' doctrine.

2. The Constitution (Seventy-third) Amendment Act, 1992 [hereinafter '73rd Amendment'] and the Constitution (Seventy-fourth) Amendment Act, 1992 [hereinafter '74th Amendment'] had inserted Part IX and Part IX-A into the constitutional text thereby contemplating the powers, composition and functions of local self-government institutions, i.e. the Panchayats (for rural areas) and Municipalities (for urban areas). In pursuance of objectives such as democratic decentralization, greater accountability between citizens and the state apparatus as well as the empowerment of weaker sections, these constitutional amendments contemplated a hierarchical structure of elected local bodies. With respect to rural areas, Part IX contemplates three tiers of Panchayats, namely those of 'Gram Panchayats'

(for each village, or group of small villages), 'Panchayat Samitis' (at the block level) and the 'Zilla Parishads' (at the District level). For urban areas, Part IX-A prescribed the constitution of 'Nagar Panchayats' (for areas in transition from a rural area to an urban area), 'Municipal Councils' (for smaller urban areas) and 'Municipal Corporations' (for a larger urban area).

3. To better appreciate the legislative intent, it would be instructive to refer to the following extract from the Statement of Objects and Reasons for the 73rd Amendment:

> "1. Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.
>
> 2. Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them.
>
> 3. Accordingly, it is proposed to add a new Part relating to Panchayats in the Constitution to provide for, among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the Offices of Chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supersession of any Panchayat; ..."

In the same vein, we can refer to the following extracts from the Statement of Objects and Reasons for the 74th Amendment:

> "1. In many States, local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.
>
> 2. Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution, particularly for -
>
> (i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to –
>
> (a) the functions and taxation powers; and
>
> (b) arrangements for revenue sharing
>
> (ii) ensuring regular conduct of elections;
>
> (iii) ensuring timely elections in the case of supersession; and
>
> (iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

3. Accordingly, it is proposed to add a new Part relating to the Urban Local Bodies in the Constitution to provide for –

(a) constitution of three types of Muncipalities:

(i) Nagar Panchayats for areas in transition from a rural area to urban area

(ii) Municipal Councils for smaller urban areas;

(iii) Municipal Corporations for larger urban areas.

…

(e) reservation of seats in every Municipality –

(i) for Scheduled Castes and Scheduled Tribes in proportion to their population of which not less than one-third shall be for women; …"

4. Before outlining and addressing the contentions advanced on behalf of the petitioners and the respondents, it will be useful to survey the constitutional provisions that have been called into question. The rival contentions relate to Article 243-D(4) and 243-T(4) which contemplate the reservation of chairperson posts, as well as Article 243-D(6) and 243-T(6) which enable reservations in favour of backward classes. With respect to the reservation of seats in Panchayats, Article 243-D reads as follows: -

243-D. Reservation of Seats. - (1) Seats shall be reserved for–

(*a*) The Scheduled Castes; and

(*b*) The Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to

the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under

this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of office of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

(emphasis supplied)

Similarly, the composition of Municipalities is guided by the reservation policy contemplated in Article 243-T:

243-T. Reservation of seats. – (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to

be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

(emphasis supplied)

5. The overarching scheme of Article 243-D and 243-T is to ensure the fair representation of social diversity in the composition of elected local bodies so as to contribute to the empowerment of the traditionally weaker sections in society. The preferred means for pursuing this policy is the reservation of seats and chairperson positions in favour of Scheduled Castes (SC), Scheduled Tribes (ST), women and backward class candidates.

- Article 243-D(1) and Article 243-T(1) are analogous since they lay down that the reservation of seats in favour of SC and ST candidates should be based on the proportion between the population belonging to these categories and the total population of the area in question. Needless to say, the State Governments are empowered to determine the extent of such reservations on the

basis of empirical data such as population surveys among other methods, thereby being guided by the principle of 'proportionate representation'.

- Article 243-D(2) and Article 243-T(2) further provide that from among the pool of seats reserved for SC and ST candidates, at least one-third of such seats should be reserved for women belonging to those categories. Hence, there is an intersection between the reservations in favour of women on one hand and those in favour of SC/STs on the other hand.

- With respect to reservations in favour of women, Article 243-D(3) and Article 243-T(3) lay down that at least one-third of the total number of seats in the local bodies should be reserved for women. On the face of it, this is an embodiment of the principle of 'adequate representation'. This idea comes into play when it is found that a particular section is inadequately represented in a certain domain and a specific threshold is provided to ensure that this section of the population comes to be adequately represented with the passage of time.

- With regard to chairperson positions, Article 243-D(4) and Article 243-T(4) enable State legislatures to reserve these offices in favour of SC, ST and women candidates. In the case of panchayats, the first proviso to Article 243-D(4) states that the aggregate number of chairperson positions reserved in favour of SC and ST candidates in an entire state should be based on the proportion between the population belonging to these categories and the total population. With all the chairperson positions at each level of the panchayats in an entire State as the frame of reference, the second proviso to Article 243-D(4) states that one-third of these offices should be reserved for women. The third proviso to Article 243-D(4) lays down that the number of chairperson positions reserved under the said clause would be allotted by rotation to different panchayats in each tier. This rotational policy is a safeguard against the possibility of a particular office being reserved in perpetuity. It is pertinent to note that unlike the reservation policy for panchayats, there are no comparable provisos to Article 243-T(4) for guiding the reservation of chairperson positions in Municipalities. This is a notable distinction between the otherwise analogous schemes prescribed in Article 243-D and Article 243-T.

- It is also pertinent to take note of Article 243-D(5) and Article 243-T(5), both of which provide that the reservation of seats and chairperson positions in favour of SC and ST categories would operate for the period contemplated under Article 334. It must be stressed here that there is no such time-limit for the reservations made in favour of women, implying that they will operate in perpetuity.

- Article 243-D(6) and Article 243-T(6) contemplate the power of State Legislatures to reserve seats as well as chairperson positions in favour of a 'backward class of citizens'. Unlike the fore-mentioned provisions that deal with reservations in favour of SC, ST and women candidates, Article 243-D(6) and Article 243-T(6) do not explicitly provide guidance on the quantum of reservations. In the absence of any explicit criteria or limits, it can be assumed that reservation policies contemplated under Article 243-D(6) will ordinarily be guided by the standard of proportionate representation.

6. In light of the submissions that have been paraphrased in the subsequent paragraphs, the contentious issues in this

case can be framed in the following manner:

(i). Whether Article 243-D(6) and Article 243-T(6) are constitutionally valid since they enable reservations in favour of backward classes for the purpose of occupying seats and chairperson positions in Panchayats and Municipalities respectively?

(ii). Whether Article 243-D(4) and Article 243-T(4) are constitutionally valid since they enable the reservation of chairperson positions in Panchayats and Municipalities respectively?

SUBMISSIONS MADE ON BEHALF OF THE PETITIONERS

7. In W.P. (C) No. 356/1994, Shri M. Rama Jois, learned senior counsel appearing on behalf of the petitioners had initially challenged the constitutionality of Clauses (2) to (6) of Art. 243-D as well as Clauses (2)-(6) of Art. 243-T. These were challenged in conjunction with some provisions of the Karnataka Panchayati Raj Act, 1993 which provided for the reservation of seats and chairperson posts in favour of SCs, STs, women and backward classes. The impugned sections of that statute reserved 15% of the seats in Panchayats in favour of SCs, 3% in favour of STs, 33% in favour of women and 33% in favour of other backward classes [Section 5 for Gram Panchayats, Section 123 for Taluk Panchayats and Section 162 for Zilla Panchayats]. Chairperson positions in Panchayats were reserved in a similar proportion, with the entire pool of chairperson posts in the State as the frame of reference [Section 44 for Gram Panchayats, Section 138 for Taluk Panchayats and Section 177 for Zilla Panchayats]. Subsequently, the scope of the challenge was enlarged to question the reservation of seats and chairperson posts in favour of women and backward classes under the Karnataka Municipalities Act, 1964 [Sections 11, 14(2)(A) and 352(5) of the said Act] and the Karnataka Municipal Corporations Act,

1976 [Section 7 and 10 of the said Act].

8. The petitioners did not object to the proportionate reservation of seats in favour of Scheduled Castes and Scheduled Tribes, as contemplated by Art. 243-D(1) and 243-T(1) respectively. It was stated that reservations in favour of SC/STs were consistent with the intent of the framers of the Constitution, since reservations in favour of these groups had been provided in respect of the composition of the Lok Sabha and the State Legislative Assemblies (under Art. 330 and 332). However, the petitioners raised strong objections against the other aspects of the reservation policy contemplated under Articles 243-D and 243-T. Initially, they had assailed the reservation of seats in favour of women, which has been enabled by Art. 243-D(2) and (3) with respect to rural local bodies, and by Art. 243-T(2) and (3) with respect to urban local bodies. However, this challenge was given up during the course of the arguments before this Court and the thrust of the petitioner's arguments was directed towards the following two aspects:

- Firstly, objections were raised against Art. 243-D(6) and Art. 243-T(6) since they enable reservations of seats and chairperson posts in favour of backward classes, without any guidance on how to identify these beneficiaries and the quantum of reservations.

- Secondly, it was argued that the reservation of chairperson posts in the manner contemplated under Art. 243-D(4) and 243-T(4) is unconstitutional, irrespective of whether these reservations are implemented on a rotational basis and irrespective of whether the beneficiaries are SCs, STs and women. The objection was directed against the very principle of reserving chairperson posts in elected local bodies.

9. The common thread running across the petitioners' arguments was that these provisions which were inserted into the Constitution by way of the 73rd and 74th Amendments, are violative of principles such as equality, democracy and fraternity, which are part of the 'basic structure' doctrine. The decision in *I.R. Coelho v. State Tamil Nadu* [(2007) 2 SCC 1] had clarified that the constitutional amendments which have been placed in the Ninth Schedule after the *Keshavananda Bharati* decision [(1973) 4 SCC 225] are not immune from judicial review. Even though there is some uncertainty as to whether constitutional amendments can be scrutinized with respect to the fundamental rights enumerated in Part III, there is no obstruction to their scrutiny on the basis of principles such as equality, democracy and fraternity, since all of them find a place in the Preamble to our Constitution. Since the petitioner has given up the challenge against the reservation of seats in favour of women, it will not be necessary to paraphrase the submissions related to that aspect.

10. It was urged that the reservation policy contained in the Karnataka Panchayati Raj Act, 1993 provides for the aggregate reservation of nearly 84% of the seats in Panchayats, which is excessive and violative of the equality clause. Especially with regard to reservations in favour of backward classes, it was argued that the same does not meet the test of 'reasonable classification', thereby falling foul of Article 14. Pointing to the caste groups which have been listed as Other Backward Classes (OBCs) in the State of Karnataka, it was reasoned that even if they are assumed to be backward in the socio-economic sense, there was ample evidence that they were already well represented in the political space. In fact, the findings of the Chinappa Reddy Commission Report (1990) showed that a majority of the Members of Parliament (MPs) and the Members of the Legislative Assembly (MLAs) elected from Karnataka belonged to the OBC category. In such a scenario, there was no intelligible criterion to identify OBCs for preferential treatment by way of reservations. An analogy was

drawn with reservations for government jobs under Article 16(4), which presupposes backwardness as well as the inadequate representation of the beneficiary group.

11. Next, it was urged that the reservations in favour of OBCs were solely on the grounds of caste, thereby violating the anti-discrimination clause found in Article 15 of the Constitution. It was further suggested that reservations in favour of the already well represented OBC groups would not serve the stated objective of empowering the weaker sections in society. Shri M. Rama Jois, learned senior counsel drew a distinction between the context of reservations in the matter of elections on one hand and in the matter of education and employment on the other hand. It was reasoned that persons belonging to Socially and Educationally Backward Communities (SEBCs) [in respect of Article 15(4) and 15(5)] and under-represented Backward Classes [in respect of Article 16(4)] are legitimately given reservations since they are in a disadvantageous position when they compete for selection to educational courses and government jobs, respectively. This disadvantage is linked to backwardness in the social and economic sense, owing to which persons belonging to these groups may not have the resources or the awareness needed to gain access to higher education or public employment. However, the fact of social and economic backwardness does not necessarily act as a barrier to political participation. Stressing on the distinction between 'selection' and 'election', Shri Jois contended that the OBCs did not need reservation benefits because empirical findings suggested that there was already a high degree of political mobilization among them. Apart from the fact that OBCs appear to be well-represented in the legislature, it was argued that economic backwardness should not be conflated with political backwardness. This is so because in the electoral arena, a candidate from a poorer background is not necessarily at a disadvantage when competing with candidates from relatively richer backgrounds.

12. It was also contended that reserving seats and chairperson posts in favour of OBCs was an unjustified departure from the intent of the framers of the Constitution. As noted earlier, the framers conferred reservation benefits on SCs and STs for the purpose of elections to the Lok Sabha and the State Legislative Assemblies (under Arts. 330 and 332) which are time-bound in accordance with Article 334. Given this background, the petitioners contend that the framers had incorporated these measures in the nature of compensatory discrimination to address the historical disadvantage faced by SCs and STs. However, it could not be assumed that OBCs had suffered a comparable degree of disadvantage, especially since there were no cogent empirical findings about the prevalence of backwardness and that there were no specific recommendations for reservations in favour of backward classes, as contemplated under Article 340 of the Constitution. It was urged that since the framers had not explicitly provided for OBC reservations in 1950, it was untenable to introduce them by way of constitutional amendments in 1993.

13. Another set of concerns touched on the overbreadth in the identification of OBCs for the purpose of the reservations conferred by the impugned State legislations. It was contended that even among the listed OBC groups, one cannot assume the same degree of backwardness for the entire group. There are bound to be some sub-sections within these groups which are in a relatively better-off situation. However, the reservations enabled by Art. 243-D(6) and Art. 243-T(6) do not contemplate the exclusion of the 'creamy layer' in the manner that has been prescribed for reservations in the context of higher education [under Arts. 15(4) and 15(5)] and public employment [under Art. 16(4), (4A) and (4B)] respectively. The non-exclusion of the creamy layer creates the apprehension that the benefits will be cornered by a limited section of the intended beneficiaries, thereby frustrating the objectives of the reservation policy in the first place. We were also alerted to the possibility that State Governments could confer reservation benefits in favour of

particular OBC groups as a means of garnering political support from these groups, instead of ameliorating backwardness in the social and economic sense. In support of this contention, it was pointed out that the Karnataka Panchayati Raj Act had provided for reservations that were in excess of the 50% upper ceiling prescribed for communal reservations in past judicial decisions. [See: *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649; *Indra Sawhney v. Union of India,* 1992 Supp 3 SCC 217]

14. With respect to Chairperson positions in the elected local bodies, it was argued that they were in the nature of single posts and reserving them amounted to cent-per-cent reservation, thereby offending the equality clause. The objection was against the very principle of reserving chairperson posts, irrespective of the identity of the beneficiaries and even when such posts are reserved by way of rotation. This argument was buttressed with references to past decisions which have struck down the reservations of single posts in the context of public employment [See: *Post Graduate Institute of Medical Education and Research V. K.L. Narasimhan,* (1997) 6 SCC 283]. It was further argued that the chairperson positions in the Panchayats and Municipalities were executive offices and reserving them would set a dangerous precedent that could ultimately lead to the reservation of executive offices at higher levels of government. It was urged those who occupy the reserved chairperson posts are more likely to cater to the narrow interests of their own groups rather than working for the welfare of the entire local community.

15. After his extensive arguments which invoked the equality clause, Shri M. Rama Jois turned our attention to arguments invoking the principle of democracy. It was argued that excessive reservations placed unfair limitations on the rights of political participation of persons belonging to the unreserved categories. In particular, the reservation of seats and chairperson positions curtailed the right to vote, the right

to sponsor candidates of one's choice and the right to contest elections among other aspects. It was contended that such restrictions were in conflict with the principle of 'universal adult franchise' (under Art. 326) which also entails that as far as possible, there should be parity in the weightage given to the votes cast by each individual. In this sense, reservations tend to distort the electoral process by giving more weightage to the voters and candidates from the beneficiary groups as opposed to those from the general category. With regard to reservations of chairperson posts, the petitioners have described a scenario wherein there may be very few persons from the reserved category in a particular village, thereby forcing voters to re-elect candidates belonging to the reserved categories despite dissatisfaction with their performance.

16. Lastly, Shri M. Rama Jois argued that reservations in the electoral arena would only lead to more divisiveness at the level of the local community as well as at the national level. In the long run, reservations designed on caste lines are likely to become instruments of political favouritism, thereby fanning resentment among the people. This would clearly come into conflict with the preambular objective of promoting a sense of fraternity among the citizens. In the petitioner's submissions, it has been reasoned that the objective of empowering the weaker sections through political participation will be better served if a larger number of candidates belonging to these sections were nominated by political parties to stand for elections. Based on these submissions, the petitioners in W.P. (C) No. 356/1994 have prayed for the striking down of Articles 243-D(4) and 243-T(4) since they enable reservations of chairperson posts in elected local bodies, as well as Articles 243-D(6) and 243-T(6) which enable reservation of seats and chairperson posts in favour of backward classes. In relation to the same, the petitioners have also sought the invalidation of the impugned State legislations, in so far as they provide for excessive reservation in favour of backward classes and the reservation of chairperson posts.

17. In W.P. 517/2005, Shri Salman Khurshid, learned senior counsel appearing on behalf of the petitioners has confined their contentions to two aspects. With regard to reservations in favour of OBCs in the State of Uttar Pradesh, it has been contended that the aggregate reservations should not exceed the upper ceiling of 50%. There is no challenge to the constitutional validity of Article 243-D(6) and Article 243-T(6) since they are merely enabling provisions. However, there is a concurrence between the petitioners in respect of their objections against the reservation of chairperson posts in elected local bodies. Hence the petitioners in W.P. (C) No. 517/2005 have also contested the constitutional validity of Article 243-D(4) and Article 243-T(4).

18. The specific challenge is directed against Sections 11A and 12 of the Uttar Pradesh Panchayat Raj Act, 1947 read with the relevant rules as well as Sections 6A, 7A, 18A and 19A of the Uttar Pradesh Kshetra Panchayat and Zilla Panchayat Act, 1961 read with the relevant rules. The grievance is directed against the fact that under these State Legislations, 27% of the seats in panchayats have been reserved for OBCs even though empirical data indicates that nearly 59% of the entire population of the State of Uttar Pradesh belongs to the OBC category. It has been contended that this is a clear case of excessive reservations in favour of a community that is already in a majority. Akin to the arguments made in respect of the State of Karnataka, this argument can be reasonably developed to argue that there is no need for reserving seats in elected local bodies for communities that are already well represented in the political space and do not face serious hurdles in respect of political participation. Furthermore, it was contended that there was no provision for the exclusion of the 'creamy layer' in respect of the reservations for OBCs in panchayats. In this respect, Shri Salman Khurshid stressed on the need for the State legislations to be modified in order to ensure that the upper ceiling of 50% reservations was not breached. It was argued that reservation policies should be either in the nature

of compensatory discrimination to address historical injustices or in the nature of protective discrimination to protect weaker sections. However, they should not be allowed to become instruments of reverse discrimination which curtail the rights of persons who do not belong to the reserved categories.

19. However, the main objection was directed against the very principle of reserving chairperson posts, irrespective of whether it is in favour of SCs, STs, women or OBCs. By drawing an analogy with solitary posts in public employment, it was argued that Art. 243-D(4) and Art. 243-T(4) come into conflict with Art. 16(4) since the latter did not contemplate reservations of single posts. With regard to the aims and objectives of local self-government, it was contended that the reservation of chairperson posts placed undue restrictions on the rights of candidates belonging to the general category. It was reasoned that unlike candidates in elections to the Lok Sabha and the State Legislative Assemblies who are free to contest from different constituencies, candidates in elections for local bodies will not ordinarily contest in areas other than those where they are registered as voters. If such migration were to frequently take place, then that would defeat the objectives of local self-government since the overarching objective is to empower elected representatives who are sufficiently interested in the welfare of local communities and are accountable to them. Hence, the reservation of chairperson posts in panchayats can have the effect of unduly preventing persons belonging to the unreserved categories from contesting these elections. In support of their contentions, the petitioners have cited some High Court decisions which have struck down the reservation of chairperson posts in panchayats, namely those reported as *Janardhan Paswan v. State of Bihar,* AIR 1988 Pat 75 and *Krishna Kumar Mishra v. State of Bihar,* AIR 1996 Pat. 112.

20. It was contended that the 'reverse discrimination' which takes place in the context of reservations in local self-

government is of a higher degree than what transpires in case of education and employment. It was reasoned that in respect of admission to educational institutions and recruitment to government jobs, the meritorious candidates who are displaced by reservations at least have alternatives available to them. However, such alternatives are not open to those who want to contest elections to become members of Panchayats in the areas where they reside. In the petitioners' view, this is not only an unfair limitation on the rights of persons belonging to the general category, but also a measure that frustrates the pursuit of democratic decentralization.

21. Shri Salman Khurshid, further submitted that the courts have to strive for a balance between the often competing considerations of 'justice to the backwards, equity for the forwards and efficiency for the entire system' [*M. Nagaraj v. Union of India,* (2006) 8 SCC 212, at para. 44]. In this respect, it was argued that excessive reservations in favour of OBCs and the reservation of chairperson posts in panchayats disrupts the desired balance between these considerations. In fact the petitioners have also urged us to reconsider some earlier decisions of this Court which have dealt with the status of the rights of political participation such as the right to vote, the right to nominate candidates and the right to contest elections. It may be recalled that the right to vote has been held to be a statutory right and not a fundamental right and the same position has been consistently upheld in subsequent decisions. [See decision in *N.P. Ponnuswamy v. Returning Officer,* 1952 SCR 218, which has been followed in *Jyoti Basu v. Debi Ghosal,* (1982) 1 SCC 691, *Mohan Lal Tripathi v. District Magistrate, Rai Bareilly,* (1992) 4 SCC 80, *Rama Kant Pandey v. Union of India,* (1992) 2 SCC 438 and *Kuldip Nayar v. Union of India,* (2006) 7 SCC 1] This implies that the rights of political participation are not absolute in nature and are subject to statutory controls such as those provided in the Representation of People Act, 1951 among others. Undoubtedly, reservations in elected local bodies do place restrictions on the rights of

political participation of persons who do not belong to the reserved categories. In this respect, the petitioners have contended that this Court should examine the reasonableness of such restrictions with regard to the objective of ensuring 'free and fair elections' [as observed in *Indira Gandhi vs. Raj Narain,* 1975 Supp SCC 1, at Para. 213] as well as the expanded understanding of Article 21 of the Constitution.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENTS

22. Since the constitutionality of some clauses in Art. 243-D and Art. 243-T have been contested in this case, notices were issued to all the State governments which had either enacted fresh legislations or amended existing legislations in accordance with the mandate of the 73rd and 74th Amendments. While all of these State Governments were impleaded as respondents in this case, we had the benefit of listening to the oral arguments presented by Shri Rajeev Dhavan, Sr. Adv., who appeared on behalf of the State of Bihar, Shri Dinesh Dwivedi, Sr. Adv., who appeared on behalf of the State of Uttar Pradesh, Shri Uday Holla, Sr. Adv., who appeared for the State of Karnataka and Shri R. Shanmugasundaram, Sr. Adv., who represented the Union Territory of Pondicherry. Apart from the learned senior counsels who represented the various State Governments, we were also addressed by Shri Gopal Subramanium, the Additional Solicitor-General [now Solicitor-General of India] who voiced the views of the Union of India.

23. The respondents have of course defended the constitutional validity of reservations in favour of backward classes [as contemplated under Art. 243-D(6) and 243-T(6)] as well as reservations of chairperson posts [enabled by Art. 243-D(4) and 243-T(4)] in elected local bodies. For the sake of convenience, we will first refer to the submissions made by Shri Rajeev Dhavan, Sr. Adv., since the same were adopted by most of the other answering respondents. In response to the petitioner's contention that the impugned constitutional

provisions violated elements of the 'basic structure' doctrine, Shri Rajeev Dhavan contended that the basic structure is not co-extensive with the fundamental rights in their entirety and hence it would be wrong to scrutinize the validity of Art. 243-D and 243-T on the basis of principles which have been evolved in relation to the reservation benefits enabled by Articles 15(4) and 16(4). A distinction was drawn between a constitutional amendment which modifies the scope of fundamental rights and an abrogation of the basic structure. Pointing out that the nature and purpose of reservations in the context of local self-government was quite different from that of education and employment, it was contended that the objectives of Art. 243-D and Art. 243-T was to pursue the idea of substantive equality rather than formal equality in the matter of political representation at the grassroots level. Beginning with the premise that Constitutional amendments represent the popular will, it was contended that classifications that are made by constitutional provisions deserve a higher standard of deference in comparison to statutory classifications. In this case, the test of 'reasonable classification' cannot be applied mechanically and due regard must be shown to the underlying objectives of democratic decentralization such as the empowerment of weaker sections, a fair representation of social diversity in local bodies and more accountability between the elected representatives and the voters. The respondents' submission is that the provisions enabling reservations in panchayats and municipalities are in consonance with these objectives and that the standard of judicial review over them should be that of proportionality.

24. It was further contended that the equality clause should not be viewed in a strait-jacketed manner and that it should account for the 'equality of expectations' as well as 'equality of outcomes' in the context of political representation at the grassroots level. This means that while there is an expectation of equal distribution of political power in representative institutions, we also have to factor in how the distribution of

power has a bearing on the substantive outcomes and results for the electorate. In this case, we are dealing with considerations of horizontal equality in a political sense. Owing to the complex patterns of inequality in our society, there may often be a need to depart from the standard of 'formal equality' when it comes to expectations about distribution of political power. Affirmative action is designed to pursue the goal of substantive equality and for this purpose it is necessary to take into account the existing patterns of discrimination, disadvantage and disempowerment among the different sections of society. It was contended that while such patterns of inequality were often sought to be ascertained through empirical studies, a mere emphasis on numbers is not adequate to understand the implications of the same. Hence, reservations in local self-government have been introduced to ensure the effective sharing of State power with the previously marginalized sections and also to empower them so as to enable a confrontation with the existing patterns of social discrimination.

25. Proceeding on the basis of this theoretical formulation, Shri Rajeev Dhavan has defended the constitutional validity of reservations in favour of backward classes as well as the reservation of chairperson posts. In response to the petitioner's arguments that the reservations curtailed the rights of political participation of persons belonging to the general category, it was contended that we must take a real view of democracy which is responsive to the existing patterns of social inequality rather than the formal view taken by the petitioners. Such a real view of democracy would endorse the affirmative action taken to empower the traditionally weaker sections. Even though it was conceded that there has been a lot of uncertainty in the identification of backward classes for the purpose of reservation policies in the context of education and employment, it was contended that Art. 243-D(6) and Art. 243-T(6) are merely enabling provisions and cannot be struck down as being in violation of the equality clause. It was reasoned that

even though these provisions did not contain any guidance as to the quantum of reservations, it was eventually up to the State Governments to investigate the existence of backwardness and to confer reservation benefits accordingly. In that respect, this case presents a good opportunity to clarify whether the phrase 'backward classes' which appears in Art. 243-D(6) and Art. 243-T(6) is coextensive with the 'Socially and Educationally Backward Classes' (SEBCs) contemplated under Articles 15(4) and 15(5) or with the under-represented backward classes as contemplated under Art. 16(4).

26. It was further contended that the upper ceiling of 50% reservations has been contemplated in judicial decisions dealing with reservations in education and employment. While the considerations behind the same cannot be readily extended to the domain of political representation at the grassroots level, it was argued that even if they were to be applied, the decision in *Indra Sawhney* decision had contemplated an exception to the 50% norm in 'extraordinary situations' [See 1992 Supp (3) SCC 217, at Para. 810]. To support this contention, it was pointed out that reservations in excess of 50% had been permitted in the Fifth and Sixth Scheduled Areas and more importantly the Legislative Assemblies of some States have reservations that are far in excess of 50% of the number of seats. With respect to the State legislations under challenge, it was argued that the 50% ceiling would not be crossed under most of them since it is only the vertical reservations (i.e. on communal lines in favour of SC/ST/OBCs) that are taken into consideration for this purpose. Even though there is a 33% reservation in favour of women in elected local bodies, the same is in the nature of a horizontal reservation which intersects with the vertical reservations in favour of SC/ST/OBC. In such a scenario, the seats occupied by women belonging to the general category cannot be computed for the purpose of ascertaining whether the 50% upper ceiling has been breached.

27. In response to the challenge against the very principle of reserving Chairperson posts, it has been contended that the same is in the nature of protective discrimination. The respondents have strongly refuted the petitioners' submission that the chairperson posts in local bodies are akin to solitary posts in public employment. Disputing this analogy, it was contended that as per Art. 243-D(4), the reservation of Chairperson posts is to be done on a rotational basis and the frame of reference for the same is the entire pool of chairperson posts in the local bodies of the whole State. In such a scenario, it was wrong to characterise chairperson posts as solitary posts. In response to the suggestion that the reservation of executive positions in local self-government could prove to be the precursor for reservation of executive positions in higher levels of government, it was stated that the considerations applicable in the local setting are very different from those that prevail at the State and the National level. At higher levels of government, elected representatives from the traditionally weaker sections can rely on the support of mainstream political parties if they face undue pressures and prejudices. However, at the local level, the patterns of disempowerment, discrimination and disadvantage are far more pervasive and it will be difficult for weaker sections to gain an effective say in governance, but for the reservation of chairperson positions in Panchayats and Municipalities.

28. The respondent's position was further supported by Shri Gopal Subramanium (now SG). The Learned SG responded to the petitioner's argument that the framers had deliberated upon the question of reservations in representative institutions and that they had chosen to confine the same to SCs and STs (under Arts. 330 and 332). To counter this line of reasoning, it was submitted that the provisions incorporated by the framers did not preclude the expansion of reservation benefits in favour of backward classes by means of a subsequent constitutional amendment. It was pointed out that even though the 73rd and 74th Amendments enacted in 1993

had given constitutional recognition to the local self-government institutions, it could not be asserted that reservations in favour of weaker sections had not been contemplated before that point of time. To support this line of reasoning, the written submissions submitted on behalf of the Union of India have traced the evolution of local self-government institutions from the pre-constitutional period to the post-independence period. After referring to the main recommendations of the Balwantrai Mehta Committee Report (1957) and the Ashok Mehta Committee Report (1978) which were in favour of democratic decentralisation, it was urged that reservations in local self-government were intended to enable the adequate representation of previously excluded and marginalized groups while also giving them the opportunity to play leadership roles. The learned SG further contended that the spirit behind Arts. 243-D and 243-T was akin to Arts. 15(3), 15(4) and 16(4) which have enabled different forms of affirmative action in order to pursue the goal of substantive equality. In this sense, the learned SG has taken a definitive stand by suggesting that the phrase 'backward classes' which appears in Art. 243-D(6) and 243-T(6) should be coterminus with the Socially and Educationally Backward Classes (SEBCs) identified for the purpose of reservation enabled by Art. 15(4).

29. Apart from the above, the learned SG has cited numerous decisions of this Court which have examined and evolved the idea of 'substantive equality', which in turn is identified as part of the 'basic structure' doctrine. In this respect, the gist of the submission is that the reservation policy enabled by Arts. 243-D and 243-T will enhance the political participation of hitherto weaker sections, thereby contributing to their welfare in the long run. In response to the arguments about limitations on the political participation of persons who do not belong to the reserved categories, it was reiterated that the right to cast votes and to contest elections are not fundamental rights and hence they can be subjected to statutory controls.

THE NATURE AND PURPOSE OF RESERVATIONS IN THE CONTEXT OF LOCAL-SELF GOVERNMENT IS DIFFERENT FROM THAT IN HIGHER EDUCATION AND PUBLIC EMPLOYMENT

30. Before addressing the contentious issues, it is necessary to examine the overarching considerations behind the provisions for reservations in elected local bodies. At the outset, we are in agreement with Shri Rajeev Dhavan's suggestion that the principles that have been evolved for conferring the reservation benefits contemplated by Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Article 243-D and 243-T. In this respect, we endorse the proposition that Article 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions, the nature and purpose of which is different from the reservation policies designed to improve access to higher education and public employment, as contemplated under Article 15(4) and 16(4) respectively. Specifically with regard to the unviability of the analogy between Article 16(4) and Article 243-D, we are in agreement with a decision of the Bombay High Court, reported as *Vinayakrao Gangaramji Deshmukh v. P.C. Agrawal & Ors,* AIR 1999 Bom 142. That case involved a fact-situation where the chairperson position in a Panchayat was reserved in favour of a Scheduled Caste Woman. In the course of upholding this reservation, it was held as follows:

> "... Now, after the seventy-third and seventy-fourth Constitutional amendments, the constitution of local bodies has been granted a constitutional protection and Article 243D mandates that a seat be reserved for the Scheduled Caste and Scheduled Tribe in every Panchayat and Sub-article (4) of the said Article 243D also directs that the offices of the Chairpersons in the panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide. Therefore, the reservation in the local bodies like the Village Panchayat is not governed by Article 16(4), which speaks about the reservation in the public employment, but a separate constitutional power which directs the reservation in such local bodies. ..."

We are of course aware of the fact that some decisions in the past have examined the validity of reservations in local self-government by applying the principles evolved in relation to education and employment.

31. In this respect, we are in partial agreement with one of the submissions made by Shri M. Rama Jois that the nature of disadvantages which restrict access to education and employment cannot be readily equated with disadvantages in the realm of political representation. To be sure, backwardness in the social and economic sense does not necessarily imply political backwardness. However, the petitioner's emphasis on the distinction between 'selection' (in case of education and employment) and 'election' (in case of political representation) does not adequately reflect the complexities involved. It is of course undeniable that in determining who can get access to education and employment, due regard must be given to considerations of merit and efficiency which can be measured in an objective manner. Hence, admissions to educational institutions and the recruitment to government jobs is ordinarily done through methods such as examinations, interviews or assessment of past performance. Since it is felt that applicants belonging to the SC/ST/OBC categories among others are at a disadvantage when they compete through these methods, a level-playing field is sought to be created by way of conferring reservation benefits.

32. In the domain of political participation, there can be no objective parameters to determine who is more likely to get elected to representative institutions at any level. The choices of voters are not guided by an objective assessment of a

candidate's merit and efficiency. Instead, they are shaped by subjective factors such as the candidate's ability to canvass support, past service record, professed ideology and affiliations to organised groups among others. In this context, it is quite possible that candidates belonging to the SC/ST/OBC categories could demonstrate these subjective qualities and win elections against candidates from the relatively better-off groups. However, such a scenario cannot be presumed in all circumstances. It is quite conceivable that in some localized settings, backwardness in the social and economic sense can also act as a barrier to effective political participation and representation. When it comes to creating a level-playing field for the purpose of elections to local bodies, backwardness in the social and economic sense can indeed be one of the criteria for conferring reservation benefits.

33. It must be kept in mind that there is also an inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political representation at the grassroots level on the other hand. While access to higher education and public employment increases the likelihood of the socio-economic upliftment of the individual beneficiaries, participation in local-self government is intended as a more immediate measure of empowerment for the community that the elected representative belongs to. The objectives of democratic decentralisation are not only to bring governance closer to the people, but also to make it more participatory, inclusive and accountable to the weaker sections of society. In this sense, reservations in local self-government are intended to directly benefit the community as a whole, rather than just the elected representatives. It is for this very reason that there cannot be an exclusion of the 'creamy layer' in the context of political representation. There are bound to be disparities in the socio-economic status of persons within the groups that are the intended beneficiaries of reservation policies. While the exclusion of the 'creamy layer' may be feasible as well as desirable in the context of reservations for

education and employment, the same principle cannot be extended to the context of local self-government. At the level of panchayats, the empowerment of the elected individual is only a means for pursuing the larger end of advancing the interests of weaker sections. Hence, it would be counter-intuitive to exclude the relatively better-off persons among the intended beneficiaries from the reservation benefits that are designed to ensure diversity in the composition of local bodies. It is quite likely that such persons may be better equipped to represent and protect the interests of their respective communities. We can now attempt to provide answers to the contentious issues.

(i). VALIDITY OF RESERVATIONS IN FAVOUR OF BACKWARD CLASSES

34. With respect to the challenge against the constitutional validity of Art. 243-D(6) and 243-T(6) which enable the reservation of seats and chairperson posts in favour of backward classes, we are in agreement with the respondents that these are merely enabling provisions and it would be quite improper to strike them down as violative of the equality clause. Admittedly, Art. 243-D(6) and 243-T(6) do not provide guidance on how to identify the backward classes and neither do they specify any principle for the quantum of such reservations. Instead, discretion has been conferred on State Legislatures to design and confer reservation benefits in favour of backward classes. It is but natural that questions will arise in respect of the exercise of a discretionary power. The petitioners in this case have objected to reservations in favour of OBCs to the tune of 33% in the State of Karnataka and 27% in the State of Uttar Pradesh. Similar objections can be raised with regard to some of the other State legislations as well. The gist of the objection is that since most of the OBC groups are already well represented in the political space, there is no principled basis for conferring reservation benefits on them. Based on this premise, it was contended that the reservations in favour of OBCs do not meet the tests of 'reasonable classification' and

proportionality. Furthermore, apprehensions were voiced that the reservations in favour of OBCs have emerged as an instrument by which incumbent State governments can engage in 'vote-bank' politics by preferring one group over another. In light of these contentions, it is obvious that the petitioner's real concern is with overbreadth in the State legislations.

35. There is no doubt in our minds that excessive and disproportionate reservations provided by State legislations can indeed be the subject-matter of specific challenges before the Courts. However, the same does not justify the striking down of Art. 243-D(6) and 243-T(6) which are Constitutional provisions that enable reservations in favour of backward classes in the first place. As far as the challenge against the various State legislations is concerned, we were not provided with adequate materials or argumentation that could help us to make a decision about the same. The identification of backward classes for the purpose of reservations is an executive function and as per the mandate of Art. 340, dedicated commissions need to be appointed to conduct a rigorous empirical inquiry into the nature and implications of backwardness. It is also incumbent upon the executive to ensure that reservation policies are reviewed from time to time so as to guard against overbreadth. In respect of the objections against the Karnataka Panchayati Raj Act, 1993, all that we can refer to is the Chinnappa Reddy Commission Report (1990) which reflects the position as it existed twenty years ago. In the absence of updated empirical data, it is well nigh impossible for the Courts to decide whether the reservations in favour of OBC groups are proportionate are not. Similarly, in the case of the State of Uttar Pradesh, the claims about the extent of the OBC population are based on the 1991 census. Reluctant as we are to leave these questions open, it goes without saying that the petitioners are at liberty to raise specific challenges against the State legislations if they can point out flaws in the identification of backward classes with the help of updated empirical data.

36. As noted earlier, social and economic backwardness does not necessarily coincide with political backwardness. In this respect, the State Governments are well advised to reconfigure their reservation policies, wherein the beneficiaries under Art. 243-D(6) and 243-T(6) need not necessarily be coterminus with the Socially and Educationally Backward Classes (SEBCs) [for the purpose of Art. 15(4)] or even the Backward classes that are under-represented in government jobs [for the purpose of Art. 16(4)]. It would be safe to say that not all of the groups which have been given reservation benefits in the domain of education and employment need reservations in the sphere of local self-government. This is because the barriers to political participation are not of the same character as barriers that limit access to education and employment. This calls for some fresh thinking and policy-making with regard to reservations in local self-government.

37. In the absence of explicit constitutional guidance as to the quantum of reservation in favour of backward classes in local self-government, the rule of thumb is that of proportionate reservation. However, we must lay stress on the fact that the upper ceiling of 50% (quantitative limitation) with respect to vertical reservations in favour of SC/ST/OBCs should not be breached. On the question of breaching this upper ceiling, the arguments made by the petitioners were a little misconceived since they had accounted for vertical reservations in favour of SC/ST/OBCs as well as horizontal reservations in favour of women to assert that the 50% ceiling had been breached in some of the States. This was clearly a misunderstanding of the position since the horizontal reservations in favour of women are meant to intersect with the vertical reservations in favour of SC/ST/OBC, since one-third of the seats reserved for the latter categories are to be reserved for women belonging to the same. This means that seats earmarked for women belonging to the general category are not accounted for if one has to gauge whether the upper ceiling of 50% has been breached.

38. Shri Rajeev Dhavan had contended that since the

context of local self-government is different from education and employment, the 50% ceiling for vertical reservations which was prescribed in *Indra Sawhney* (supra.), cannot be blindly imported since that case dealt with reservations in government jobs. It was further contended that the same decision had recognised the need for exceptional treatment in some circumstances, which is evident from the following words (at Paras. 809, 810):

> "809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.
>
> 810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being put of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

39. Admittedly, reservations in excess of 50% do exist in some exceptional cases, when it comes to the domain of political representation. For instance, the Legislative Assemblies of the States of Arunachal Pradesh, Nagaland, Meghalaya, Mizoram and Sikkim have reservations that are far in excess of the 50% limit. However, such a position is the outcome of exceptional considerations in relation to these areas. Similarly, vertical reservations in excess of 50% are permissible in the composition of local self-government institutions located in the Fifth Schedule Areas. In the recent decision reported as *Union of India v. Rakesh Kumar,* (2010) 1 SCALE 281, this Court has explained why it may be necessary to provide reservations in favour of Scheduled Tribes

that exceed 50% of the seats in panchayats located in Scheduled Areas. However, such exceptional considerations cannot be invoked when we are examining the quantum of reservations in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SC/ST/OBCs cannot exceed the upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs.

(iii). VALIDITY OF RESERVING CHAIRPERSON POSITIONS

40. The main criticism against the reservation of chairperson positions in local self-government is that the same amounts to cent-per-cent reservation since they are akin to solitary posts. As mentioned earlier, the petitioners have relied upon some High Court decisions [See: *Janardhan Paswan v. State of Bihar,* AIR 1988 Pat 75; *Krishna Kumar Mishra v. State of Bihar,* AIR 1996 Pat 112], wherein it had been held that reservations of Chairperson posts in Panchayats would not be permissible since the same was tantamount to the reservation of solitary seats. However, Article 243-D(4) provides a clear Constitutional basis for reserving the Chairperson positions in favour of SC and STs (in a proportionate manner) while also providing that one-third of all chairperson positions in each tier of the Panchayati Raj Institutions would be reserved in favour of women. As described earlier, the considerations behind the provisions of Article 243-D cannot be readily compared with those of Article 16(4) which is the basis for reservations in public employment. It is a settled principle in the domain of service law that single posts cannot be reserved under the scheme of Article 16(4) and the petitioners have rightly pointed out to some precedents in support of their contention. However, the same proposition cannot be readily extended to strike down reservations for chairperson positions in Panchayats. This is because

Chairperson positions should not be viewed as solitary seats by themselves for the purpose of reservation. Instead, the frame of reference is the entire pool of Chairperson positions in each tier of the three levels of Panchayati Raj Institutions in the entire State. Out of this pool of seats which is computed across panchayats in the whole state, the number of offices that are to be reserved in favour of Scheduled Castes and Scheduled Tribes is to be determined on the basis of the proportion between the population belonging to these categories and the total population of the State. This interpretation is clearly supported by a bare reading of the first proviso to Art. 243-D(4). It would be worthwhile to re-examine the language of the said provision:

> 243-D(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:
>
> Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:
>
> Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:
>
> Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

41. As may be evident from the above-mentioned provision, when the frame of reference is the entire pool of

chairperson positions computed across each tier of Panchayati Raj institutions in the entire state, the possibility of cent-per-cent reservation does not arise. For this purpose, a loose analogy can be drawn with reservations in favour of Scheduled Castes and Scheduled Tribes for the purpose of elections to the Lok Sabha and the respective Vidhan Sabhas. Before elections to these bodies, the Election Commission earmarks some electoral constituencies as those which are reserved for candidates belonging to the SC/ST categories. For the purpose of these reservations, the frame of reference is the total number of Lok Sabha or Vidhan Sabha seats in a State and not the single position of an MP or MLA respectively. Coming back to the context of Chairperson positions in Panchayats, it is therefore permissible to reserve a certain number of these offices in favour of Scheduled Castes, Scheduled Tribes and women, provided that the same is done in accordance with the provisos to Article 243-D(4).

42. In the case of urban local bodies, Art. 243-T(4) also enables reservation of chairperson posts in favour of Scheduled Castes, Scheduled Tribes and women. However, there are no further specifications to guide the reservation of chairperson positions in urban areas. While it is not possible for us to ascertain the legislative intent behind the same, one can perhaps theorise that there was an assumption that the intended beneficiaries are in a relatively better-off position to overcome barriers to political participation in urban local bodies, when compared with rural local bodies.

43. It was also contended that since chairpersons of Panchayats and Municipalities are entrusted with executive powers, reserving these posts could prove to be the precursor for reservations of executive offices at higher levels of government. It was even suggested that the reservation of chairperson posts was akin to reserving the posts of Chief Minister and Prime Minister at the State and National level, respectively. In our opinion, this analogy with the higher levels of government is misplaced. The offices of chairpersons in

Panchayats and Municipalities are reserved as a measure of protective discrimination, so as to enable the weaker sections to assert their voice against entrenched interests at the local level. The patterns of disadvantage and discrimination faced by persons belonging to the weaker sections are more pervasive at the local level. Unlike elected representatives in the Lok Sabha and the Vidhan Sabha who can fall back on the support of mainstream political parties as well as media scrutiny as a safeguard against marginalization and unjust discrimination, elected representatives from the disadvantaged sections may have no such support-structures at the local level. In this respect, the Union Parliament thought it fit to enable reservations of Chairperson positions in order to ensure that not only are the weaker sections adequately represented in the domain of local self-government, but that they also get a chance to play leadership roles.

44. The other significant criticism of the reservation of chairperson posts in local bodies is that it amounts to an unreasonable limitation on the rights of political participation of persons who do not belong to the reserved categories. As enumerated in the petitioner's submissions, the rights of political participation broadly include the right of a citizen to vote for a candidate of his/her choice and right of citizens to contest elections for a public office. In the context of the present case, these would include the rights of elected members to choose the chairpersons of Panchayats and Municipalities. As outlined earlier, it was contended that reserving these posts has the effect of limiting the choices available to voters and effectively discourages persons belonging to the general category from contesting these elections. Shri Salman Khurshid had made the point that unlike those who contest elections for the Lok Sabha and the Vidhan Sabha, it is not viable for those who seek membership in the local bodies to contest elections in territorial constituencies other than those in which they reside. This line of argumentation was adopted in support of the contention that

the reservation of chairperson posts is violative of the principles of democracy.

45. While the exercise of electoral franchise is an essential component of a liberal democracy, it is a well-settled principle in Indian law, that the right to vote and contest elections does not have the status of fundamental rights. Instead, they are in the nature of legal rights which can be controlled through legislative means. On this point, we can refer to the following observations made by R.M. Sahai, J. in *Mohan Lal Tripathi v. District Magistrate, Rai Bareilly,* (1992) 4 SCC 80, Para. 2:

> "Democracy is a concept, a political philosophy, an ideal practised by many nations culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly. But electing representatives to govern is neither a 'fundamental right' nor a 'common law right' but a special right created by the statutes, or a 'political right' or 'privilege' and not a 'natural', 'absolute' or 'vested right'. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. Right to remove an elected representative, too, must stem out of the statute as 'in the absence of a constitutional restriction it is within the power of a legislature to enact a law for the recall of officers'. Its existence or validity can be decided on the provision of the Act and not, as a matter of policy.'

In this respect, it may be noticed that the Constitution empowers the Election Commission of India to prepare electoral rolls for the purpose of identifying the eligible voters in elections for the Lok Sabha and the Vidhan Sabhas. This suggests that the right to vote is not an inherent right and it cannot be claimed in an abstract sense. Furthermore, the Representation of People Act, 1951 gives effect to the Constitutional guidance on the eligibility of persons to contest elections. This includes grounds that render persons ineligible

from contesting elections such as that of a person not being a citizen of India, a person being of unsound mind, insolvency and the holding of an 'office of profit' under the executive among others. It will suffice to say that there is no inherent right to contest elections since there are explicit legislative controls over the same.

46. The petitioners have asked us to reconsider the precedents wherein the rights of political participation have been characterised as statutory rights. It has been argued that in view of the standard of reasonableness, fairness and non-discrimination required of governmental action under Article 21 of the Constitution, there is a case for invalidating the restrictions that have been placed on these rights as a consequence of reservations in local self-government. We do not agree with this contention. In this case, we are dealing with an affirmative action measure and hence the test of proportionality is a far more appropriate standard for exercising judicial review. It cannot be denied that the reservation of chairperson posts in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and women does restrict the rights of political participation of persons from the unreserved categories to a certain extent. However, we feel that the test of reasonable classification is met in view of the legitimate governmental objective of safeguarding the interests of weaker sections by ensuring their adequate representation as well as empowerment in local self-government institutions. The position has been eloquently explained in the respondents' submissions, wherein it has been stated that 'the asymmetries of power require that the Chairperson should belong to the disadvantaged community so that the agenda of such Panchayats is not hijacked for majoritarian reasons.' [Cited from Submissions on behalf of the State of Bihar, p. 49]

47. There have of course been some arguments doubting the efficacy of reserving chairperson posts, mostly on the premise that this does not lead to the actual empowerment of the intended beneficiaries, since they are still dominated by the

traditionally powerful sections. Especially in the case of elected women representatives at the local level, it is often argued that the real power is exercised by the male members of their families. We are also alert to the frequent reports of instances where women representatives have asserted themselves, thereby inviting the wrath of the retrograde patriarchial society. However, there are also increasing reports about success stories which show that enhancing women's participation in local self-government has expanded social welfare. Irrespective of such concerns about the efficacy of reservations in local self-government, it is not proper for the judiciary to second-guess a social welfare measure that has been incorporated by way of a constitutional amendment. In light of these considerations, we reject the challenge in respect of the constitutional validity of Art. 243-D(4) and 243-T(4).

CONCLUSION

48. In view of the above, our conclusions are:-

(i) The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Articles 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for purposes of Articles 15(4) and 16(4), but can be much shorter.

(ii) Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable State Legislatures to reserve seats and chairperson posts in favour of backward classes. Concerns about disproportionate reservations

should be raised by way of specific challenges against the State Legislations.

(iii) We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State Legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of 'backward classes' under Art. 243-D(6) and Art. 243-T(6) should be distinct from the identification of SEBCs for the purpose of Art. 15(4) and that of backward classes for the purpose of Art. 16(4).

(iv) The upper ceiling of 50% vertical reservations in favour of SC/ST/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas.

(v) The reservation of chairperson posts in the manner contemplated by Article 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment.

49. With these observations, the present set of writ petitions stands disposed of.

N.J. Writ Petitions disposed of.

T. NARASIMHULU & ORS.
v.
STATE OF A. P. & ORS.
(Civil Appeal No. 8116 of 2003)

MAY 11, 2010

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

Constitution of India, 1950 – Article 309 – Rule relating to appointment of Forest Rangers as Assistant Conservators – Amendments to the rule, in exercise of powers conferred under the proviso to Article 309 – Mode of publication of rules made under the proviso to Article 309 – Held: A rule made under the proviso to Article 309 has the same effect as an Act of appropriate Legislature regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State – Hence, even if Article 309 does not say that the rules made under the proviso thereto are required to be published, these rules are required to be published just as any other Act passed by the appropriate Legislature is required to be published so that the persons affected by the rules or the Act are aware of the rule or the Act – Where the law prescribes the mode of publication of the law to become operative, the law must be published in that mode only, but where the mode of publication of the law is not prescribed by the law, such law should be published in some usual or recognized mode to bring it to the knowledge of all persons concerned – Andhra Pradesh General Clauses Act – s.21 – Service Law – Recruitment – Andhra Pradesh Forest Service Rules, 1965 – r.2.

Service Law – Seniority – Andhra Pradesh Forest Service Rules, 1965 – r.2 – Amendments made to r.2 with retrospective effect – Validity of –Challenged on ground that it adversely affected inter-se seniority and thus took away the

vested or accrued rights of employees – Held: Challenge not tenable – Seniority of a Government servant is not a vested right – An Act of the State Legislature or a rule made under Article 309 of the Constitution can retrospectively affect the seniority of a Government servant – Constitution of India, 1950 – Article 309.

On 29.05.1995, the Government of Andhra Pradesh issued G.O.Ms. No. 35 adding a proviso to Rule 2 of the Andhra Pradesh Forest Service Rules, 1965 that Forest Range Officers who secured first and second ranks in their batches for Honours in Ranger's Training Course shall be eligible for appointment as Assistant Conservators and this G.O.Ms. No. 35 was published in the Gazette of the Andhra Pradesh on 01.06.1995. On 03.07.1995, the Andhra Pradesh Government issued G.O.Ms. No.51 amending this proviso to Rule 2 of the Forest Service Rules so as to provide that Forest Range Officers who secured Honours in their batches in the Rangers Training Course shall be eligible for appointment as Assistant Conservators and this G.O.Ms. No.51 was published in the Gazette of Andhra Pradesh on 12.09.1996.

The appellants who were working as Assistant Conservators of Forests challenged the amendments to Rule 2 of the Forest Service Rules by G.O.Ms. No.35 and G.O.Ms. No.51.

It was submitted by the appellants that a bare perusal of the G.O.Ms. 35 dated 29.05.1995 and G.O.Ms. No.51 dated 03.07.1995 would show that the Government Orders directing that the amendments shall be deemed to have come into force from 08.04.1986 was not part of the Notification which was published in the Gazette; that the amendments by G.O.Ms. Nos. 35 and 51 are amendments to Rule 2 made under the proviso to Article

309 of the Constitution and although the proviso to Article 309 of the Constitution does not prescribe any specific mode of publication of the Rules made thereunder, the amendments are required to be published in the same manner in which the Rules made under an Act are published. The appellants submitted that although the amendments made to Rule 2 by G.O.Ms. Nos. 35 and 51 were published by a notification in the Official Gazette, the portion of the Government Order in G.O.Ms. NOs. 35 and 51 directing that the amendments would have retrospective effect from 08.04.1986 was not published in the notifications in the Official Gazette and the legal consequence thereof is that the amendments to Rule 2 made by G.O.Ms. NOs. 35 and 51 would have only prospective effect, or in other words, will not have retrospective effect from 08.04.1986.

Dismissing the appeals, the Court

HELD:1.1. This Court is unable to accept that the portion of the Government Orders in G.O.Ms. Nos.35 and 51 directing that the amendments to Rule 2 of the Andhra Forest Service Rules would have retrospective effect from 08.04.1986 were required to be published in the Official Gazette. [Para 5] [1037-C-D]

1.2. A plain reading of G.O.Ms. Nos. 35 and 51 would show that the amendments to Rule 2 of the Forest Service Rules made therein are in exercise of powers conferred by the proviso to Article 309 of the Constitution. Article 309 of the Constitution would show that under the main provision of the Article, Acts of appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of Union or of any State. The proviso to Article 309 of the Constitution, however, states that until provision in that

behalf is made by or under an Act of the appropriate Legislature under this Article, the President or the Governor, as the case may be, or any such person as they may direct, make rules regulating the recruitment and conditions of service of persons appointed, to such services and posts in connection with the affairs of the Union or of any State respectively. The proviso to Article 309 further says that "any rules so made shall have effect subject to the provisions of any such Act" made under Article 309 of the Constitution. The words "any rules so made shall have effect" signify that the rules will become operative subject only to the provisions of the Constitution and the provisions of any Act made by the appropriate Legislature under Article 309 of the Constitution. Hence, Section 21 of the Andhra Pradesh General Clauses Act, which provides that where in any Act, or any rule passed under any Act, it is directed that any order, notification or other matter shall be notified or published, such notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Official Gazette, has no application whatsoever to a rule made under the proviso to Article 309 of the Constitution. [Para 5] [1037-C-D; 1038-B-F]

1.3. In the present case, the amendments to Rule 2 of the Forest Service Rules by G.O.Ms. Nos. 35 and 51 with retrospective effect are sought to be made in exercise of powers conferred under the proviso to Article 309 of the Constitution and not in exercise of any power conferred by any Act made by the State Legislature and the Constitution or any appropriate Act made under Article 309 of the Constitution does not prescribe any mode of publication of rules made under the proviso to Article 309. This is not to say that rules made under the proviso to Article 309 of the Constitution are not required to be published at all. A rule made under the proviso to

Article 309 of the Constitution has the same effect as an Act of appropriate Legislature regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. Hence, even if Article 309 of the Constitution does not say that the rules made under the proviso thereto are required to be published, these rules are required to be published just as any other Act passed by the appropriate Legislature is required to be published so that the persons affected by the rules or the Act are aware of the rule or the Act. [Paras 6 and 7] [1039-D-H]

1.4. Where the law prescribes the mode of publication of the law to become operative, the law must be published in that mode only, but where the mode of publication of the law is not prescribed by the law, such law should be published in some usual or recognized mode to bring it to the knowledge of all persons concerned. In the present case, the contention of the appellants before the Tribunal or the High Court was not that the Government Order in G.O.Ms. Nos. 35 and 51 that the amendment to Rule 2 of the Forest Service Rules would have retrospective effect from 08.04.1986 was never made known by any reasonable mode, but that it was not published in the Official Gazette. This contention of the appellants has no merit. [Para 8] [1040-G-H; 1041-B]

I.T.C. Bhadrachalam Paperboards & Anr. v. Mandal Revenue Officer, A. P. & Ors. **(1996) 6 SCC 634, distinguished.**

Harla v. The State of Rajasthan **AIR 1951 SC 467;** *State of Maharashtra v. Mayer Hans George* **AIR 1965 SC 722, relied on.**

Chandra Prakash Tiwari & Ors. v. Shakuntala Shukla & Ors. **(2002) 6 SCC 127, referred to.**

2. The submission made by the respondent that since the seniority of the appellants had been adversely affected by amendments to Rule 2 by G.O.Ms. NOs. 35 and 51 made with retrospective effect from 08.04.1986, the amendments take away the vested rights or accrued rights and are liable to be struck down by the Court, is also without merit. Seniority of a Government servant is not a vested right and an Act of the State Legislature or a rule made under Article 309 of the Constitution can retrospectively affect the seniority of a Government servant. [Para 9 & 12] [1041-G-H; 1044-F-G]

S. S. Bola & Ors. v. B. D. Sardana & Ors. **(1997) 8 SCC 522, relied on.**

Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors., **(1997) 6 SCC 623, referred to.**

3. As regards the further submission that the amendment to Rule 2 by G.O.Ms. No. 51 only provides that Forest Range Officers, who secured honours in their batches in the Rangers Training Course, would be deputed for training to join two years course of the State Forest Service College and does not provide for appointment of such Forest Range Officers as Assistant Conservators of Forests, it is clear from the title of Rule 2 that the rule provides for appointment and not for training. The main provision of the rule provides for appointment of four categories of officers of the State Forest Services, namely, Chief Conservator, Conservators, Deputy Conservators and Assistant Conservators. The proviso to Rule 2 as amended by G.O.Ms. No. 51 further provides that Forest Range Officers who secured Honours in their batches in the Rangers' Training Course shall be eligible for appointment as Assistant Conservators and after deputation to join the two years course of State Forest Service Colleges run by the Government of India, will be treated as direct recruits to the post of Assistant Conservators. There is, therefore, no scope for taking a view that the proviso to Rule 2 as amended by G.O.Ms. No. 51 is not a rule relating to appointment of Forest Rangers as Assistant Conservators. [Para 14] [1045-E-H; 1046-A-C]

Case Law Reference:

(1996) 6 SCC 634	**distinguished**	**Para 3**
(2002) 6 SCC 127	**referred to**	**Para 4**
AIR 1951 SC 467	**relied on**	**Para 7**
AIR 1965 SC 722	**relied on**	**Para 7**
(1997) 6 SCC 623	**referred to**	**Para 9**
(1997) 8 SCC 522	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8116 of 2003.

WITH

C.A. Nos. 8082, 8083 & 8088 of 2003.

L.N. Rao Rakesh Dwivedi, P.S. Patwalia, Praveen K. Pandey, D. Mahesh Babu, P.V. Ramana, T.N. Rao, C.S.N. Mohan Rao, G. Ramakrishna Prasad, B. Suyodhan, Amar Pal, Bharat J. Joshi, Wasay Khan, D. Bharathi Reddy, C.K. Sucharita, N. Das, T.V. George, Ajay Singh, Tushar Bakshi, T.V. Ratnam, for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are appeals against the judgment and order dated 05.04.2002 of the Division Bench of the Andhra Pradesh High Court in a batch of Writ Petitions Nos. 14689 of 2001, 25322 of 2001, 24420 of 1997 and Writ Petition No.22926 of 2001 (for short 'the impugned judgment').

2. The relevant facts very briefly are that on 28.07.1983 the Government of India sent a Circular to all the State Governments to depute the Forest Range Officers who have passed the Forest Ranger Course with honours for admission to two year course at the State Forest College for the post of Assistant Conservator of Forest. In response to the Circular, the Government of Andhra Pradesh sent the Forest Range Officers, who had secured honours in Forest Ranger Course, on deputation to the State Forest College for training as Assistant Conservators of Forests during the period 08.04.1986 to 23.06.1994. On 13.11.1994, the Andhra Pradesh Administrative Tribunal delivered a judgment in O.A. No.3258 of 1994 holding that the deputation of Forest Range Officers, namely, Sri B. Narayan Reddy and Sri T. P. Thimma Reddy, for training as Assistant Conservators of Forests was contrary to the Andhra Pradesh Forest Service Rules, 1965 (for short 'the Forest Service Rules'). On 29.05.1995, the Government of Andhra Pradesh issued G.O.Ms. No. 35 adding a proviso to Rule 2 of the Forest Service Rules that Forest Range Officers who secured first and second ranks in their batches for Honours in Ranger's Training Course shall be eligible for appointment as Assistant Conservators and this G.O.Ms. No. 35 was published in the Gazette of the Andhra Pradesh on 01.06.1995. On 03.07.1995, the Andhra Pradesh Government issued G.O.Ms. No.51 amending this proviso to Rule 2 of the Forest Service Rules so as to provide that Forest Range Officers who secured Honours in their batches in the Rangers Training Course shall be eligible for appointment as Assistant Conservators and this G.O.Ms. No.51 was published in the Gazette of Andhra Pradesh on 12.09.1996. The appellants who were working as Assistant Conservators of Forests challenged the amendments to Rule 2 of the Forest Service Rules by G.O.Ms. No.35 and G.O.Ms. No.51 before the Andhra Pradesh Administrative Tribunal and thereafter before the High Court. By the impugned judgment, the Division Bench of the High Court has dismissed the Writ Petitions.

3. Mr. L. Nageshwar Rao , learned counsel appearing for the appellants in Civil Appeal No.8116 of 2003, submitted that a bare perusal of the G.O.Ms. 35 dated 29.05.1995 and G.O.Ms. No.51 dated 03.07.1995 would show that the Government Orders directing that the amendments shall be deemed to have come into force from 08.04.1986 was not part of the Notification which was published in the Gazette. He submitted that the amendments by G.O.Ms. Nos. 35 and 51 are amendments to Rule 2 made under the proviso to Article 309 of the Constitution and although the proviso to Article 309 of the Constitution does not prescribe any specific mode of publication of the Rules made thereunder, the amendments are required to be published in the same manner in which the Rules made under an Act are published. He referred to Section 21 of the Andhra Pradesh General Clauses Act which provides that even where an Act or Rule provides for publication merely but does not say expressly that it shall be published in the Official Gazette, it would be deemed to have been duly made if it is published in the Official Gazette. He cited a decision of this Court in *I.T.C. Bhadrachalam Paperboards & Anr. v. Mandal Revenue Officer, A. P. & Ors.* [(1996) 6 SCC 634] in support of this submission. He vehemently submitted that although the amendments made to Rule 2 by G.O.Ms. Nos. 35 and 51 were published by a notification in the Official Gazette, the portion of the Government Order in G.O.Ms. NOs. 35 and 51 directing that the amendments would have retrospective effect from 08.04.1986 was not published in the notifications in the Official Gazette. He argued that the legal consequence is that the amendments to Rule 2 made by G.O.Ms. NOs. 35 and 51 would have only prospective effect. In other words, the amendments by G.O.Ms. Nos. 35 and 51 would have effect from 19.05.1995 and 03.07.1995 respectively and will not have retrospective effect from 08.04.1986.

4. Mr. P.S. Patwalia, learned counsel appearing for Respondent Nos. 3, 4, 7, 8, 12, 13 and 14 (the private respondents), in reply, submitted that Article 309 of the

Constitution does not prescribe any specific mode of publication for the rules made under the Article and all that is required is that there should be some reasonable mode of publication so that the affected parties are made aware of the factum of promulgation of the rules. He further submitted that in *Chandra Prakash Tiwari & Ors. v. Shakuntala Shukla & Ors.* [(2002) 6 SCC 127], this Court has held that where the parties were actually aware of the fact that the rules have been published, the argument that the rules were not actually published is a hyper-technical one.

5. We are unable to accept the submission of Mr. Nageshwar Rao that portion of the Government Orders in G.O.Ms. Nos. 35 and 51 directing that the amendments to Rule 2 therein would have retrospective effect from 08.04.1986 were required to be published in the Official Gazette. A plain reading of G.O.Ms. Nos. 35 and 51, copy of which has been annexed, would show that the amendments to Rule 2 of the Forest Service Rules made therein are in exercise of powers conferred by the proviso to Article 309 of the Constitution. Article 309 of the Constitution is extracted hereinbelow:

> *"309. Recruitment and conditions of service of persons serving the Union or a State.*—Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:
>
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this

> Article, and any rules so made shall have effect subject to the provisions of any such Act."

Article 309, quoted above, would show that under the main provision of the Article, Acts of appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of Union or of any State. The proviso to Article 309 of the Constitution, however, states that until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, the President or the Governor, as the case may be, or any such person as they may direct, make rules regulating the recruitment and conditions of service of persons appointed, to such services and posts in connection with the affairs of the Union or of any State respectively. The proviso to Article 309 further says that "any rules so made shall have effect subject to the provisions of any such Act" made under Article 309 of the Constitution. The words "any rules so made shall have effect" signify that the rules will become operative subject only to the provisions of the Constitution and the provisions of any Act made by the appropriate Legislature under Article 309 of the Constitution. Hence, Section 21 of the Andhra Pradesh General Clauses Act, which provides that where in any Act, or any rule passed under any Act, it is directed that any order, notification or other matter shall be notified or published, such notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Official Gazette, has no application whatsoever to a rule made under the proviso to Article 309 of the Constitution.

6. In *I.T.C. Bhadrachalam Paperboards & Anr. v. Mandal Revenue Officer, A. P. & Ors.* (supra) cited by Mr. Rao, one of the questions which arose for decision was whether the publication of the exemption notification in the Andhra Pradesh Gazette as required by Section 11(1) of the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963 was mandatory

or merely directory and this Court held after considering its earlier decisions that where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and that such a requirement is imperative and cannot be dispensed with. The Court, in particular, held that where a power is conferred to exempt a class of persons from the levy created by a statute upon another authority by the legislature, that authority has to, and can, exercise that power only in strict compliance with the requirements of the provision conferring that power and it is in the interest of the general public that such notifications are not only given wide publicity but there should also be no dispute with respect to the date of their making or with respect to the language and contents thereof. In the present case, the facts are entirely different. As we have seen, the amendments to Rule 2 of the Forest Service Rules by G.O.Ms. Nos. 35 and 51 with retrospective effect are sought to be made in exercise of powers conferred under the proviso to Article 309 of the Constitution and not in exercise of any power conferred by any Act made by the State Legislature and the Constitution or any appropriate Act made under Article 309 of the Constitution does not prescribe any mode of publication of rules made under the proviso to Article 309.

7. This is not to say that rules made under the proviso to Article 309 of the Constitution are not required to be published at all. A rule made under the proviso to Article 309 of the Constitution has the same effect as an Act of appropriate Legislature regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. Hence, even if Article 309 of the Constitution does not say that the rules made under the proviso thereto are required to be published, these rules are required to be published just as any other Act passed by the appropriate Legislature is required to be published so that the persons affected by the rules or the Act are aware of the rule or the Act. In *Harla v. The State of Rajasthan* [AIR 1951 SC 467] this Court held:

"…. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some civilized19way so that all men may know what it is or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to 19civilized man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

Also in *State of Maharashtra v. Mayer Hans George* [AIR 1965 SC 722] this Court held:

"…… Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e. by publication within the country in such media as generally adopted to notify to all the persons concerned the making of rules …. ."

8. It will be clear from the law laid down by this Court that where the law prescribes the mode of publication of the law to become operative, the law must be published in that mode only, but where the mode of publication of the law is not prescribed by the law, such law should be published in some usual or

recognized mode to bring it to the knowledge of all persons concerned. In the present case, the contention of the appellants before the Tribunal or the High Court was not that the Government Order in G.O.Ms. Nos. 35 and 51 that the amendment to Rule 2 of the Forest Service Rules would have retrospective effect from 08.04.1986 was never made known by any reasonable mode, but that it was not published in the Official Gazette. This contention of the appellants, as we have seen, has no merit.

9. Mr. Rao next submitted that Rules under the proviso to Article 309 of the Constitution can be made by the President or the Governor, as the case may be, with retrospective effect, but if such Rules made with retrospective effect affect a vested right of a Government servant, the same will be *ultra vires* Article 14 of the Constitution. He submitted that in the seniority list published on 15.12.1988 the appellants were shown senior to respondents 3 to 14 (private respondents) having been appointed to the cadre of Assistant Conservators of Forests by direct recruitment earlier than the private respondents, but as a consequence of the retrospective effect of the amendments to Rule 2 of the Forest Service Rules by G.O.Ms. Nos. 35 and 51, the private respondents will be shown senior to the appellants in the seniority list. He referred to the observations of this Court in para 24 at page 638 of the judgment in *Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors.* [(1997) 6 SCC 623] that in many decisions of this Court the expressions 'vested rights' or 'accrued rights' have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. He argued that since the seniority of the appellants had been adversely affected by amendments to Rule 2 by G.O.Ms. NOs. 35 and 51 made with retrospective effect from 08.04.1986, the amendments take away the vested rights or accrued rights and are liable to be struck down by the Court.

10. In reply, Mr. Patwalia submitted that in *S. S. Bola & Ors. v. B.D. Sardana & Ors.* [(1997) 8 SCC 522] a three-Judge Bench of this Court has taken a view that a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a Government servant and that an Act of the State Legislature, which has retrospective effect and which affects seniority of Government servants, cannot held to be *ultra vires* the Constitution. He submitted that the private respondents, who were Forest Range Officers and were deputed to the State Forest College in accordance with Government Orders, had been treated as direct recruits of different years to the posts of Assistant Conservators of Forests pursuant to the G.O.Ms. Nos. 35 and 51 and that the seniority in the cadre of the Assistant Conservators of Forests have to be determined vis-à-vis the appellants, who were also direct recruits in accordance with the relevant seniority rules. He submitted that the contention of the appellants that their vested/ accrued right to seniority has been affected by the amendments to Rule 2 of the Forest Service Rules, is, therefore, misconceived.

11. In *Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors.* (supra), cited by Mr. Nageshwar Rao, however, whether seniority was a vested right or not was not the issue and the issue was whether pension of a Government servant admissible under the rules in force at the time of retirement could be adversely affected by a retrospective amendment to the rules and the Constitution Bench held that such retrospective amendment affected the vested rights and was violative of Articles 14 and 16 of the Constitution. Mr. Rao, however, has relied on the following observations in paras 23 and 24 of the judgment in *Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors.* (supra):

> "*23.* The said decision in *Raman Lal Keshav Lal Soni*[1] of the Constitution Bench of this Court has been followed

1. (1983) 2 SCC 33.

by various Division Benches of this Court. (See *K.C. Arora* v. *State of Haryana*[2]; *T.R. Kapur* v. *State of Haryana*[3]; *P.D. Aggarwal* v. *State of U.P.*[4]; *K. Narayanan* v. *State of Karnataka*[5]; *Union of India* v. *Tushar Ranjan Mohanty*[6] and *K. Ravindranath Pai* v. *State of Karnataka.*[7])

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. …."

It will be clear from the obiter in para 24 of the judgment quoted above on which Mr. Nageshwar Rao has relied upon that this Court has included seniority as one amongst the vested rights or accrued rights on the basis of the decisions of this Court noted in para 23 of the judgment quoted above. We have perused the decisions noted in para 23 of the judgment and we find that it is only in the case of *Union of India v. Tushar Ranjan Mohanty* (supra) that a two-Judge Bench of this Court has held that seniority of the Tushar Ranjan Mohanty was a vested right and this vested right could not be taken away by retrospective amendments of the rules.

12. In a three-Judge Bench judgment in *S. S. Bola & Ors. v. B.D. Sardana & Ors.* (supra), cited by Mr. Patwalia, however, we find that this Court has clearly held that seniority was not a vested or accrued right. Three separate judgments were delivered by K. Ramaswamy, J., S. Saghir Ahmad, J. and G. B. Pattanaik, J. K. Ramaswamy, J. has held:

2. (1984) 3 SCC 281.

3. (1986 Supp. SCC 584.

4. (1987) 3 SCC 622.

5. 1994 Supp. (1) SCC 450.

6. (1994) 5 SCC 450.

7. 1995 Supp. (2) SCC 246.

"no one has a vested right to promotion or seniority. But an officer has an interest to seniority acquired by working out the rules. The seniority should be taken away only by operation of valid law." [(1997) 8 SCC at 634]

G. B. Pattanaik, J. has also held:

"Thus, to have a particular position in the seniority list within a cadre can neither be said to be an accrued or vested right of a Government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby. …." [(1997) 8 SCC at 666].

S. Saghir Ahmad, J. has agreed with G. B. Pattanaik, J. and has held:

"In the instant case, the judgments rendered by this Court in the earlier decisions relating to the seniority of the present incumbents were founded on the service rules then existing. These service rules have since been replaced by the impugned Act which has been enforced with retrospective effect. The various aspects of merits have been considered by my Brother Pattanaik and I cannot usefully add any further words on merits. …." [(1997) 8 SCC at 639 at para 162].

It is, thus, clear from the judgment of a larger Bench that in *S. S. Bola & Ors. v. B. D. Sardana & Ors.* (supra) that seniority of a Government servant is not a vested right and that an Act of the State Legislature or a rule made under Article 309 of the Constitution can retrospectively affect the seniority of a Government servant. The second contention of Mr. Rao, therefore, also fails.

13. Mr. Rakesh Dwivedi, learned counsel appearing for the appellants in Civil Appeal Nos.8082 and 8083 of 2003, in addition to the contention of Mr. Nageshwar Rao, submitted that

the amendment to Rule 2 by G.O.Ms. No. 51 only provides that Forest Range Officers, who secured honours in their batches in the Rangers Training Course, would be deputed for training to join two years course of the State Forest Service College and does not provide for appointment of such Forest Range Officers as Assistant Conservators of Forests.

14. Rule 2 together with the proviso as amended by G.O.Ms. No.51 is quoted hereinbelow:

> *"Rule 2. Appointment :*— Appointment to the several categories should be made as follows :

Category	Method of Appointment
Category 1: Chief Conservator	Promotion from Conservators
Category 2: Conservators	Promotion from Dy.Conservators
Category 2: Dy.	Conservators Promotion from Asst.Conservators
Category 2: Asst.	Conservators Direct recruitment or recruitment by transfer from Rangers of the Andhra Pradesh Sub-ordinate Service.

> Provided that Forest Range Officers who secured honours in their batches in the Rangers' Training Course shall be eligible for appointment as Assistant Conservators. They shall be deputed to join the two years course of State Forest Service Colleges run by the Government of India, treating them as direct recruits to the post of Asst. Conservators. The terms and conditions of training prescribed under clauses (a) and (b) of Rule 6 of the said Rules for a probationary Assistant Conservator of Forests appointed by direct recruitment, shall apply to the persons mentioned above. Such appointment to the post of Assistant Conservator of Forests shall be counted against direct recruitment quota."

It will be clear from the title of Rule 2 that the rule provides for appointment and not for training. The main provision of the rule provides for appointment of four categories of officers of the State Forest Services, namely, Chief Conservator, Conservators, Deputy Conservators and Assistant Conservators. The proviso to Rule 2 as amended by G.O.Ms. No. 51 further provides that Forest Range Officers who secured Honours in their batches in the Rangers' Training Course shall be eligible for appointment as Assistant Conservators and after deputation to join the two years course of State Forest Service Colleges run by the Government of India, will be treated as direct recruits to the post of Assistant Conservators. There is, therefore, no scope for taking a view that the proviso to Rule 2 as amended by G.O.Ms. No. 51 is not a rule relating to appointment of Forest Rangers as Assistant Conservators.

15. In the result, we do not find any merit in these appeals and we accordingly dismiss the same, but there shall be no order as to costs.

B.B.B. Appeals dismissed.

SURESH PRASAD SINGH
v.
DULHIN PHULKUMARI DEVI AND ORS.
(Civil Appeal No. 187 of 2003)

MAY 12, 2010

[DR. MUKUNDAKAM SHARMA AND A.K. PATNAIK, JJ.]

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961:

s.16(3) – Object of – Discussed.

s.16(3) – Right of pre-emption – Held: Is conferred on the co-sharer of the land transferred as also on the raiyat holding land adjoining to the land transferred – On facts, co-sharer made an application under s.16(3) within 3 months of the date of registration of sale deed – Authorities ought to have allowed the application considering the mandatory nature of the right of pre-emption conferred by s.16(3) – Vendee of the adjoining land cannot be allowed to defeat the right of pre-emption of co-sharer – Even after a long lapse of 19 years, High Court should not have rejected the claim for pre-emption since it was lodged in accordance with the statute and within the time prescribed by the statute – Direction to Collector to facilitate conveyance of the land in favour of co-sharer – Delay/laches – Land laws – Pre-emption.

s.16(3) – Claim under, rejected on the ground that claimant was not co-sharer – Reliance placed on sale deeds – Held: On facts, not correct – Entries in the Revisional Survey Khatiyan and the Chakbandi Khatiyan made by public authorities were relevant for deciding whether the claimant was co-sharer in respect of the land transferred – As per the Revisional Survey Khatiyan and the Chakbandi Khatiyan, claimant was the co-sharer of the transferor in the land transferred – Deeds and documents.

The suit land was sold to the respondent 1 by 'B' and 'R' by a registered deed. Appellant thereafter filed an application under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 for transfer of the suit land in his favour on the ground that he was a co-sharer and a boundary raiyat in respect of the land and had right of pre-emption. He also deposited the purchase money in accordance with the proviso to Section 16(3)(i) of the Act. Deputy Collector rejected the application. The appellant filed appeal which was allowed. In revision, Board of Revenue held that the appellant was not entitled to pre-empt under Section 16(3) of the Act. Appellant filed writ petition before High Court. The High Court dismissed the writ petition holding that the right of pre-emption was a weak right and moreover the vendee had remained in possession of suit land for more than 20 years. Hence the appeal.

Allowing the appeal, the Court

HELD: 1. A plain reading of Section 16(3)(i) of the Bihar Land Reform (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 would show that any "co-sharer of the transferor" is entitled to make an application for the transfer of the land to him. Hence, the expression "co-sharer of the transferor" would mean co-sharer in the land transferred. The Board of Revenue had placed reliance on the recitals in the two sale-deeds for recording a finding that the appellant and the transferors of the land transferred were not co-sharers. The recitals in the two sale-deeds made by the parties to the sale deeds were not relevant rather the entries in the Revisional Survey Khatiyan and the Chakbandi Khatiyan made by public authorities were relevant for deciding whether the appellant and the transferors of land were co-sharers in respect of the land. As per the Revisional

Survey Khatiyan of the suit land and the Chakbandi Khatiyan, the appellant and the transferors were co-sharers of the land transferred to respondent No.1. The appellant being a co-sharer of the transferor in the land transferred to respondent No.1 had a statutory right of pre-emption under Section 16(3) of the Act. Section 16(3)(i) states that any co-sharer "shall be entitled" within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the transfer deed. It is not disputed that the appellant in fact made such an application within three months of the date of registration of the sale deed executed by the transferors in favour of respondent No.1 and also deposited the purchase money together with sum equal to 10% thereof in the prescribed manner within the period of three months as provided in the proviso of Section 16(3)(i). The Deputy Collector, therefore, had no discretion but to allow the application considering the mandatory nature of the right of pre-emption conferred by Section 16(3) of the Act. Thus, even if there was a long lapse of 19 years, the High Court could not have rejected the claim of the appellant for pre-emption when the claim recognized by the statute, was lodged in accordance with the statute and within the time prescribed by the statute and in the manner provided by the statute. [Paras 9, 11-13] [1057-B; 1058-G-H; 1059-A-E; 1060-E-F]

Shaym Sunder & Ors. v. *Ram Kumar & Anr.* **(2001) 8 SCC 24, relied on.**

Ram Pravesh Singh v. *Additional Member, Board of Revenue* **1995 (1) Patna LJR 764;** *Satya Gupta (Smt.) alias Madhu Gupta* v. *Brijesh Kumar* **(1998) 6 SCC 423;** *Radhakrishan Laxminarayan Toshniwal* v. *Shridhar Ramchandra Alshi & Ors.* **AIR 1960 SC 1368;** *Bhagwan Das*

v. *Chet Ram* **(1971) 1 SCC 12;** *Rikhi Ram* v. *Ram Kumar* **(1975) 2 SCC 318;** *Bishan Singh* v. *Khazan Singh* **AIR 1958 SC 838;** *Sudama Devi* v. *Rajendra Singh* **AIR 1973 Patna 199;** *Ramachabila Singh* v. *Ramsagar Singh* **1968 PLJR 279, referred to.**

2. The respondent No.1 claiming to be a boundary raiyat stated that she had purchased under an earlier sale-deed dated 11.01.1980 a plot of land adjoining to the land in respect of which appellant had applied for pre-emption under Section 16(3) of the Act. Section 16(3) confers the right of pre-emption not only on the co-sharer but also on the raiyat holding land adjoining to the land transferred. However, a complete stranger who was not originally a raiyat holding land adjoining to the land transferred cannot be allowed to defeat the right of pre-emption of a co-sharer by first purchasing an adjoining plot of land and thereafter claiming to be a raiyat holding land adjoining to the land transferred. The object of Section 16(3) of the Act is to recognise the right of pre-emption of the co-sharer of the transferor or any raiyat holding land adjoining to the land transferred and this object would be frustrated if strangers are allowed to first buy one plot of land and then resist the claim for right of pre-emption of a co-sharer or a boundary raiyat on the basis of such first purchase of a plot of land. The concerned Collector is directed to direct respondent No.1 to convey the land in favour of the appellant by executing and registering a document of transfer and put the appellant in vacant possession of the land in accordance with the provisions of Section 16(3) of the Act. [Paras 14, 15] [1060-G-H; 1061-A-G]

Case Law Reference:

(2001) 8 SCC 24	**relied on**	**Paras 3, 13**
1995 (1) Patna LJR 764	**referred to**	**Paras 5, 14**

(1998) 6 SCC 423	**referred to**	**Para 6**
AIR 1960 SC 1368	**referred to**	**Paras 7, 8**
(1971) 1 SCC 12	**referred to**	**Para 7**
(1975) 2 SCC 318	**referred to**	**Para 7**
AIR 1958 SC 838	**referred to**	**Para 8**
AIR 1973 Patna 199	**referred to**	**Para 13**
(1969 BLJR 203	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 187 of 2003.

From the Judgment & Order dated 19.02.2001 of the High Court of Judicature at Patna in L.P.A. No. 127 of 2000.

Akhilesh Kumar Pandey, Shalini Chandra and Sudhanshu Saran for the Appellant.

Rajiv Shankar Dvivedi and Ajay Choudhary 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 19.02.2001 of the Division Bench of the Patna High Court in L.P.A. No. 127 of 2000 (for short 'the impugned judgment').

2. The relevant facts briefly are that land measuring 1.30 acres comprising Revisional Survey Plot Nos.1501, 1512, 1513, 1514 and 1527 of Khata No.229 in village Paiga in District Bhojpur in Bihar was sold by Brij Bihari Singh and Rash Bihari Singh to respondent No.1 by a registered Sale Deed on 04.08.1980. Soon thereafter, the appellant filed an application before the Deputy Collector, Land Reforms, Sadar, Arrah, under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (for

short "the Act") claiming that he was a co-sharer and a boundary raiyat in respect of the land and that the land be transferred to him. The appellant also deposited the purchase money together with 10% extra of the purchase money in accordance with the proviso to Section 16(3)(i) of the Act. The Deputy Collector, Land Reforms, however, rejected the application of the appellant by his order dated 10.02.1981. The appellant thereafter filed an appeal against the order of rejection before the Additional Collector, Bhojpur (Arrah) and by order dated 06.04.1993 the Additional Collector allowed the appeal. The Respondent No.1 challenged the order of the Additional Collector before the Board of Revenue in a revision and the Board of Revenue set aside the order passed by the Additional Collector. The appellant then filed a Writ Petition being C.W.J.C. No.13318 of 1993 and by order dated 06.03.1995, a learned Single Judge of the Patna High Court set aside the order passed by the Board of Revenue and remitted the matter back to the Board of Revenue for reconsideration on the question whether there has been a partition between the appellant and Brij Bihari Singh and Rash Bihari Singh prior to 21.06.1980 and whether the appellant ceased to be a co-sharer in respect of the land. Thereafter, the Board of Revenue again held that the appellant was not entitled to pre-empt under Section 16(3) of the Act and set aside the order of the Additional Collector in the appeal and restored the order of the Deputy Collector dated 10.02.1981 rejecting the claim of pre-emption made by the appellant. Aggrieved, the appellant filed a fresh Writ Petition being C.W.J.C. No.7714 of 1997 before the Patna High Court and the learned Single Judge of the High Court dismissed the Writ Petition by order dated 17.11.1999. The appellant then filed L.P.A. No.127 of 2000 before the Division Bench of the High Court and by the impugned judgment, the Division Bench of the High Court dismissed the L.P.A. of the appellant.

3. Learned counsel for the appellant submitted that the Division Bench of the High Court, while dismissing the L.P.A.,

has held that the Court cannot ignore two important facts and these are: firstly, that the right of pre-emption is a weak right and secondly, that the vendee has remained in possession for more than twenty years and at this stage the Court was not inclined to interfere with the matter. He submitted that the Division Bench of the High Court failed to appreciate that the right of pre-emption under Section 16(3) of the Act was a statutory right and the appellant had filed an application under Section 16(3) of the Act within three months of the date of registration of the Sale Deed as provided in Section 16(3) of the Act. He cited the judgment of this Court in *Shaym Sunder & Ors. v. Ram Kumar & Anr.* [(2001) 8 SCC 24] in which it has been held that the right of pre-emption under statutory law is mandatory and not discretionary and submitted that the view taken by the High Court that the right of pre-emption is a weak right and should not be enforced so as to disturb the long possession of the respondent No.1 in respect of the land is not correct.

4. Learned counsel for the appellant next submitted that the learned Single Judge while dismissing C.W.J.C. No.7714 of 1997 has held that there was a definite finding that the appellant was not a co-sharer in the revisional order of the Board of Revenue. He submitted that the finding of the Board of Revenue that the appellant was not a co-sharer was wholly erroneous as there was no partition in the branch of Deoki Singh and this is clear from the entries in the Revisional Survey Records of the year 1972-73 as well as the entries of the Chakbandi/Consolidation Khatiyan. He submitted that the Board of Revenue appears to have taken into consideration recitals in a sale deed dated 16.01.1981 made after 21.06.1980 in favour of respondent No.1, despite the fact that by the order dated 06.03.1995 of the learned Single Judge in C.W.J.C. No.13318/1993, the Board of Revenue was directed to exclude from consideration any document that might have come into existence after 21.06.1980 on whether there has been a partition in respect of the land prior to 21.06.1980.

5. Learned counsel for the respondent No.1, on the other hand, submitted that a claim for pre-emption made by a co-sharer will not be available under Section 16(3) of the Act against the transferee who holds the land adjacent to the transferred land. In support of this submission, he relied on the decision of the Patna High Court in *Ram Pravesh Singh* v. *Additional Member, Board of Revenue* [1995 (1) Patna LJR 764]. He submitted that respondent No.1 had earlier purchased 1.33 acres of several plots in the same Khata No.229 by sale deed dated 11.01.1980 and was thus a boundary raiyat holding land adjacent to the transferred land and the appellant could not have a claim of pre-emption under Section 16(3) of the Act against the respondent No.1. He submitted that this is one of the reasons why the Deputy Collector dismissed the application of the appellant for pre-emption by his order dated 10.02.1981.

6. Learned counsel for the respondent No.1 next submitted that the Board of Revenue had come to a finding of fact that there was a prior partition in the family of the appellant and this finding of fact was not interfered with by the High Court in the impugned judgment. He cited a decision of this Court in *Satya Gupta (Smt.) alias Madhu Gupta* v. *Brijesh Kumar* [(1998) 6 SCC 423] wherein it has been held that where findings of fact of the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on re-appreciation of the evidence merely on the ground that another view was possible. He submitted that this Court should not for the same reasons interfere with the findings of fact recorded by the Board of Revenue.

7. Learned counsel for the respondent No.1 submitted that the learned Single Judge and the Division Bench of the High Court have held that considering the long possession of the respondent No.1 for 19 years, the claim of pre-emption of the appellant cannot be allowed. He submitted that this finding on equity should not be disturbed and cited the decision of this Court in *Radhakrishan Laxminarayan Toshniwal* v. *Shridhar*

Ramchandra Alshi & Ors. [AIR 1960 SC 1368] for the proposition that there is no equity of a pre-emptor, whose sole object is to obstruct a valid transaction by virtue of the right created in him by statutes. Relying on *Shaym Sunder & Ors*. v. *Ram Kumar & Anr*. (supra), *Bhagwan Das* v. *Chet Ram* [(1971) 1 SCC 12 = 1971 (2) SCR 640] and *Rikhi Ram* v. *Ram Kumar* [(1975) 2 SCC 318], he submitted that the pre-emptor must have the right to pre-empt not only at the time of the date of sale, but also at the time of adjudication of the suit in which the claim for pre-emption has been made and if he loses that right any time before the adjudication of the suit, no decree for pre-emption can be granted by the Court even if he may have had such right on the date of filing the suit. He submitted that the sale deed dated 16.01.1981 would show that Raghu Bansh Singh son of Hirdaya Singh and the brother of Hari Nandai Singh, who was the father of the appellant, had executed a sale deed in favour of Smt. Ramjaro Devi in respect of 1.21 Dec. of land from Plot Nos. 306 and 284 of Khata No. 229 after permission was obtained from the consolidation authority and this clearly shows that there had been partition between the two sons of Hirdaya Singh. He submitted that similarly sale deed dated 16.01.1981 shows that in the Southern Boundary of Plot No. 284, the name of the appellant has been shown and this shows that the appellant had exclusive share in the south of Plot No.284. He submitted that relying on these two sale deeds, the Board of Revenue has come to the conclusion that the appellant had ceased to be a co-sharer and therefore cannot claim the right of pre-emption under Section 16(3) of the Act.

8. Learned counsel for the respondent No.1 finally submitted that this Court has held in *Bishan Singh v. Khazan Singh* [AIR 1958 SC 838] and *Radhakrishan Laxminarayan Toshniwal* v. *Shridhar Ramchandra Alshi & Ors*. (supra) that the right of pre-emption is a weak right. He submitted that considering the fact that the respondent No.1 has been in possession of the land since last 19 years and the land is contiguous to her other land and had in fact merged with her other land, any order passed by this Court ordering transfer of the land to the appellant would result in fragmentation of the land holding of the respondent No.1, and will result in gross miscarriage of justice.

9. Section 16(3) of the Act is quoted herein below:

"16(3)(i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer or a *raiyat* of adjoining land, any co-sharer of the transferor or any *raiyat* holding land adjoining the land transferred, shall be entitled, within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed:

Provided that no such application shall be entertained by the Collector unless the purchase money together with a sum equal to ten percent thereof is deposited in the prescribed manner within the said period.

(ii) On such deposit being made, the co-sharer or the *raiyat* shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (i) is pending for decision:

Provided that where the application is rejected, the co-sharer or the *raiyat* as the case may be, shall be evicted, from land and possession thereof shall be restored to the transferee and the transferee shall be entitled to be paid a sum equal to ten percent of the purchase money out of the deposit made under clause (i).

(iii) If the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be specified in the order and, if he neglects or refuses to comply with the direction, the

procedure, prescribed in Order XXI, Rule 34 of the Code of Civil Procedure, 1908 (V of 1908), shall be, so far as may be, followed."

A plain reading of Section 16(3)(i) of the Act would show that any "co-sharer of the transferor" is entitled to make an application for the transfer of the land to him. Hence, the expression "co-sharer of the transferor" would mean co-sharer in the land transferred.

10. Accordingly, the first question which has to be decided in this case is whether the appellant was a co-sharer of the transferor in the land which was transferred by way of sale to respondent No.1. The land transferred to the respondent No. 1 under the sale-deed executed by Brij Bihari Singh and Rash Bihari Singh, the transferors, was 1.30 acres comprising Revisional Survey Plot Nos.1501, 1512, 1513, 1514 and 1527 of Khata No.229 in village Paiga in District Bhojpur in Bihar. The Board of Revenue in para 5(a) of its order dated 21.09.1996 in case No. 301 of 1993, copy of which has been annexed in the paper book as Annexure P-4, has recorded the following findings with regard to Revisional Survey of Khata No.229 in village Paiga:

> '5(a) The revisional survey khatiyan of Mauja Paiga Khata no.229 shows that there are as many as 36 plots under this khata with a total area of 25.2 acres. The khata has been prepared in the following manner:
>
> > "Hirdaya Singh and Devi Dayal Singh and Chandreshwar Singh sons of Deoki Singh 9 shares equal, Raja Ram Singh and Rajendra Singh son of Yadunandan Singh 2 shares equal and Braj Bhan Singh son of Budh Ram Singh 1 share."
>
> It is thus clear that the shares of each co-parcener has been numerically defined and determined even in the R.S. Khatiyan. Not only the shares of Deoki Singh (9 shares), Yadunandan Singh (2 shares) and Budh Ram Singh (1 share) have been defined in the lands of khata no.229, but even the shares of the three sons of Deoki Singh, 2 sons of Yadunandan Singh and the only son of Budh Ram Singh have been ascertained and defined.'

The Board of Revenue has further found that Chakbandi Khatiyan has been prepared on the identical lines as the Revisional Survey Khatiyan.

11. It thus appears that the land in Khata No.229 has 36 plots and is of a total area of 25.2 acres and in this land in khata No.229 the family of Deoki Singh had 9 shares and in these 9 shares, the three sons of Deoki Singh, namely, Hirdaya Singh, Devi Dayal and Chandreshwar Singh had equal shares but the land had not been partitioned by metes and bounds. Consequently, it could not be ascertained which particular plot of land or part of plot of land in khata No.229 was owned by Hirdaya Singh, Devi Dayal or Chandreshwar Singh. In other words, all the three sons namely, Hirdaya Singh, Devi Dayal and Chandreshwar Singh were co-sharers in the 9 shares of the land in khata No.229. The appellant belongs to the sub-branch of Hirdaya Singh, whereas the transferors of the land, namely, Brij Bihari Singh and Rash Bihari Singh belong to the sub-branch of Chandreshwar Singh. The appellant and the transferors were, therefore, co-sharers in the land transferred to respondent No.1. The Board of Revenue appears to have wrongly construed the Revisional Survey Khatiyan and Chakbandi Khatiyan in respect of khata No.229 and has arrived at an erroneous finding that the appellant and the transferors of the land were not co-sharers of the land. The Board of Revenue has also relied on the recitals in the sale-deeds dated 11.01.1980 and 16.01.1981 for recording a finding that the appellant and the transferors of the land transferred were not co-sharers. In our considered opinion the recitals in the two sale-deeds made by the parties to the sale deeds were not relevant rather the entries in the Revisional Survey Khatiyan and the Chakbandi Khatiyan made by public authorities were relevant for deciding whether the appellant and the transferors

of land were co-sharers in respect of the land and we have found that as per the Revisional Survey Khatiyan of the land in khata No.229 and the Chakbandi Khatiyan, the appellant and the transferors were co-sharers of the land transferred to respondent No.1.

12. The appellant being a co-sharer of the transferor in the land transferred to respondent No.1 had a statutory right of pre-emption under Section 16(3) of the Act. As the language of Section 16(3)(i) shows, any co-sharer "shall be entitled" within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the transfer deed. It is not disputed that the appellant in fact made such an application within three months of the date of registration of the sale deed executed by the transferors in favour of respondent No.1 and also deposited the purchase money together with sum equal to 10% thereof in the prescribed manner within the period of three months as provided in the proviso of Section 16(3)(i). The Deputy Collector, therefore, had no discretion but to allow the application considering the mandatory nature of the right of pre-emption conferred by Section 16(3) of the Act.

13. The learned Single Judge deciding the writ petition and the Division Bench of the High Court deciding the L.P.A. appear to have taken a view that the right of pre-emption is a weak right, presumably because the Division Bench of Patna High Court in *Sudama Devi* v. *Rajendra Singh* (AIR 1973 Patna 199) and learned Single Judge in *Ram Pravesh Singh* v. *The Additional Member, Board of Revenue and Others* (supra), has taken this view. Whatever may have been the views of the Patna High Court and this Court in the earlier decisions cited by learned counsel for the respondent No.1, a five Judge Bench of this Court in *Shaym Sunder & Ors*. v. *Ram Kumar & Anr*. (supra) has now held that where a right of pre-emption is recognized by statute, it has to be treated as mandatory and not discretionary. The relevant passage from the judgment in

Shaym Sunder & Ors. v. *Ram Kumar & Anr*. (supra) is quoted herein below:

> "17. ....The right of pre-emption of a co-sharer is an incident of property attached to the land itself. It is some sort of encumbrance carrying with the land which can be enforced by or against the co-owner of the land. The main object behind the right of pre-emption, either based on custom or statutory law, is to prevent intrusion of a stranger into the family-holding or property. A co-sharer under the law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of the property purchased by him, meaning thereby that where a co-sharer transfers his share in holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding in an area where the law of pre-emption prevails. Such a right at present may be characterisd as archaic, feudal and outmoded but this was law for nearly two centuries, either based on custom or statutory law. It is in this background the right of pre-emption under statutory law has been held to be mandatory and not mere discretionary........"

Thus, even if there has been a long lapse of 19 years, the High Court could not have rejected the claim of the appellant for pre-emption when the claim was recognized by the statute, had been lodged in accordance with the statute and within the time prescribed by the statute and in the manner provided by the statute.

14. The respondent No.1, however, claims to be a boundary raiyat saying that she had purchased under an earlier sale-deed dated 11.01.1980 a plot of land adjoining to the land in respect of which appellant has applied for pre-emption under Section 16(3) of the Act. Learned counsel for the respondent No.1 has relied on the decision of the Patna High Court in *Ram Pravesh Singh v. Additional Member, Board of Revenue* (supra) for the proposition that the claim of pre-emption was not maintainable

against a person who holds an adjacent plot of land. This view of the Patna High Court is based upon its earlier judgment in *Ramachabila Singh v. Ramsagar Singh* (1969 BLJR 203 : 1968 PLJR 279) that if the transferee happens to be an adjacent raiyat in respect of some other plots, a co-sharer cannot claim any right of pre-emption under Section 16(3) of the Act. As a matter of fact, Section 16(3) confers the right of pre-emption not only on the co-sharer but also on the raiyat holding land adjoining to the land transferred. We are, however, of the considered opinion that a complete stranger who was not originally a raiyat holding land adjoining to the land transferred cannot be allowed to defeat the right of pre-emption of a co-sharer by first purchasing an adjoining plot of land and thereafter claiming to be a raiyat holding land adjoining to the land transferred. The decisions of the Patna High Court are cases of original boundary raiyats resisting the claim of pre-emption by a co-sharer of the transferred land. The object of Section 16(3) of the Act is to recognise the right of pre-emption of the co-sharer of the transferor or any raiyat holding land adjoining to the land transferred and this object would be frustrated if strangers are allowed to first buy one plot of land and then resist the claim right of pre-emption of a co-sharer or a boundary raiyat on the basis of such first purchase of a plot of land.

15. For the aforesaid reasons, we set aside the impugned judgment of the Division Bench in L.P.A. No. 127 of 2000, the order of the learned Single Judge in C.W.J.C. No.7714 of 1997 and the order of the Board of Revenue and the Deputy Collector and direct the concerned Collector to direct respondent No.1 to convey the land in favour of the appellant by executing and registering a document of transfer and put the appellant in vacant possession of the land in accordance with the provisions of Section 16(3) of the Act.

The appeal is accordingly allowed with no order as to costs.

D.G. Appeal allowed.

GOPAL SINGH AND ORS.
v.
STATE OF M.P.
(Criminal Appeal No.1297 of 2008)

MAY 12, 2010

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

Appeal – Appeal against acquittal – Allowed by High Court – Justification – Held: On facts, not justified – If trial court's judgment is well based on the evidence and the conclusion drawn in favour of the accused is possible, High Court would not be justified in interfering on the premise that a different view could also be taken – Though High Court is entitled to reappraise the evidence, there should be substantial and compelling reasons for setting aside an acquittal order and making one of conviction – In the case at hand, the trial court gave positive findings with regard to various aspects of the prosecution story – The High Court was not able to meet the reasons which weighed with the trial court in drawing its conclusion – Case did not call for interference by High Court.

According to the prosecution, due to serious enmity on account of land dispute, the appellants severely beat two persons with "lathis", "lohangis" and "farsas" thereby causing their death. The prosecution relied primarily on the eye–witness account of PW5 and on the oral dying declarations made by the two deceased to PW4, PW9, PW10 and PW11. In addition, the prosecution relied on the recoveries made pursuant to the disclosure statements of the accused.

The trial Court held it to be a case of delayed FIR. It found the dying declarations unbelievable, the evidence of the solitary eye-witness PW5 totally unnatural, and the

investigation completely irresponsible and shoddy, and accordingly acquitted the accused-appellants.

Aggrieved by the judgment of acquittal, the State Government filed appeal in the High Court which was allowed.

In this Court, it was contended by the appellants, that the High Court was remiss in upsetting the order of acquittal as the trial court had by a very cogent and detailed judgment considered every aspect of the matter and acquitted the accused, and the High Court had ignored the basic principle that if the view taken by the trial court was possible on the evidence, no interference should be made.

Allowing the appeal, the Court

HELD: 1. The High Court's power while converting an acquittal into a conviction is no longer a matter of speculation and debate. It is now well settled that if the trial court's judgment is well based on the evidence and the conclusion drawn in favour of the accused was possible thereof, the High Court would not be justified in interfering on the premise that a different view could also be taken and though the High Court was entitled to reappraise the evidence there should be substantial and compelling reasons for setting aside an acquittal order and making one of conviction. [Para 7] [1071-C-D]

2. A bare perusal of the record and the findings recorded by the trial court reveal that the present case is not one of the category which would call for interference by the High Court. The trial court has given positive findings with regard to the various aspects of the prosecution story. The High Court has, in the course of its judgment, not been able to meet the reasons which weighed with the trial court in drawing its conclusion. The

fact that the first report had been recorded at about 1 p.m. and suppressed by the prosecution has been largely ignored by referring to the first information recorded at about 4.45 p.m. after the Ruqa had been sent by Sub-Inspector from the place of incident to the Police Station. The High Court has also ignored the fact that there was no evidence to show as to when special report had been dispatched to or received by the Magistrate. The inference drawn by the Trial Court, therefore, that the first information of 1 p.m. had been suppressed by the prosecution as the names of the assailants were not known and that there was no evidence to confirm the time of the recording of the FIR shortly after 4.45 p.m. as there was no evidence of the dispatch or delivery of the special report, which cast clearly suspicion even on this part of the prosecution story, has not been dealt with by the High Court. [Para 8] [1071-A-H; 1072-A-B]

3. The High Court has examined the reliability of the oral dying declarations made by the two deceased to the four witnesses but while observing that there were substantial discrepancies inter-se each of them, has still chosen to rely on their statements. The Court has ignored the statement of the Dr. who opined that the injured would have been rendered unconscious within 10 to 15 minutes after receiving their injuries by opining that this fact would vary from person to person. This would undoubtedly be true, but the doctor's statement is only one of the factors which had weighed with the Trial Court in rendering its opinion. Even otherwise, an oral dying declaration made to a person who had very serious enmity with the accused should be accepted with a little hesitation and reservation. [Para 9] [1072-C-D]

4. The High Court has accepted the statement of PW5 as the eye witness of the incident ignoring the fact that his behaviour was unnatural as he claimed to have

rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the specious and unacceptable plea that he feared for his own safety. Therefore, the judgment of the High Court is erroneous for the above reasons. [Paras 10, 11] [1072-E-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1297 of 2008.

From the Judgment and Order dated 24.03.2008 of the High Court of Judicature of Madhya Pradesh at Jabalpur in Criminal Appeal No. 60 of 1993.

Fakhruddin, Munawar S. Aalam, Karim Ansari, Bharat Bhushan, Raj Kishor Choudhary, Yusuf Khan, Rauf Rahim, Yadunandan Bansal, Minu Sharma, Gulshan Jahan and Aftab Ali Khan for the Appellants.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. The prosecution story is as under:

1. On the 19th June 1990, the two deceased Rajmohan and Niranjan Singh had gone to Jammusarkala to buy sugar and while they were returning to their village and were passing through the nearby forest, they were severely beaten by the six accused with “lathis”, “lohangis” and “farsas”. Information of the incident was given by Maina Banjara PW3 to Daulat Singh PW4 and Sumer Singh PW10. Sumer Singh and Maina Banjara and several others then returned to the spot whereafter Niranjan Singh and Rajmohan (injured) made oral dying declarations that they had been beaten by the six accused with the aforementioned weapons. The two died a short while later. Intimation of the incident was also received in Police Station

Berasia at 3.40 p.m. by telephone and was recorded in Ex.P-3 on which Sub-Inspector O.P.Katiyar PW13 reached the place of incident along with a police force and found the dead bodies. A Ruqa was recorded at 4.40 p.m. at the site and on its basis a formal FIR was registered in the Police Station. The dead bodies were thereafter dispatched to the hospital for post-mortem which was performed by Dr. R.K.Sharma PW1 who found 28 injuries on each of the two deceased. During the course of the investigation, the accused were arrested and on the basis of their disclosure statements, the weapons of offence were also recovered. The police also ascertained that the two parties were very closely related inter-se and that there was gross enmity between them with respect to certain agricultural land. On the completion of the investigation, the accused were charged for an offence punishable under Section 302 read with Section 34 of the IPC as they pleaded not guilty, they were brought to trial.

2. The prosecution in support of his case relied primarily on the eye – witness account of Feran Singh PW5 and on the oral dying declarations made by the two deceased to Daulat Singh PW4, Harnath Singh PW9, Sumer Singh PW10 and Shivraj Singh PW11. In addition, the prosecution relied on the recoveries made pursuant to the disclosure statements of the accused. The prosecution case was then put to the accused and the plea taken was of serious enmity on account of a land dispute between them and Daulat Singh PW4 as the latter was keen to take over their agricultural land. The trial court recorded a comprehensive judgment and discussed the evidence under two broad heads (1) the eye witness evidence of Feran Singh PW5 and (2) the circumstantial evidence which included the motive behind the incident and the dying declaration of the deceased and the recoveries of the weapons of offence. The Court then examined the evidence of the prosecution in the background of the motive and observed that Maharaj Singh accused was the son of Balwant Singh from his first wife and the other accused were sons of Maharaj Singh whereas PW4

Daulat Singh and PW9 Harnath Singh were also sons of Balwant Singh though from a second wife and Feran Singh PW5 was son of Daulat Singh PW and Shivraj Singh PW11 was son of Sumer Singh PW10, meaning thereby all the witnesses belonged to one large group. The Court also observed that from the evidence on record, it was amply clear that the relations between the two sets of brothers were very strained and several criminal litigations inter-se them and pertaining to a land dispute had started in the year 1984 and were subsisting even on the date of murder and that the periodic quarrels between them had caused great friction in the family. The Court then went on to examine the prosecution story and recalled that two different stories had been projected by the prosecution, first, that a report had been filed by Daulat Singh PW at the Police Station immediately after the crime had been committed at about 1 p.m. and the second that information had been received on telephone as per Ex.P3 at 3.45 p.m. on which Sub-Inspector Katiyar PW13 had reached the place of incident at 4p.m and after spot inspection at 4.45 p.m. had initiated the recording of the FIR. The Court, however, disbelieved the statement of Sub Inspector that he had reached the place of incident at 4 p.m. observing that if the information had been received at 3.45 p.m. it would not have been possible for him to have covered the 18 km distance through a very rustic rural road within 20 minutes. The Court, accordingly, held that on account of the discrepancy with regard to the lodging of the FIR at 1 p.m. or after 4.45 p.m., the only inference that could be drawn was that till 1p.m. the names of the accused were not known and that the report of 1 p.m. had been withheld by the prosecution. The Court then went into the alternative that assuming that the FIR had indeed been recorded shortly after 4.45 p.m. and the incident had taken place at 10 or 10.30 a.m. about one km away from the village and the time taken in conveying the information to the village by Maina Banjara to Daulat Singh and Sumer Singh, it appeared to be a case of a delayed FIR. The Court further observed that there was no evidence to show as to when the copy of the FIR had been

received by the Magistrate, as provided by Section 157 of the Code of Criminal Procedure and finally concluded on this aspect by observing:

> "it could be safely deduced that the FIR was finalized deliberately as an after-thought, after having dispatched the dead bodies for post-mortem examination. Under these circumstances, namely the way in which the FIR was filed, as to whether in point of fact, the FIR was registered at 4.45 p.m. or at 1 p.m., and the details regarding the crime, non-despatch of a copy thereof to the Magistrate, non-compliance of immediate recording of the incidence of crime, omission of the names of the accused persons in the text of the respective panchnamas on the bodies and also in the merge statements thereof, on perusal of all these circumstances, I come to the conclusion that the report was lodged with unwarranted delay and the prosecution has since failed to provide any logical explanation thereof. Under the above circumstances, prima facie the story put forth by the prosecution is highly doubtful."

3. The Court then examined the dying declarations that have been allegedly made by the two deceased shortly before their deaths to Daulat Singh PW4, Harnath Singh PW9 and Sumer Singh PW10. The Court referred to the broad principle underlying the recording of a dying declaration and emphasized that its veracity had to be adjudged carefully as the maker was not available for cross-examination and the Court was thus called upon to exercise great caution and for that purpose two broad factors had to be kept in mind, firstly, that the person making the dying declaration was physically capable of making it, and secondly that the statement, if made, represented the true state of affairs. The Court then examined the statement of the witnesses to the dying declaration and observed that as the evidence inter-se them was completely discrepant as to the manner in which the dying declaration had been made, a serious doubt was cast on the truthfulness of their testimony.

The Court also referred to the evidence of Dr. R.K.Sharma PW, the doctor who had performed the post-mortem examinations, and had found 28 wounds on each body, and observed that as per the statement of the doctor both the injured would have been rendered unconscious within 10 to 15 minutes looking to the critical nature of the wounds. The Court then tested the prosecution story on this basis and opined the incident had occurred around 9 or 10 a.m., as suggested, and Daulat Singh and Sumer Singh had taken an hour to reach the place of incident (as Daulat Singh had virtually admitted that they had reached the site of at 11 a.m.), it appeared to be extremely doubtful that Rajmohan and Niranjan Singh were in a position to make any statement. The Court also examined the statement of Harnath Singh PW9 and observed that it was a blatant lie and that it would have been impossible for him to reach the place of incident to become a witness to the oral dying declarations. The Court, accordingly, concluded that the statements of the aforesaid witnesses were totally contradictory and illogical and in point of fact the deceased were not in a position to make any statement and that under these circumstances, "the story of the dying declaration was totally made up, unnatural and non-dependable." The Court also examined the evidence of the solitary eye witness Feran Singh PW son of Daulat Singh and recorded a positive finding that the story projected by him was totally unnatural inasmuch that he had rushed to the village from the site after seeing the incident about I km away where his father, uncle, brothers, cousins and the entire family had been present, but he did not tell them as to what had happened but had, in fact, hidden himself on the plea that he feared for his own safety. The Court ultimately concluded that the evidence was against normal human behaviour and could not be deemed to be trust-worthy. The Court also held that the investigation in the matter was completely irresponsible and shoddy and the police had made no attempt to ascertain the identity of the person who had made the telephone call leading to the recording of Ex.P3 at 3.40 p.m. and the prosecution story appeared to have been built on the

assumption that as the relations between the parties were strained, it were the accused and accused alone, who were responsible for the double murders. The trial court, accordingly, acquitted the accused.

4. Aggrieved by the judgment of acquittal, the State of Madhya Pradesh filed an appeal in the High Court and the appeal has been allowed. The judgment of the High Court is under challenge before us after the grant of special leave.

5. It has been urged by Mr. Fakhruddin, the learned senior counsel for the appellants, that the High Court was remiss in upsetting the order of acquittal as the trial court had by a very cogent and detailed judgment considered every aspect of the matter and acquitted the accused, and that the High Court had ignored the basic principle that if the view taken by the trial court was possible on the evidence, no interference should be made. It has been highlighted that the trial court had considered the evidence under two broad heads and recorded a positive finding that the first report of the incident at about 1 p.m. had been suppressed by the prosecution and the report recorded after 4.45 p.m. was, thus, not the first information report but even assuming that it was the first report, the fact that there was no evidence to show that the special report had been delivered to the Magistrate belied the prosecution story that it had been recorded at about 4.45 p.m. It has also been pointed out that the serious animosity between the parties was proved on record and several litigations that were continuing since 1984 was the evident cause for the false implication of the accused, who were the father, Maharaj Singh and his five sons. It has further been submitted that the prosecution had placed primary reliance on the dying declarations made by the two deceased to four different persons and in the light of the statement of Dr. Sharma PW that the injured could not have remained conscious for more 10 or 15 minutes after sustaining the injuries, the story of the oral dying declarations allegedly made about two hours thereafter could not be believed. It has further been pointed out that the conduct of Feran Singh PW5 the solitary eye witness

was completely unnatural and belied his presence.

6. Mrs. Vibha Dutta Makhija, the learned counsel appearing for the State has, however, supported the judgment of the High Court and has argued that the High Court was justified in believing the prosecution story as the incident had happened all of a sudden and a quick and clock work like investigation could not be expected in India's rural set up.

7. We have considered the arguments advanced by the learned counsel for the parties. The High Court's power while converting an acquittal into a conviction is no longer a matter of speculation and debate. It is now well settled that if the trial court's judgment is well based on the evidence and the conclusion drawn in favour of the accused was possible thereof, the High Court would not be justified in interfering on the premise that a different view could also be taken and though the High Court was entitled to reappraise the evidence there should be substantial and compelling reasons for setting aside an acquittal order and making one of conviction.

8. A bare perusal of the record and the findings recorded by the trial court reveal that the present case is not one of the category which would call for interference by the High Court. The trial court has given positive findings with regard to the various aspects of the prosecution story already referred to above. The High Court has, in the course of its judgment, not been able to meet the reasons which weighed with the trial court in drawing its conclusion. The fact that the first report had been recorded at about 1 p.m. and suppressed by the prosecution has been largely ignored by referring to the first information recorded at about 4.45 p.m. after the Ruqa had been sent by Sub- Inspector Katiyar from the place of incident to the Police Station. The High Court has also ignored the fact that there was no evidence to show as to when special report had been dispatched to or received by the Magistrate. The inference drawn by the Trial Court, therefore, that the first information of 1 p.m. had been suppressed by the prosecution as the names

of the assailants were not known and that there was no evidence to confirm the time of the recording of the FIR shortly after 4.45 p.m. as there was no evidence of the dispatch or delivery of the special report, which cast clearly suspicion even on this part of the prosecution story, has not been dealt with by the High Court.

9. The High Court has examined the reliability of the oral dying declarations made by the two deceased to the four witnesses but while observing that there were substantial discrepancies inter-se each of them, has still chosen to rely on their statements. The Court has ignored the statement of Dr. Sharma PW who opined that the injured would have been rendered unconscious within 10 to 15 minutes after receiving their injuries by opining that this fact would vary from person to person. This would undoubtedly be true, but the doctor's statement is only one of the factors which had weighed with the Trial Court in rendering its opinion. Even otherwise, an oral dying declaration made to a person who had very serious enmity with the accused should be accepted with a little hesitation and reservation.

10. We also find that the High Court has accepted the statement of Feran Singh PW5 as the eye witness of the incident ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the specious and unacceptable plea that he feared for his own safety.

11. We are, therefore, of the opinion that the judgment of the High Court is erroneous for the above reasons. We, accordingly, allow the appeal and direct the acquittal of the accused. If they are in custody, they shall be released forthwith. If they are on bail, their bail bonds shall stand discharged.

B.B.B. Appeal allowed.

RANVEER YADAV
v.
STATE OF BIHAR
(Criminal Appeal No. 188 of 2009)

MAY 12, 2010

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

Contempt of Courts Act, 1971 – ss. 12(1) explanation, 2(c)(ii), 19(1)(b) – Contempt of court – Apology in contempt proceeding – Held: It must be bonafide and to the satisfaction of the court – Apology must be offered at the earliest possible opportunity – Belated apology hardly shows contrition which is the essence of the purging of a contempt – Court may refuse to accept apology though not belated but is without real contrition and remorse and was merely tendered as a weapon of defence – On facts, conviction and sentence of main contemnor by High Court for disrupting the court proceedings which forced the judge to leave, justified – His act is a clear case of criminal contempt in the face of the court – In show cause notice main contemnor did not offer any apology rather tried to justify his act – Apology was offered in a subsequent show cause reply which was a belated apology – Supreme Court Rules, 1966 – Or. XXI r. 15 (1)(e).

BH, BM, PN and MD are accused in a Sessions trial case and the appellant was the witness in the case and was to be cross-examined. On the fateful day, all of them disrupted the proceedings by aggressively exchanging heated words and creating unpleasant scenes in court, forcing the judge to leave the room. The Additional Sessions Judge made a reference to High Court. The High Court treated the same as reference made under section 15(2) of the Contempt of Courts Act, 1971 and issued show cause notice to the contemnors. It held that the appellant was the main person responsible for the

disruption, who acted in a motivated and high handed manner. The High Court convicted the appellant for the contempt of lower court. He was sentenced to a simple imprisonment for two months with fine of Rs. 2000/-. The High Court accepted the unqualified apology of the other contemnors and let them off. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. In the facts of the case and on the materials on record, it is clear that the case of the appellant that in the show-cause notice which was given to appellant, no different role has been attributed to him and he cannot be treated differently by the High Court in the matter of awarding punishment cannot be accepted as the appellant's case stands on a different footing. In fact the appellant took the main role in causing disruption and there was no lack of opportunity on his part in answering the charges against him. The charges put against him must be read in a practical sense and cannot be read in a pedantic manner. All the constituents of the charges were stated in the show-cause notice and the appellant understood the charges and gave the reply. Nowhere in the reply the appellant raised any difficulty in understanding the charges. It does not appear that any contention was raised by the appellant before the High Court about any vagueness in the charges or about furnishing inadequate particulars in the charges. This argument of the counsel for the appellant only before this Court and that too without a proper factual basis cannot be entertained. [Para 19] [1081-F-H; 1082-A-B]

1.2. From the facts of the case it is clear that the offending acts of the appellant are specifically coming under section 2(c)(ii) of the Contempt of Courts Act, 1971. Due conduct of any judicial proceeding is a matter of high public importance as it is inextricably connected with rule

of law on which is based the constitutional mode of governance in this country. That is why the framers of the Act preceded the expression interfere with the words "tends to" and it has been further emphasized by addition of word 'due' before "course of any judicial proceedings". The legislature does not waste words. Therefore, every word used in section 2(c)(ii) must be given its proper and natural meaning. Thus read, section 2(c)(ii) must be given a broad sweep so as to include within it even any attempt to interfere with the due course of a judicial proceeding. The word 'due' is very crucial in this context and must mean a natural and proper course of judicial proceeding. [Paras 21 and 22] [1082-F-H; 1083-A]

1.3. Section 2(c)(ii) has been enacted to protect apart from sanctity, the regularity and purity of a judicial proceeding. It is based on principles of high public policy. That is why contempt power is said to be an inherent attribute of a Superior Court of Record. This power has not been given to the subordinate judiciary, but in an appropriate case, subordinate judiciary can make a reference to the High Court under section 15 (2) of the Act. Thus, when High Court exercises its power on a reference under section 15(2) of the Act, it is virtually exercising the same as a guardian of the subordinate judiciary to protect its proceedings against an outrage and affront. In exercising such power, the High Court being a 'Court of Record' and the highest judicial authority in the State is discharging its jurisdiction '*in loco parentis*' over subordinate judiciary in that State. Therefore, there is something in the nature of High Court's power under section 15(2) of the Act which couples it with a duty. The duty is obviously to uphold the rule of law. But there is a rider. Contempt power has to be exercised with utmost caution and in an appropriate case and that is why High Court has been

entrusted with it. [Paras 23 and 24] [1083-B-E; 1084-A]

1.4. The offending acts of the appellant constitute contempt in the face of Court. When contempt takes place in the face of the Court, peoples' faith in the administration of justice receives a severe jolt and precious judicial time is wasted. Therefore, the offending acts of the appellant certainly come within the ambit of interference with the due course of judicial proceeding and are a clear case of criminal contempt in the face of the Court. The High Court, in the impugned judgment was correct in holding the appellant guilty and also in punishing him with the sentence it has imposed. It appears in the show cause notice, which was given by the appellant, initially he did not offer any apology. Rather the appellant tried to justify. The apology was offered in a subsequent show cause reply. Therefore, it is a belated apology. [Paras 25 and 26] [1084-B-E]

1.5. Under Explanation to section 12(1) of the Act, the Court may reject an apology if the Court finds that it was not made bonafide. Under section 12, it has been made very clear that the apology must be to the satisfaction of the Court. Therefore, it is not incumbent upon the Court to accept the apology as soon as it is offered. Before an apology can be accepted, the Court must find that it is bonafide and is to the satisfaction of the Court. However, Court cannot reject an apology just because it is qualified and conditional provided the Court finds it is bonafide. [Para 27] [1084-E-G]

1.6. An apology in a contempt proceeding must be offered at the earliest possible opportunity. A belated apology hardly shows the 'contrition which is the essence of the purging of a contempt'. Apart from belated apology in many cases such apology is not accepted unless it is bonafide. Even if it is not belated where apology is without real contrition and remorse and was

merely tendered as a weapon of defence, the Court may refuse to accept it. [Paras 28, 30 and 33] [1084-G; 1085-B-C, F]

1.7. The judgment of the High Court is upheld. The appellant is to serve the sentence in terms of the High Court order. Notices issued on other respondents are discharged. [Para 34] [1085-G]

Debabrata Bandopadhyay and Ors. vs. The State of West Bengal and Anr. **AIR 1969 SC 189;** *Principal, Rajni Parekh Arts, K.B. Commerce and B.C.J. Science College, Khambhat and Anr. vs. Mahendra Ambalal Shah* **1986 (2) SCC 560;** *Secretary, Hailakandi Bar Association vs. State of Assam and Anr.* **(1996) 9 SCC 74;** *Chandra Shashi vs. Anil Kumar Verma* **(1995) 1 SCC 421, referred to.**

Case Law Reference:

AIR 1969 SC 189	**Referred to.**	**Para 29**
1986 (2) SCC 560	**Referred to.**	**Para 31**
(1996) 9 SCC 74	**Referred to.**	**Para 32**
(1995) 1 SCC 421	**Referred to.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 188 of 2009.

From the Judgment & Order dated 03.09.2008 of the High Court of judicature at Patna in Contempt Jurisdiction in Original CR Misc. (DB) No. 8 of 2008.

P.S. Mishra, Kumar Rajesh Singh, Sishir Pinaki, Thathagat H.Vardhan, Upendra Mishra, Dhruv Kr. Jha and Niranjana Singh for the Appellant.

Nagendra Rai, P.H. Parekh, Gopal Singh, Manish Kumar, Sameer Parekh, Ajay Kumar Jha, Somanadri Gour, Pallavi

Srivastava (for Parehk & Co.) Shangtanu Sagar, Smarhar and T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. This is a statutory appeal under Section 19(1)(b) of the Contempt of Courts Act, 1971 read with Order XXI Rule 15(1)(e) of the Supreme Court Rules, 1966 from the final judgment and sentence dated 3.9.2008 of the High Court of Patna in Original Cr. Misc.(DB) No. 8 of 2008.

2. The said Original Misc. (DB) No. 8 of 2008 was a reference through a communication dated 22.4.2008 by the 1st Additional Sessions Judge, Khagaria about an incident which happened in his Court on 13.2.2008. The High Court treated the same a reference made under Section 15(2) of the Contempt of Courts Act, 1971 (hereinafter, “the Act”) made by the 1st Additional Sessions Judge, Khagaria (hereinafter, “the Judge”).

3. The reference by the Judge was made for the reason that during the course of the Sessions Trial No.46/93 on 13.02.2008, five of the alleged contemnors were on one side and the sixth contemnor, the appellant Ranveer Yadav, on the other side, and all of them disrupted the proceedings by aggressively exchanging heated words and creating unpleasant scenes in Court. The decorum and dignity of the Court was so much threatened that the Judge was forced to rise.

4. Out of the six contemnors, Bharat Yadav, Bimal Yadav, Ajay Yadav, Pandav Yadav and Madan Yadav are accused in the Sessions Trial No. 46/93. The appellant Ranveer Yadav, an witness in the case and was due to be cross-examined on that day, i.e. 13.02.2008.

5. The High Court on the basis of such reference issued notice on 11.07.2008 to show cause why the alleged contemnors should not be held guilty of Criminal Contempt for their acts set out in the reference.

6. In the joint affidavits filed by the first five contemnors, they tendered their apologies for creating the disturbance and stated that the main person responsible for the ruckus was the appellant, Ranveer Yadav. They stated the scene was created by him to delay his cross-examination.

7. The show cause submitted by Madan Yadav, who is 76 years old and is one of the accused in the Sessions Trial No. 46/93, is a crucial one. Madan Yadav stated that the appellant is the prime accused in a case of murder of Madan's son in 1998. In that case the appellant could be produced before the Trial Court for the purpose of framing charges only on the orders of the High Court. Madan further stated that he had been falsely implicated in the criminal case which was pending before the Court on the basis of a police complaint containing false allegations made by the brother of the appellant. The main reason for Madan's implication is to pressurize him to withdraw the earlier case relating to the murder of his son and which is pending against the appellant.

8. The High Court after noting these facts observed that the appellant, on many occasions came to the Trial Court with followers who helped him in creating a nuisance in Court. It also observed that several Additional Public Prosecutors had withdrawn themselves from criminal cases against the appellant in view of threats and intimidation they received from the appellant. On the date of incident, even the defence counsel was not spared as is apparent from the letter written by the defence counsel to the Presiding Officer.

9. The High Court found that appellant had also managed to postpone and delay his cross-examination on various occasions on the pretext of illness and non-appearance on the fixed dates.

10. It was also brought to the notice of the High Court that a case under Section 302 IPC in which the appellant was an accused had to be transferred to another district in view of

threats and intimidation given out by the appellant.

11. In the show cause submitted by the appellant Ranveer Yadav, he tried to justify his behaviour on 13.02.2008 by stating that on 12.12.2007, in the Court he had been informed that there would be a compromise. But he got miffed when the Additional Public Prosecutor made an appearance before the Court and he thought that the latter had appeared without the orders of the Public Prosecutor. On such justification of the appellant, High Court held that the appellant being a witness had nothing to do with the appearance of the public prosecutor and held that the appellant's misbehaviour was not justified.

12. With regard to his failure to appear before the Court on 1.3.2008, the appellant stated that he was not provided the police protection which he had asked for.

13. The High Court held that all the Contemnors were guilty of having committed criminal contempt and it relied on the letters of the two prosecution counsel as well as the defence counsel and came to the conclusion that the main person responsible for the disruption was the appellant who acted in a motivated and high handed manner to interfere in the due conduct of the proceeding.

14. High Court further held that the main culprit for the disruption in Court was the appellant. While accepting the unqualified apology of the other five contemnors and letting them off with admonition and severe warning, the appellant was sentenced to a simple imprisonment for two months with a fine of Rs.2,000/- and in default the appellant was to undergo a further imprisonment of one month.

15. This Court while issuing notice in this appeal passed an order dated 28.8.2009 asking the other five contemnors to show cause why the order of the High Court accepting their unconditional apology and directing them to be let off be not set aside. In the meantime, a further stay on the arrest of the

appellant was ordered extending the order whereby the appellant was given exemption from surrendering.

16. The five contemnors who were let off by the High Court filed their joint counter affidavit on 28.01.2010. While tendering their unqualified apology, they have given the same explanation as given before the High Court that the main person responsible for the disruptions was the appellant. In Paras IV as well as V of the counter affidavit, they have stated that the appellant behaved in an audacious manner and abused the counsel for the both sides and refused to be examined. They have also made allegations that the appellant is a very well connected person and has a political background with criminal antecedents.

17. In this case learned counsel for the appellant sought to argue that in a contempt proceeding, the High Court cannot take a different stand by punishing the appellant and letting the other appellants go unpunished even after holding that they are guilty of contempt.

18. Learned counsel also argued that in the show-cause notice which was given to the appellant, no different role has been attributed to him so he cannot be treated differently by the High Court in the matter of awarding punishment.

19. This Court is unable to appreciate the above contention of the learned counsel for the appellant. In the facts of the case and on the materials on record, it is clear that the case of the appellant stands on a different footing. In fact the appellant took the main role in causing disruption and there has no lack of opportunity on his part in answering the charges against him. The charges put against him must be read in a practical sense and cannot be read in a pedantic manner. All the constituents of the charges were stated in the show-cause notice and the appellant has understood the charges and has given the reply. Nowhere in the reply the appellant has raised any difficulty in understanding the charges. It does not appear that any

contention was raised by the appellant before the High Court about any vagueness in the charges or about furnishing inadequate particulars in the charges. This argument of the learned counsel for the appellant only before this Court and that too without a proper factual basis cannot be entertained.

20. Criminal contempt has been defined under Section 2(c) of the Act. The said definition is very wide. For a proper appreciation of the questions involved in this case the said definition is set out below:-

> "2(c). "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
>
> (i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
>
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
>
> (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;"

21. From the facts of the case it is clear that in this case the offending acts of the appellant are specifically coming under Section 2(c)(ii). Due conduct of any judicial proceeding is a matter of high public importance as it is inextricably connected with rule of law on which is based the constitutional mode of governance in this country. That is why the framers of the Act preceded the expression interfere with the words "tends to" and it has been further emphasized by addition of word 'due' before "course of any judicial proceedings".

22. We must remember that legislature does not waste words. Therefore, every word used in Section 2(c)(ii) must be given its proper and natural meaning. Thus read, Section 2(c)(ii)

must be given a broad sweep so as to include within it even any attempt to interfere with the due course of a judicial proceeding. The word 'due' is very crucial in this context and must mean a natural and proper course of judicial proceeding.

23. This Court, therefore, holds that Section 2(c)(ii) has been enacted to protect apart from sanctity, the regularity and purity of a judicial proceeding. This, we repeat, is based on principles of high public policy. That is why contempt power is said to be an inherent attribute of a Superior Court of Record. This power has not been given to the subordinate judiciary, but in an appropriate case, subordinate judiciary can make a reference to the High Court under Section 15 (2) of the Act, as has been done in this case. Thus when High Court exercises its power on a reference under Section 15(2) of the Act, it is virtually exercising the same as a guardian of the subordinate judiciary to protect its proceedings against an outrage and affront. In exercising such power, the High Court being a 'Court of Record' and the highest judicial authority in the State is discharging its jurisdiction '*in loco parentis*' over subordinate judiciary in that State. Therefore, there is something in the nature of High Court's power under Section 15(2) of the Act which couples it with a duty. The duty is obviously to uphold the rule of law. Here we may remember the views of Lord Chancellor Earl Cairns, who gave the concept of power coupled with duty, the most graceful articulation and which I quote:

> "...But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so..."
>
> [*Julius v. Lord Bishop of Oxford and another,* 5 A.C. 214 (H.L.) at 222-223]

24. These words resonate with a strange poignancy even today. But there is a rider. Contempt power has to be exercised with utmost caution and in an appropriate case and that is why High Court has been entrusted with it.

25. The offending acts of the appellant constitute contempt in the face of Court. When contempt takes place in the face of the Court, peoples' faith in the administration of justice receives a severe jolt and precious judicial time is wasted. Therefore, the offending acts of the appellant certainly come within the ambit of interference with the due course of judicial proceeding and are a clear case of criminal contempt in the face of the Court.

26. The High Court, in the impugned judgment, therefore was correct in holding the appellant guilty and also in punishing him with the sentence it has imposed. It appears in the show cause notice, which was given by the appellant, initially he did not offer any apology. Rather the appellant tried to justify. The apology was offered in a subsequent show cause reply. Therefore, it is a belated apology.

27. It may be noted that under Explanation to Section 12(1) of the Act, the Court may reject an apology if the Court finds that it was not made bonafide. Under Section 12 it has been made very clear that the apology must be to the satisfaction of the Court. Therefore, it is not incumbent upon the Court to accept the apology as soon as it is offered. Before an apology can be accepted, the Court must find that it is bonafide and is to the satisfaction of the Court. However, Court cannot reject an apology just because it is qualified and conditional provided the Court finds it is bonafide.

28. An apology in a contempt proceeding must be offered at the earliest possible opportunity. A belated apology hardly shows the 'contrition which is the essence of the purging of a contempt'.

29. This Court in the case of *Debabrata Bandopadhyay*

and others vs. The State of West Bengal and another reported in AIR 1969 SC 189, observed "an apology must be offered and that too clearly and at the earliest opportunity. A person who offers a belated apology runs the risk that it may not be accepted for such an apology hardly shows the contrition which is the essence of the purging of a contempt" (See para 7 page 193 of the report).

30. Apart from belated apology in many cases such apology is not accepted unless it is bonafide.

31. Even in a case of civil contempt this Court held in the case of *Principal, Rajni Parekh Arts, K.B. Commerce and B.C.J. Science College, Khambhat and another vs. Mahendra Ambalal Shah* reported in 1986 (2) SCC 560 that an apology offered at a late stage would encourage the litigants to flout the orders of Courts with impunity and accordingly the Court refused to accept the apology (See para 7 page 566 of the report).

32. Equally in the case of *Secretary, Hailakandi Bar Association vs. State of Assam and another* reported in (1996) 9 SCC 74, this Court in a case of criminal contempt refused to accept an apology which was belated. The Court held that such belated apology cannot be accepted because it has not been given in good faith (See para 24 page 82).

33. Even if it is not belated where apology is without real contrition and remorse and was merely tendered as a weapon of defence, the Court may refuse to accept it. (See *Chandra Shashi vs. Anil Kumar Verma,* (1995) 1 SCC 421).

34. For the reasons aforesaid, the appeal fails, the judgment of the High Court is affirmed. The appellant is to serve the sentence in terms of the High Court order. Notices issued on other respondents, namely, Bharat Yadav, Bimal Yadav, Ajay Yadav, Pandav Yadav and Madan Yadav are discharged.

N.J. Appeal dismissed.

EXECUTIVE ENGINEER, UTTARANCHAL POWER CORPORATION
v.
M/S. KASHI VISHWANATH STEEL LTD. & ORS.

(Civil Appeal No. 1106 of 2007)

MAY 12, 2010

[HARJIT SINGH BEDI AND T.S. THAKUR, JJ.]

Uttar Pradesh Electricity Reforms Act, 1999 – Notification dated 07.08.2000 – Tariff Rate Schedule for supply of electricity – Levy of 15% surcharge on electricity supplied directly from independent feeder – Agreement between applicant and U.P. Power Corporation for supply of electricity – Confusion as regard interpretation of tariff – Issuance of circular that if consumers connected to independent feeders did not want electricity supply for 500 hours, no surcharge could be levied, provided consumer intimates Executive Engineer – Grant of exemption to applicant – Meanwhile writ petition by some other company challenging levy of surcharge – High Court holding that consumers drawing power from independent feeders, entitled to rebate @1% for each 10 hours shortfall on bill amount – Bifurcation of U.P. Power Corporation – Establishment of Uttarakhand Power Corporation (UPC) – Withdrawal of exemption order by UPC and issuance of revised bill – Challenge to – Writ petition allowed – Appeal before Supreme Court – Allowed holding that UPC did not make any such promise to consumers, thus, doctrine of promissory estoppel not applicable – Said order recalled – On rehearing of appeal, held: In absence of averment that there was a promise made by U.P. Power Corporation regarding supply of energy without payment of surcharge and in absence of any material to show that applicant acted upon any such promise, doctrine of promissory estoppel not applicable – Order of High Court set aside – Doctrines – Promissory estoppel.

In terms of the Notification dated 07.08.2000, the Uttar Pradesh Electricity Regulatory Commission stipulated the Tariff Rate Schedule for the supply of electricity. It provided that the consumers opting for supply during the restricted/peak hours were to pay an additional surcharge of 15% on the bill amount. The consumers getting power supply from independent feeders emanating from 400/220/132 KV sub-station were to pay an additional surcharge of 15% on the bill amount subject to the assured electricity supply of minimum 500 hours in a month. In case of shortfall of electricity, the consumers were entitled to a rebate @1% for each 10 hours shortfall on the bill amount. The respondent company entered into an agreement with the Uttar Pradesh Power Corporation Ltd. for the supply of electrical energy. There was some confusion in regard to the interpretation of tariff. A circular was issued that if the consumers connected to independent feeders did not want electricity supply for guaranteed period of 500 hours, no surcharge of 15% could be levied provided they informed the Executive Engineer. The respondent wrote a letter to the Executive Engineer that they did not require assured supply of electricity for 500 hours and was granted exemption from payment of 15% surcharge from 24.10.2000. Meanwhile, LML company filed writ petition challenging levy of surcharge on the total energy bill payable by it. The High Court dismissed the petition. It held that the consumers drawing power from the independent feeders, were entitled to a rebate @1% for each 10 hours shortfall on the bill amount.

Thereafter, upon bifurcation of U.P. Power Corporation, the Uttarakhand Power Corporation (UPC) was established. By order dated 07.12.2001, UPC withdrew the exemption granted to the respondent by the erstwhile U.P. State Power Corporation Ltd. from 24.10.2000 and issued a revised bill. The respondent filed

writ petition challenging the same. The High Court allowed the writ petition holding that since the respondent company did not require assured supply of 500 hours electricity in a month, it was not liable to pay 15% surcharge; that the exemption granted by U. P. Power Corporation Ltd. was valid and in accordance with the Notification, thus struck down the demand raised by the Corporation. Thereafter, UPC as also LML company filed appeal before this Court. It was held that U. P. Power Corporation appears to have made a promise to consumers and the same was enforceable. As regard UPC it was held that it did not make any such promise to consumers, thus, promissory estoppel will not apply. The issue regarding surcharge on consumers drawing power from independent feeder was pending before the Regulatory Commission and thus, was withdrawn. The CA No. 1106 of 2007 filed on behalf of UPC was allowed. Thereafter, the respondent filed IA in CA No. 1106 of 2007, before this Court seeking clarification of the order that UPC did not make any promise to consumers. The respondent contended that the promise was made by U.P. Power Corporation which was binding upon the Corporation as also its successor-in-interest-UPC after the same came into existence, thus was enforceable. The IA was disposed of. It was directed that the judgment dated 13.12.2007 of this Court in CA No. 1106 of 2007 be recalled. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 In Writ Petition No. 942 of 2001 filed by the respondent-KVSL it was unequivocally admitted that the respondent-company was a consumer getting supply from an independent feeder emanating from 400/220/132 KV sub station. With the coming into existence of State of Uttarakhand w.e.f. 9th November, 2000 a new Power Corporation for the said State was established on 1st April, 2001. The respondent-company's further case is

that Uttarakhand Power Corporation did not charge 15% surcharge on monthly demand and energy charges for the period April 2001 to October 2001 and that it is only on 7th December, 2001 that the applicant received an intimation that circular dated 8th September had been revoked and letter dated 24th October cancelled. The U.P. Electricity Regulatory Commission had approved a new tariff by order dated 1st September, 2000 and U.P. State Power Corporation had issued a consequential Notification dated 10th July, 2001. The notification did not any longer provide for 15% surcharge from consumers getting supply of energy from independent feeders. [Para 17] [1101-B-E]

1.2. While according to the applicant-KVSL circular issued by the U.P. Power Corporation dated 8th September, 2001 giving an option to the consumers was valid and in accordance with law, there is not even a murmur in the writ petition filed by the respondent-company to the effect that either the U.P. Power Corporation or its successor had at any point of time made any promise to the company that supply of energy would be without any surcharge notwithstanding the fact that the tariff prescribed by the Regulatory Commission envisaged the levy of surcharge on electricity supplied directly from an independent feeder. There is similarly no averment whatsoever in the writ petition to the effect that the respondent-KVSL had altered its position acting upon any such promise. Not only that the agreements executed between the parties, namely, KVSL on the one hand and Power Corporation on the other also did not contain any unequivocal promise for supply of energy, no matter the supply was made from an independent feeder. In the absence of even an averment to the effect that there was a promise made by the U.P. State Power Corporation regarding supply of energy without payment of surcharge and in the absence of any material to show

that the respondent-KVSL had indeed acted upon any such promise it is difficult to see how the said company can insist upon any such non-existent promise being made good. Before a party can rely upon on the doctrine of promissory estoppel it must make a specific averments and place material on record to demonstrate that a promise was indeed made to it. There is neither any averment nor any material to support the plea of promissory estoppel in the case at hand. [Para 17] [1101-E-H; 1102-A-C]

1.3. The High Court of Uttrakhand did not find a case in favour of the respondent-KVSL. It is one thing to say that the plea of promissory estoppel is available to a consumer but an entirely different thing to say that such a plea has been made good by the material on record. Therefore it cannot be accepted that any promise was made by the U.P. State Power Corporation to the respondent-KVSL which could justify the grant of any mandamus in its favour for making good any such promise. The order passed by the High Court in the writ petition filed by respondent-KVSL is set aside. [Paras 18, 19 and 20] [1102-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1106 of 2007.

From the Judgment and order dated 17.01.2007 of the High Court of Uttaranchal at Nainital in W.P. No. 936 of 2001.

Shanti Bhushan, Niraj Sharma, Vikrant Singh Bais and Sumit Kumar Sharma, for the Appellant.

K.V. Viswanathan, Amit Bhandari, Neha, Abhishek Kaushik and Vikas Mehta, for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises

out of an order dated 17th January, 2007 passed by the High Court of Uttaranchal at Nainital whereby Writ Petition No.936 of 2001 filed by respondent M/s Kashi Vishwanath Steels Ltd. has been allowed and order dated 7th December, 2001 passed by the Executive Engineer (Electricity) Distribution Division, District Udham Singh Nagar, quashed.

2. Uttar Pradesh State Electricity Board was established by the State of Uttar Pradesh in terms of the provisions of the Electricity (Supply) Act, 1948. With the enactment of Uttar Pradesh Electricity Reforms Act, 1999 the Government constituted Uttar Pradesh Electricity Regulatory Commission. In terms of a Notification dated 7th August, 2000 the Commission stipulated the tariff for the supply of electricity effective from 9th August, 2000. The rate schedule for large and heavy power, inter alia, provided that consumers who opt for power supply during the restricted/peak hours shall pay an additional surcharge of 15% on the amount billed at the "Rate of Charge" under item-4A of the Schedule. It further provided that consumers getting power supply from independent feeders emanating from 400/220/132 KV sub-stations shall pay an additional surcharge of 15% on demand and energy charges subject to the condition that these consumers will get assured electricity supply of minimum 500 hours in a month. In case of shortfall in the guaranteed hours of electricity supply, the consumers were entitled to a rebate @ 1% for each 10 hours shortfall on the bill amount computed under "Rate of Charge". Relevant portion of the Tariff Rate Schedule HV-2 forming part of Notification dated 7th August, 2000, reads as under:

"...........

Notes:

(a) In respect of consumers who opt for power supply during restricted/peak hours an additional surcharge of 15% on the amount billed at the "Rate of Charge" under

item 4-A above, i.e. Demand Charge and Energy Charge shall be levied.

However, in respect of consumers getting power supply on independent feeders emanating from 400/220/132 KV sub-stations an additional surcharge of 15% on demand and energy charges shall be charged further subject to the condition that these consumers will get an assured supply of minimum 500 hours in a month. In case of short fall in above guaranteed hours of supply a rebate @ 1% for each 10 hours short fall will be admissible on the bill amount computed under "Rate of Charge".

......................."

3. Respondent- Kashi Vishwanath Steels Ltd. (hereinafter referred to as the 'KVSL' for short) is a public limited company registered under the Companies Act. On 9th November, 1995 it had entered into an agreement with Uttar Pradesh Power Corporation Ltd., Lucknow (respondent no.4 in this appeal) for the supply of electrical energy ipfor the production of Furnace and Steel Rolling Manufacturing (Process) unit at Narayan Nagar Kashipur in the form of three phase Alternating Current at a declared pressure of 33000 Volts and a power of not exceeding 4800 K.V. amperes. The said agreement was followed by a fresh agreement executed on 28th March, 2000 between the company and the Uttar Pradesh Power Corporation Ltd., inter alia, providing that the company shall pay for the supply of energy at the rates stipulated by the supplier from time to time and that the rate schedule applicable at the time of execution of the agreement could be revised at the discretion of the supplier. With the tariff prescribed by the U.P. Electricity Regulatory Commission becoming effective for the supply received by the consumer-company the latter became liable to pay in terms of the said tariff. Some confusion, however, appears to have arisen in regard to the interpretation of the tariff prescribed by the Commission particularly in relation to the levy of 15% surcharge upon consumers who drew power

from independent feeders. The Corporation purported to clear the mist by issuing a circular dated 8th September, 2000 whereunder it purported to give certain guidelines to the concerned subordinate officers and demanded strict compliance thereof. The circular, inter alia, provided that if consumers connected to independent feeders did not want electricity supply for the guaranteed period of 500 hours, no such surcharge of 15% could be levied provided they intimate to the Executive Engineer that they do not want the guaranteed supply for 500 hours. The relevant portion of the circular reads as under:

> "2.(a) In the rate schedule HV-2, as a result of the guarantee of 500 hours electricity supply of independent feeder from 400, 220 and 132 KV sub stations, 15% surcharge shall be levied. Consumers of this category shall be ensured 500 hours electricity supply per month. Due to lesser electricity supply than 500 hours, they shall be given 1% deduction for every ten hours in their electricity bill. If consumers connected with these independent feeders do not want guarantee of 500 hours electricity supply then, in that event, they shall not be imposed 15% surcharge in their bills. Such consumers shall intimate the Executive Engineer distribution by registered post that they do not want guarantee of 500 hours electricity supply. The Executive Engineer shall issue office memo in this regard. If any consumer of this category does not give any option then he shall be ensured 500 hours electricity supply and 15% surcharge shall be taken. S.S.O./Junior Engineer shall be responsible to ensure that the consumer in question does not use electricity during the restricted period. If consumers of this category use electricity in the restricted period also then they shall be charged 15+15 = 30% surcharge."

4. It was pursuant to the above circular that the KVSL addressed two letters one dated 6th October, 2000 and the

other dated 16th October, 2000 to the Executive Engineer of the Corporation to the effect that the former did not require the assured supply of electrical energy for 500 hours and that they may not be required to pay surcharge at the stipulated rate of 15%. On receipt of the said letters the Executive Engineer issued an office memo dated 24th October, 2000 granting exemption to the KVSL from payment of 15% surcharge subject to the unit complying with the other conditions stipulated in the memo.

5. In the meantime M/s L.M.L. Limited who had also entered into an agreement with U.P. State Electricity Board for supply of electrical energy for its factory at Kanpur filed Writ Petition No.40692 of 2000 in the High Court of Judicature at Allahabad challenging levy of surcharge on the total energy bill payable by it. The petitioner's case in that petition was that it was not only observing the peak hour restrictions but was not consuming power during the restricted hours hence was not liable to pay the surcharge of 15% being demanded from it. In the reply filed on behalf of the electricity supply company it was on the other hand stated that power was being supplied to the petitioner from an independent feeder emanating from 400/220/132 KVS and consequently the petitioner was liable to pay 15% surcharge under the tariff determined by the U.P. Electricity Regulatory Commission. It was also stated that payment of 15% surcharge by consumers drawing energy from an independent feeder was not subject to the observance of peak hours restrictions because those who consume power between 6 p.m. to 1 p.m. had to pay an additional amount of 1% surcharge on the energy charge.

6. A Division Bench of the High Court of Allahabad dismissed the writ petition mentioned above holding that there was absolutely no confusion of any kind in the tariff approved by the Regulatory Commission to call for any clarification in the form of the circular referred to earlier. It was also declared that for consumers drawing power from independent feeders

emanating from 400/220/132 KVS sub- stations there existed no provision in the tariff prescribed by theCommission requiring them to exercise any option in the matter. The only benefit that the consumers who drew power from such independent feeders but who do not get supply for the minimum 500 hours in a month were granted a rebate @ 1% for every 10 hours or part thereof if the continuous supply had failed. The High Court observed:

> "There is absolutely no ambiguity or confusion of any kind in the tariff as approved by the Commission. It clearly contemplates two categories of consumers. One category is of consumers who get power supply on independent feeders emanating from 400/220/132 KV sub stations. The two categories are wholly independent and distinct and they are not inter linked with each other. The third condition mentioned at the bottom of the box clearly shows that a consumer cannot get power supply in restricted hours as a matter of right and he shall have to take permission from UPPCL with intimation to the Commission. It follows that if a consumer does not apply for permission from UPPCL and such a permission is not granted he shall not get power supply in restricted hours and he will not be required to pay 15 per cent surcharge. However, so far as consumers getting power supply on independent feeders emanating from 400/220/132 KV sub stations are concerned, they have to pay 15 per cent surcharge on demand and energy charges. This levy of 15 per cent surcharge is dependent only upon the fact that the consumer is getting power supply on an independent feeder emanating from 400/220/132 KV sub stations and it is not dependent upon getting power supply in restricted hours. It is also noteworthy that for such category of consumers there is no provision for taking any option to the effect that he does not want an assured supply of 500 hours in a month. The only benefit provided to him in the tariff is that he is assured of supply of minimum 500 hours in a month and in case of shortfall in the guaranteed hours

> of the supply, a rebate @ 1 per cent 10 hours or part thereof shall be admissible on the total amount computed under "Rate of Charge".

7. Relying upon the view taken by the High Court in the above writ petition the Uttarakhand Power Corporation established upon bifurcation of the U.P. Power Corporation in terms of Section 63 of the U.P. Reorganisation Act issued an order dated 7th December, 2001 withdrawing the exemption granted to KVSL by the erstwhile U.P. State Power Corporation Ltd. The withdrawal order is in the following terms:

> "In the aforesaid context, in the light of judgment of the Hon'ble High Court, Allahabad the Uttar Pradesh Power Corporation Ltd. vide order No.1423/HC/UPCL/Five-1974+204 C/2000 dated 8.9.2000 has been cancelled from the date of its issuance itself. Accordingly, Memo No.3184/Vi.Vi.kha/dated 24.10.2000 is cancelled from the date of issuance 24.10.2000. The bills of M/s Kashiviswanath are ordered to be amended in accordance with the concerned billing tariff since 8.9.2000."

8. Aggrieved by the above order KVSL filed writ petition No.936 of 2001 before the High Court of Uttaranchal challenging Note (a) of Clause IV, Rate-Schedule in Category HV-2 List II of the tariff to be unconstitutional and for quashing the revised bill issued to KVSL. A mandamus directing Uttaranchal Corporation not to levy any surcharge on the supply energy to the consumer was also prayed for.

9.The above petition was allowed by the High Court of Uttaranchal by its order dated 17th January, 2007. The High Court took the view that since the petitioner KVSL did not require assured supply of 500 hours electricity in a month it was not liable to pay 15% surcharge and that the exemption granted by the U.P. Power Corporation Ltd. was valid and in accordance with the provisions of the Notification dated 8th September, 2000. The demand raised by the Corporation was

accordingly struck down. Aggrieved by the said order the Uttaranchal Power Corporation filed Civil Appeal No.1106 of 2007 in this Court which was heard alongwith Civil Appeal No.5789 of 2002 filed by LML Ltd. against the order passed by the High Court of Allahabad dismissing Writ Petition No.40692 of 2000 filed by the said company. Similar other appeals filed by other units against identical orders passed by the High Court of Allahabad were also heard and disposed of by this Court by a common order dated 13th December, 2007. This Court held that in so far as the U.P. Power Corporation had made a promise to anyone of the consumers the same was enforceable. In the case of Uttarakhand Power Corporation, however, this Court found no such promise to have been made to the consumer. Civil Appeal No.1106/2007 filed by the Uttarakhand Power Corporation against the judgment of the High Court of Uttarakhand was accordingly allowed on that basis. In so far as appeals arising out of the judgment of the Allahabad High Court and touching the question of surcharge on consumers drawing power from independent feeders were concerned the same were allowed to be withdrawn in view of the fact that several matters involving the said question were pending before the Regulatory Commission. The appellants were permitted to agitate the said point before the Commission. The relevant portion of the order passed by this Court may at this stage be extracted:

> "50. Similarly Uttaranchal Power Corporation also does not appear to have made such a promise. The doctrine of promissory estoppel in those cases also will have no application.
>
> 51. In view of the fact that several matters are pending before the Commission on question of independent feeder we need not express any opinion thereupon. If any appeal is pending before the Commission on the said question it would decide the same independent of the same irrespective of the result of this decision. We, therefore, without expressing any opinion on the said question, permit the appellants to agitate the same point before the Commission.
>
> 52. We, therefore, allow these appeals only to the extent mentioned hereinbefore in terms of the promise made by U.P. Power Corporation and allow the appeals on question of independent feeder to be withdrawn subject to the observations made by us hereinabove. 53. Civil Appeal No. 5789 of 2002 which relates to Kanpur Electricity Supply Company is dismissed.
>
> 54. Civil Appeal No. 1106 of 2007 filed on behalf of Uttaranchal Power Corporation is allowed.
>
> 55. There shall, however, be no order as to costs.
>
> SLP (C) No. 6721 of 2007
>
> The only issue involved in this petition is the question of independent feeder and the appeal being pending before the Commission, this special leave petition is permitted to be withdrawn.
>
> Sd/-
>
> (S.B. SINHA)
>
> Sd/-
>
> (HARJIT SINGH BEDI)"

10. I.A.No.2 of 2008 in Civil Appeal No.1106 of 2007 was filed in this Court for seeking clarification/modification of the above order primarily on the ground that the observations made in para 50 are erroneous since Uttarakhand Power Corporation was non-existent during the relevant period. There was according to the applicants no question of any such promise having been made to respondent-KSVL by a non-existent entity. The promise was according to the applicant made by U.P. Power Corporation which was binding upon the Corporation as

also its successor in-interest, namely, Uttarakhand Power Corporation after the same came into existence w.e.f. 9th November, 2001. It is further stated that the dispute in the instant case was with regard to the period between September 2000 when the exemption of surcharge was granted to the consumer and 1st September, 2001 when the same was discontinued.

11. In substance the case of the applicant was that a representation/promise had been made to it by the U.P. Power Corporation which promise having been held enforceable qua other units similarly situated as the applicant, could not be ignored in so far as the applicant was concerned. The promise was according to the applicant binding even upon the successor-Corporation, namely, Uttarakhand Power Corporation and the very fact that no promise was made by Uttarakhand Power Corporation did not make any difference so long as the liability arising out of the promise made by the U.P. State Corporation was clear and legally enforceable.

12. The above application was heard and finally disposed of by a Bench of Hon'ble Harjit Singh Bedi and Hon'ble Aftab Alam, JJ. with the following direction:

> "Learned counsel for the parties agree that the judgment dated 13.12.2007 of this Court be recalled in C.A. No.1106 of 2007. We order accordingly. C.A. No.1106 of 2007 will be heard on its own merit."

13. It is in the light of the above order that this appeal has been heard for disposal afresh.

14. The order of discontinuing the surcharge w.e.f. 1st September, 2001 reads:

> "The U.P.E.R.C. in terms has recorded that discontinuation of 15% surcharge is due to (i) inability/incapability on the part of UPPCL for technical and operational reasons to ensure the guaranteed supply of 500 hours, (ii) it was difficult for UPPCL even to distinguish between the two consumers on independent feeder who asked for assured supply and who do not, (iii) most of the consumers having opted against this agreement and (iv) the financial implication was also negligible if the scheme was discontinued."

15. Appearing for the appellant Mr. Shanti Bhushan, learned senior counsel strenuously argued that the circular issued by the U.P. State Corporation modifying the tariff prescribed by the Regulatory Commission was wholly without any jurisdiction and could be recalled by the Uttarakhand Power Corporation w.e.f. the date the same was issued. Inasmuch as such a withdrawal was ordered by the Corporation it committed no illegality especially when the withdrawal was supported by clear and authoritative pronouncement of the High Court of Allahabad stating that the grant of exemption tantamounted to modifying the tariff which modification the corporation was not legally competent to make. It was further argued by Mr. Shanti Bhushan that there was no question of any promise having been made either by U.P. State Corporation or the Uttarakhand Power Corporation. In the absence of any such promise and in the absence of any material to show that the petitioner had acted upon any such promise and changed its position, there was no question of interfering with the order withdrawing the exemption on the basis of the principles of equitable estopple.

16. On behalf of the respondent-KVSL, it was on the other hand, submitted that since a promise was found to have been made by the U.P. Power Corporation to other consumers and since the said promise has been held to be enforceable, there was no justification for taking a different view insofar as the respondent-company is concerned. It was also submitted that once U.P. Corporation is held to be bound by the promise made by it the Uttarakhand Corporation which came into existence upon reorganization of the State had no option but to make the said promise good. It could not retrospectively withdraw the same only with a view to recover money which

even the U.P. State Power Corporation would not have been entitled to recover.

17. In Writ Petition No.942 of 2001 filed by the respondent-KVSL the material facts were not disputed. It was unequivocally admitted that the respondent-company was a consumer getting supply from an independent feeder emanating from 400/220/132 KV sub station. It was also not in dispute that with the coming into existence of State of Uttarakhand w.e.f. 9th November, 2000 a new Power Corporation for the said State was established on 1st April, 2001. The respondent-company's further case is that Uttarakhand Power Corporation did not charge 15% surcharge on monthly demand and energy charges for the period April 2001 to October, 2001 and that it is only on 7th December, 2001 that the applicant received an intimation that circular dated 8th September had been revoked and letter dated 24th October cancelled. That the U.P. Electricity Regulatory Commission had approved a new tariff by order dated 1st September, 2000 and U.P. State Power Corporation had issued a consequential Notification dated 10th July, 2001 is also not in dispute. The said notification, it is noteworthy, does not any longer provide for 15% surcharge from consumers getting supply of energy from independent feeders. Suffice it to say that while according to the applicant-KVSL circular issued by the U.P. Power Corporation dated 8th September, 2001 giving an option to the consumers was valid and in accordance with law, there is not even a murmur in the writ petition filed by the respondent-company to the effect that either the U.P. Power Corporation or its successor had at any point of time made any promise to the company that supply of energy would be without any surcharge notwithstanding the fact that the tariff prescribed by the Regulatory Commission envisaged the levy of surcharge on electricity supplied directly from an independent feeder. There is similarly no averment whatsoever in the writ petition to the effect that the respondent-KVSL had altered its position acting upon any such promise. Not only that the agreements executed between the parties, namely, KVSL

on the one hand and Power Corporation on the other also did not contain any unequivocal promise for supply of energy, no matter the supply was made from an independent feeder. In the absence of even an averment to the effect that there was a promise made by the U.P. State Power Corporation regarding supply of energy without payment of surcharge and in the absence of any material to show that the respondent-KVSL had indeed acted upon any such promise it is difficult to see how the said company can insist upon any such non-existent promise being made good. It is trite that before a party can rely upon on the doctrine of promissory estoppel it must make a specific averments and place material on record to demonstrate that a promise was indeed made to it. There is neither any averment nor any material to support the plea of promissory estoppel in the case at hand.

18. It is also noteworthy that the High Court of Uttarakhand did not find a case in favour of the respondent-KVSL on the ground which is now sought to be urged in the present appeal. It is one thing to say that the plea of promissory estoppel is available to a consumer but an entirely different thing to say that such a plea has been made good by the material on record.

19. We have, therefore, no hesitation in repelling the contention that any promise was made by the U.P. State Power Corporation to the respondent-KVSL which could justify the grant of any mandamus in its favour for making good any such promise.

20. We allow this appeal and set aside the order 17 th January, 2007 passed by the High Court of Uttaranchal in Writ Petition No.936 of 2001 filed by respondent-KVSL with costs of Rs.50,000/-.

N.J. Appeal allowed.

NEETI MALVIYA
v.
RAKESH MALVIYA
(Transfer Petition (C) No.899 of 2007)

MAY 12, 2010

[D.K. JAIN AND C.K. PRASAD, JJ.]

Hindu Marriage Act, 1955:

s.13-B(2) – Divorce by mutual consent – Settlement between the parties before Supreme Court Lok Adalat – Terms of settlement complied with – Waiving of the period of second motion in terms of sub-s.(2) of s.13-B – Held: The language of sub-s.(2) of s.13-B is clear and prima facie admits of no departure from the time frame laid down therein, i.e. the second motion under the said sub-section cannot be made earlier than six months after the date of presentation of the petition under sub-s.(1) of s.13-B – However, in view of more than one opinion expressed in the judgments of the Supreme Court on the issue, the matter referred to a three Judge Bench to consider the question: whether the period prescribed in sub-s.(2) of s.13-B can be waived or reduced by Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution – Constitution of India, 1950 – Article 142.

Anjana Kishore vs. Puneet Kishore **(2002) 10 SCC 194;** *Anil Kumar Jain vs. Maya Jain* **2009 (14) SCR 90 = (2009) 10 SCC 415;** *Manish Goel vs. Rohini Goel* **(2010) 2 SCR 414;** *Smt. Poonam vs. Sumit Tanwar* **2010 (3) SCR 557 = JT 2010 (3) SC 259 and** *Prem Chand Garg vs. Excise Commissioner, U.P., Allahabad* **1963 Suppl. SCR 885 = AIR 1963 SC 996, referred to.**

Case Law Reference:

(2010) 2 SCR 414	**referred to**	**para 3**
2010 (3) SCR 557	**referred to**	**para 3**
(2002) 10 SCC 194	**referred to**	**para 9**
2009 (14) SCR 90	**referred to**	**para 10**
1963 Suppl. SCR 885	**referred to**	**para 11**

CIVIL ORIGINAL JURISDICTION : Transfer Petition (Civil) No. 899 of 2007.

Satya Mitra, D.N. Pandey, Sanjay Jain for the Petitioner.

Jasmine Damkewala, Sourabh Seth (for Karanjawala & Co.) for the Respondent.

The following Order of the Court was delivered

O R D E R

1. This transfer petition has been filed by the petitioner–wife, seeking transfer of the Divorce Petition M.C. No.2168 of 2006 titled as *Rakesh Malviya Vs. Neeti Malviya,* filed by the respondent–husband, from the court of Additional Principal Judge, Family Court, Bangalore (Karnataka) to the Family Court, Hoshangabad (Madhya Pradesh).

2. After issuance of notice on 7th December 2007, efforts were made on various occasions to bring about a comprehensive settlement of the matrimonial discord between the parties. On 6th September 2008, the parties agreed for mediation. Accordingly, the parties were referred to the Delhi High Court Mediation Centre. Ultimately, in proceedings before the Supreme Court Lok Adalat held on 25th April 2009, it was reported that the parties had arrived at a settlement. The settlement agreement dated 24th April 2009 was taken on record. The relevant portion of the order passed on 25th April 2009 is extracted below:

"…One of the terms so agreed upon is that the husband

is to pay to the wife an amount of Rupees sixty five lakhs on or before 28th February, 2010. It is now agreed before us that the said amount of Rupees sixty five lakhs shall be deposited in this Court as per the schedule of dates mentioned in the agreement. The amount, so deposited, shall be put in a Fixed Deposit Receipt for a period upto 1st May, 2010.

….. ….. ….. …..

It is also agreed that when full amount in terms of the agreement is deposited, the parties shall, immediately thereafter, move a joint application for grant of divorce by mutual consent. On the passing of the decree for divorce, the amount deposited in this Court shall be released to Neeti without any delay."

3. The matter remained pending for some time but the parties continued to discharge their obligations under the terms of settlement and when the case came up for hearing on 29th January 2010, it was stated that the respondent-husband shall deposit the last instalment of money, in terms of the settlement, by 28th February 2009, which was done. However, when the matter came up for final orders on 10th May 2010, learned counsel for the parties sought time to go through the two judgments of this Court in *Manish Goel Vs. Rohini Goel*[1] and *Smt. Poonam Vs. Sumit Tanwar*[2], and assist the Court on the question whether the period of second motion in terms of sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 (for short "the Act") can be waived or reduced by this Court.

4. We have heard learned counsel for both the parties.

5. Sub-section (1) of Section 13-B of the Act is the enabling Section for presenting a petition for dissolution of marriage by a decree of divorce by mutual consent, on the

1. 2010 (2) SCALE 332.

2. JT 2010 (3) SC 259.

ground that the parties have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Sub-section (2) of Section 13-B of the Act provides the procedural steps that are required to be taken once the petition for divorce by mutual consent has been filed and six months have expired from the date of presentation of the petition before the Court. The language of sub-section (2) is unambiguous and provides that on the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

6. As already stated, the language of the said provision is clear and *prima facie* admits of no departure from the time frame laid down therein, i.e. the second motion under the said sub-section cannot be made earlier than six months after the date of presentation of the petition under sub-section (1) of Section 13-B of the Act.

7. The question with which we are concerned in the present petition is whether in view of the settlement arrived at between the parties, a decree of divorce by mutual consent can be granted by this Court without waiting for the statutory period of six months in terms of Section 13-B(2) of the Act. In other words, the question for consideration is whether or not this Court can reduce or waive of the statutory period of six months, as stipulated in the said provision?

8. At the outset, we may note that in several cases this Court has been invoking its extraordinary powers under Article 142 of the Constitution of India and passing a decree of divorce by mutual consent without waiting for the statutory period of six months to expire. As a matter of fact, even the family courts in

some States, following the ratio of the decisions or the directions by their respective High Courts, have been reducing the period of second motion when they were convinced that there was no possibility whatsoever of the spouses coming back together again and granting decree of divorce by mutual consent in terms of the settlement arrived at between the parties in order to give quietus to all the litigations pending between them.

9. In fact, in *Anjana Kishore Vs. Puneet Kishore*[3], a Bench of three Judges of this Court, while hearing a transfer petition, invoked its jurisdiction under Article 142 of the Constitution and directed the parties to file a joint petition before the family court under Section 13-B of the Act, for grant of decree of divorce by mutual consent, along with a copy of the terms of compromise arrived at between the parties. The Court further permitted the family court to consider dispensing with the need of waiting for expiry of a period of six months as required by sub-section (2) of Section 13-B of the Act and pass final orders on the petition within such time as it deems fit.

10. The issue with regard to the jurisdiction of the High Court and the matrimonial court to reduce or waive of the period of second motion in terms of sub-section (2) of Section 13-B of the Act fell for consideration of this Court in *Anil Kumar Jain Vs. Maya Jain*[4], though in a different context. Taking note of a number of earlier cases where decree of divorce by mutual consent had been granted by this Court without waiting for the expiry of statutory period of six months, it was held that neither the civil courts nor even the High Courts can pass orders before the period prescribed in Section 13-B(2) of the Act has expired. The Court opined that it is only this Court, in exercise of its extraordinary powers under Article 142 of the Constitution, that can grant relief to the parties without even waiting for statutory period of six months stipulated in Section 13-B of the Act.

3. (2002) 10 SCC 194.

4. (2009) 10 SCC 415.

11. However, recently in *Manish Goel* (supra) and *Smt. Poonam* (supra), this Court while taking note of the decisions in *Anjana Kishore* (supra) and *Anil Kumar Jain* (supra) has also referred to various other judgments of this Court taking a contrary view and has observed that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of the statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in a statute. The Court has also observed that power under Article 142 of the Constitution is not to be exercised in a case where there is no basis in law which can form an edifice for building up a structure. Reference has also been made to the decision of the Constitution Bench in *Prem Chand Garg Vs. Excise Commissioner, U.P., Allahabad*[5], wherein it was held that an order which this Court can make in order to do complete justice between the parties, cannot be inconsistent with the substantive provisions of the relevant statutory laws. *Inter alia,* observing that no court has competence either to issue a direction contrary to law or to direct an authority to act in contravention of the statutory provisions, the Court finally summarised the law on the issue before us to the effect that in exercise of power under Article 142 of the Constitution, this Court 'generally' does not pass an order either in contravention of or ignoring the statutory provisions or exercise power merely on sympathetic grounds.

12. Although it can be gathered from the use of the word 'generally' in para 15 and the last paragraph of the judgment where the Court did not find the case before it to be a fit case for exercise of its extra-ordinary jurisdiction under Article 142 of the Constitution, that both the said decisions do not altogether rule out the exercise of extraordinary jurisdiction by this Court under Article 142 of the Constitution, yet we feel that in the light of certain observations in the said decisions, particularly in *Manish Goel* (supra), coupled with the fact that the decision in *Anjana Kishore* (supra) was rendered by a Bench of three learned Judges of this Court, it would be

5. AIR 1963 SC 996.

appropriate to refer the matter to a Bench of three Judges in order to have a clear ruling on the issue for future guidance.

13. Accordingly, we refer the following question for the consideration of a Bench of three Hon'ble Judges:-

(I) Whether the period prescribed in sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 can be waived or reduced by this Court in exercise of its jurisdiction under Article 142 of the Constitution?

14. We direct the Registry to place the papers of this case before the Hon'ble Chief Justice of India for appropriate orders.

15. It is agreed between the parties that in the meanwhile, they will file a joint petition under Section 13-B of the Act for grant of divorce by mutual consent in terms of the settlement within two weeks from today. We are informed that the fixed deposit for the amount deposited by the respondent in terms of the settlement will be maturing for payment in the first week of August, 2010. As and when the said fixed deposit matures, a sum of Rupees two lacs and fifty thousand shall be paid to the petitioner by means of a bank draft payable at Itarsi (Madhya Pradesh). The balance amount along with interest accrued thereon shall be put in a fresh fixed deposit for a period of six months.

16. List in the month of November, 2010.

R.P. Matter Adjourned.

SHIMNIT UTSCH INDIA PVT. LTD. & ANR.
v.
WEST BENGAL TRANSPORT INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. & ORS.
(Civil Appeal No. 4441 of 2010)

MAY 12, 2010

[R.V. RAVEENDRAN, R.M. LODHA AND C.K. PRASAD, JJ.]

Government policy – Alteration/change in policy – Permissibility – Judicial intervention – Scope of – Held: The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective – Where the circumstances changed in some material respects, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality – Administrative law – Principle of legitimate expectation – Wednesbury reasonableness – Judicial review.

Government contract – Contract for manufacture and supply of High Security Registration Plates (HSRP) for motor vehicles – Notices Inviting Tenders (NITs) issued by various States for award of contract – In Association of Registration Plates's case, conditions of experience in the field of registration plates in foreign countries and a minimum annual turnover from such business were upheld as essential conditions in the NIT – Whether in the light of this decision, it was necessary for the State Governments to continue with these conditions or it was permissible for them to do away with such conditions – Held: The decision in Association of Registration Plates* did not create any impediment for the States to alter or modify the conditions in the NIT if the*

circumstances changed in material respects by lapse of time – Though the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions – It is always open to the State to give effect to new policy which it wished to pursue keeping in view 'overriding public interest' and subject to principles of Wednesbury reasonableness – Central Motor Vehicles Rules, 1989 – r.50 – Motor Vehicles (New High Security Registration Plates) Order, 2001 – Motor Vehicles (New High Security Registration Plates) [Amendment] Order, 2001.

In *Association of Registration Plates's case, the conditions of experience in the field of registration plates in the foreign countries and a minimum annual turnover from such business were upheld by this Court as essential conditions in the Notices Inviting Tenders (NIT) for award of contract for manufacture and supply of High Security Registration Plates (HSRP) for motor vehicles.**

Except West Bengal and Orissa, all other States followed the essential conditions approved by this Court in the case of *Association of Registration Plates. The said two States issued fresh NITs (second NITs) for manufacture and supply of HSRP in respect of motor vehicles, in which conditions pertaining to experience in foreign countries and the minimum prescribed turnover from such business were done away with.**

Before this Court, it was contended by the appellant that in *Association of Registration Plates, after considering the scheme of HSRP including the guidelines issued by the Central Government and the conditions in the NIT pertaining to experience in the foreign countries and the turnover from the said business, the Supreme Court had held that these are essential conditions of the tender aimed to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations keeping in view the magnitude of the job and the huge investment required in the project. It was further contended that these conditions, having got the seal of approval from the Supreme Court, could not have been done away with in second NIT, and if for any reason the State Government thought of cancelling the first NIT and decided to issue fresh NIT dispensing with the conditions of experience in foreign countries and prescribed minimum turnover from such business, they ought to have approached this Court for an appropriate direction.**

The question that arose for consideration in the present appeals was, whether after the decision of this Court in *Association of Registration Plates**, **it was necessary for the State Governments to continue with these conditions or it was permissible for them to do away with such conditions.**

Dismissing the appeals, the Court

HELD: 1. Once a particular matter relating to conditions in NIT has been finally decided by the highest Court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality. In the present

case, the High Court had recorded a finding that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be sub-served because of financial implications. The government policy can be changed with changing circumstances and only on the ground of change, such policy would not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice. [Para 46] [1144-B-G]

1.2. The judgment of this Court in *Association of Registration Plates** **cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial review and recognized the right of the States in formulating tender conditions. There is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having Type of Approval Certificates (TAC) from the approved institutes without compromising on the quality and specifications of HSRP as set out in Rule 50 of the Central Motor Vehicle Rules, 1989; the Motor Vehicles (New High Security Registration Plates) Order, 2001 and the Motor Vehicles (New High Security Registration Plates) [Amendment] Order, 2001. [Para 47] [1145-E-H]**

1.3. In the case of *Association of Registration Plates**, **this Court did not find any fault with the controversial conditions in the NIT and overruled all objections raised by the petitioners therein in challenge to those conditions. The impugned conditions of NIT in that group of cases were not held to be arbitrary, discriminatory or irrational nor amounted to creation of any monopoly as alleged. The declaration of law by this Court in** *Association of Registration Plates** **is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. It is difficult to hold that by virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. The decision in** *Association of Registration Plates** **did not create any impediment for the States to alter or modify the conditions in the NIT if the circumstances changed in material respects by lapse of time. [Para 50] [1147-B-E]**

1.4. As regards the State of West Bengal, the bids pursuant to the second NIT were evaluated by West Bengal Transport Infrastructure Development Corporation Limited (WBTIDCL). The lowest bid per HSRP unit for a vehicle was Rs. 469/- while the offer made by appellant was of about Rs. 1200/-. Such a huge difference in the rate per HSRP unit shows that the action of the State Government in doing away with the conditions of experience in foreign countries and prescribed turnover from such business has been in larger public interest without compromising on safety, security and quality or sustainable capacity. As regards the State of Orissa, it is an admitted position that the first

NIT issued inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and vehicles to be registered in the State of Orissa was not taken to logical conclusion and a fresh NIT was issued on BOO basis. In that NIT, *inter alia*, eligibility criteria has been provided that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules. However, NIT does not insist on conditions like experience in the foreign countries and minimum prescribed turnover from the said business. No case for judicial review or intervention is made out in the said NIT. [Paras 52 and 55] [1149-B-C; 1150-C-E]

1.5. It is true that the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions. It is always open to the State to give effect to new policy which it wished to pursue keeping in view 'overriding public interest' and subject to principles of *Wednesbury* reasonableness. [Para 54] [1149-F-H]

Association of Registration Plates v. Union of India and Ors.* **(2005) 1 SCC 679, explained.

Real Mazon India Ltd. v. State of Assam and Ors. **2008 (1) GLT 1020, disapproved.**

Mohd. Fida Karim and Anr. v. *State of Bihar & Ors.* **(1992) 2 SCC 631;** *Sterling Computers Limited v. M/s. M and N Publications Limited and Ors.* **(1993) 1 SCC 445;** *Tata Cellular* v. *Union of India* **(1994) 6 SCC 651;** Raunaq

International Ltd. v. *I.V.R. Construction Ltd. & Ors.* **(1999) 1 SCC 492;** *Punjab Communications Ltd.* v. *Union of India & Ors.* **(1999) 4 SCC 727;** *Monarch Infrastructure (P) Ltd.* v. *Commissioner., Ulhasnagar Municipal Corporation & Ors.* **(2000) 5 SCC 287;** *Union of India and Anr.* v. *International Trading Co. and Anr.* **(2003) 5 SCC 437;** *Directorate of Education and Ors.* v. *Educomp Datamatics Ltd. and Ors.* **(2004) 4 SCC 19;** *Bannari Amman Sugars Ltd.* v. *Commercial Tax Officer & Ors.* **(2005) 1 SCC 625;** *Global Energy Limited & Anr.* v. *Adani Exports Ltd. and Ors.* **(2005) 4 SCC 435;** *Master Marine Services (P) Ltd.* v. *Metcalfe & Hodgkinson (P) Ltd. & Anr.* **(2005) 6 SCC 138 and** *S. Nagaraj & Ors.* v. *State of Karnataka & Anr.* **1993 Suppl. (4) SCC 595, referred to.**

Hughes v. *Deptt. of Health and Social Security* **1985 AC 776;** *State of New South Wales* v. *Quin* **1990 64 ALJR 327 and** *State for Transport, Ex parte Richmond upon Thames London Borough Council & Ors.* **(1994) 1 All E.R. 577, referred to.**

Case Law Reference:

(2005) 1 SCC 679	**explained**	**Para 3**
1985 AC 776	**referred to**	**Para 32**
1990 64 ALJR 327	**referred to**	**Para 33**
(1994) 1 All E.R. 577	**referred to**	**Para 34**
(1992) 2 SCC 631	**referred to**	**Para 35**
(1993) 1 SCC 445	**referred to**	**Para 36**
(1994) 6 SCC 651	**referred to**	**Para 37**
(1999) 1 SCC 492	**referred to**	**Para 38**
(1999) 4 SCC 727	**referred to**	**Para 39**

(2000) 5 SCC 287	**referred to**	**Para 40**
(2003) 5 SCC 437	**referred to**	**Para 41**
(2004) 4 SCC 19	**referred to**	**Para 42**
(2005) 1 SCC 625	**referred to**	**Para 43**
(2005) 4 SCC 435	**referred to**	**Para 44**
(2005) 6 SCC 138	**referred to**	**Para 45**
1993 Suppl. (4) SCC 595	**referred to**	**Para 48**
2008 (1) GLT 1020	**disapproved**	**Para 54**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4441 of 2010.

From the Judgment and order dated 27.06.2006 of the High Court at Calcutta in APOT No. 84 of 2006, GA No. 545 of 2006 & WP No. 2083 of 2005.

WITH

C.A. No. 4442 of 2010.

F.S. Nariman, R.F. Nariman, Bhaskar Raj Pradhan, Arunabh Chowdhury, Anupam Lal Das, Ruby Singh Ahuja, Raktim Gogoi, Arpit Gupta and Sunil Fernandes, for the Appellant.

Shyam Divan, S.K. Bazaria, S. Ganesh, L. Nageswara Rao, S. Udaya Kumar Sagar, Bina Madhavan (for Lawyer's Knit & Co.), S. Kirpal, Bijoy Kumar Jain, A.K. Jain, P. Jain, Jagjit Singh Chhabra, Bijan Kumar Ghosh, Manik Das, Manash Das, Dr. Kailash Chand, Avijit Bhattacharjee, Bikas Kargupta, Shibashish Misra, Joydeep Pal, Praneet Pranav, Ashok Panigrahi, Satya Mitra Garg ans Y. Mohanty, for the Respondent.

The Judgment of the Court was delivered by

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

2. Of the two appeals by special leave, one has been preferred by Shimnit Utsch India Private Limited (for short, 'Shimnit') being aggrieved by the judgment dated June 27, 2006 of the Calcutta High Court whereby the Division Bench dismissed their appeal and affirmed the order dated February 20, 2006 of the Single Judge dismissing their writ petition and the other at the instance of M/s Tonnjes Eastern Security Technologies Private Limited (for short, 'Tonnjes') challenging the order dated March 23, 2010 whereby the Division Bench of Orissa High Court dismissed their writ petition.

The Issue

3. The common question that arises for consideration in the two appeals is, whether after decision of this Court in *Association of Registration Plates* v. *Union of India and Ors*[1]. wherein the conditions provided for experience in the field of registration plates in the foreign countries and a minimum annual turnover from such business were upheld as essential conditions in the Notices Inviting Tenders (NIT) for award of contract for manufacture and supply of High Security Registration Plates (HSRP) for motor vehicles, it is necessary for the State Governments to continue with these conditions or it is permissible for them to do away with such conditions.

Factual and legal background in Association of Registration Plates

4. The Motor Vehicles Act, 1988 (for short, '1988 Act') came into force on July 1, 1989. Chapter –IV thereof deals with registration of motor vehicles as defined in Section 2(28). Sub-section (6) of Section 41 provides that the registering authority shall assign to the vehicle, for display thereon, a distinguishing mark (registration mark) consisting of one of the groups of such of those letters and followed by such letters and figures as are

1. (2005) 1 SCC 679.

allotted to the State by the Central Government from time to time by notification in the Official Gazette. Pursuant thereto a Notification came to be issued by the Central Government on July 1, 1989 allocating group of letters to various States. The Central Motor Vehicles Rules, 1989 [for short, `1989 Rules') were framed by the Central Government in exercise of its powers under Section 64 and other relevant provisions of 1988 Act. Rule 50 of 1989 Rules provides for form and manner of display of registration marks on the motor vehicles. The said Rule 50 has been amended from time to time and new system of HSRP thereunder is now to come into effect from June 1, 2010.

5. Under sub-section (3) of Section 109 of 1988 Act, the Central Government issued Motor Vehicles (New High Security Registration Plates) Order, 2001 (for short, 'Order, 2001'). On October 16, 2001, the Central Government further issued Motor Vehicles [New High Security Registration Plates (Amendment)] Order, 2001 (for short, 'Amendment Order, 2001'). Amendment Order, 2001 provided for certain standards in respect of the new system of HSRP for motor vehicles and the process used by a manufacturer or vendor for manufacturing or supplying such plates.

6. On March 6, 2002, a communication laying down guidelines for incorporating necessary conditions in the NIT to be issued by the various States and Union Territories (UTs) was circulated by the Central Government to all States and UTs. The guidelines, inter alia, provided; (i) the tender document would specify whether the appointment of the vendor is for the whole State or for certain parts; (ii) the tender document would specify the terms of the bank guarantee; (iii) the tender document would require a report back on certain aspects on 'a periodic and regular basis' and (iv) the bidder must furnish proof of past experience/expertise in this area or proof of the same with the collaborator. By further communication dated June 14, 2002 the aforenoticed NIT guidelines were modified by the Central Government and it was suggested that the bidders may be

asked to provide details about the experience/capability of its collaborator to the satisfaction of the State authorities. By another communication dated November 13, 2002, the Central Government clarified to the States and UTs that the guidelines are suggestive in nature and left the discretion to the States and UTs in the matter of issuing NIT but reiterated security concern.

7. In the light of the guidelines suggested by the Central Government, several States/UTs issued NIT which, inter alia, included conditions, namely, (i) experience in the field of registration plates i.e., bidder should be working at least in five countries for licence plates and in a minimum of three countries with licence plates having security features worldwide; (ii) the bidder must have had a minimum annual turnover equivalent to INR 30 crores immediately preceding last year; at least 25% of this turnover must be from the licence plate business and (iii) the contract will be for a period of 15 years.

8. The NIT containing the aforenoticed conditions issued by several States led to filing of writ petitions before various High Courts. Few writ petitions were filed directly before this Court. Since the controversy was common, writ petitions filed before High Courts were transferred to this Court and taken up along with writ petition filed by A*ssociation of Registration Plates1*. It was argued on behalf of the petitioners before this Court that these conditions in NIT have been tailored to favour companies having foreign collaboration and aimed at excluding indigenous manufacturers from the tender process; there are not more than one or two companies that could satisfy the stringent eligibility conditions laid down in NIT; Indian manufacturers are fully competent to be involved for the implementation of the scheme of HSRP but the condition concerning experience in foreign countries has obviated any chance of their participating in the bidding process; fixing high turnover from such business is only for the purpose of advancing the business interest of a group of companies having foreign links and support and that it is impossible for any indigenous

manufacturer of security plates to have a turnover of approximately 12.5 crores from the HSRP which are sought to be introduced in India for the first time and the implementation of the project has not yet started in any of the States.

9. The States who had issued NIT defended the impugned tender conditions before this Court. Insofar as the State of West Bengal is concerned, a counter affidavit was filed through West Bengal Transport Infrastructure Development Corporation Ltd. (WBTIDCL). It was stated in the counter affidavit that impugned conditions in NIT are intended to achieve the high objective of public safety involved in the implementation of HSRP. The relevant averments in the counter affidavit are reproduced below

> "……… The State Governments realizing the importance of the project came out with various conditions in the Tender which are primarily related to seeing the experience and the capacity of the manufacturer to undertake such a huge task concerning the manufacturing and supply of HSRPs in the State. The State Government therefore came out with conditions to insure that the manufacturer who supplied the HSRPs in the State is not fly-by-night operator but is personally experienced enough and capable enough to carry out such an activity……..
>
> ……………The power therefore is wide enough to include aspects, which may not have been provided specifically elsewhere in the Act. The Central Government is well within its powers to prescribe the fact that the State Government has the power to select the manufacturer of HSRPs as it is State Government which understood its specific requirements and needs and has to be satisfied about the competence of the manufacturer that whom it has to work jointly in order to ensure that the objective behind the HSRPs scheme is not deviated. In the absence of such a provision the whole scheme of HSRPs which means towards achieving public safety and security by ensuring that there is issuing control and supervision of HSRPs by the State Government will get deviated.

> …………The State under the Tender wishes to choose a person who is already worked in connection with HSRPs rather than chose a person who merely claims that it can deliver. Surely in a project of such a large scale concerning public safety and security the State cannot be justified to employ the hit and trial method.
>
> ………….The objective by no means can be lost of or given an improper degree of attention. The objective is to ensure highest levels of public safety and security established in the wake of the uncertain times that people are subject to these days. Consequently, the introduction of HSRPs mandates adherence to highest standards both in supply of manufacturing quality of products, required supply of the quantity of the project and above al mandates coordination with the State will have the general control and supervision over the issuance of these number plates. The fact is mentioned are by no means exhaustive but are only given to illustrate the basis tenets of the whole business of HSRPs. The State Government by no means can adopt a hit and trial method in a project of such a vast nature. It has been no necessarily ensured that the manufacturer is selected by a fair, competitive and transparent means of selection, which is the Tender process. The selection necessarily has to happen amongst the TAC holders. The State Government has to be satisfied to the extent to leaving no scope of doubt with regard to the expertise and capability of the selected manufacturer of HSRPs the State Government has to be satisfied that the company concerned will be able to meet the requirement both on the qualitative and quantitative basis and in bare commercial terms the company chosen is the best company amongst the TAC holders. The scheme envisages constant cooperation and coordination amongst the supplier and the State. Any brake at any point of time in the system as envisaged will deviate the

objective which is sought to be achieved. It is in this background that the challenge/grievances of the petitioner must be viewed."

Decision in Association of Registration Plates

10. This Court dismissed the entire group of writ petitions on November 30, 2004. The tender conditions relating to experience in foreign countries, prescribed percentage of turnover from such business and term of 15 years were not held to be arbitrary, discriminatory or mala fide; rather these conditions were held in public interest. This Court observed :

- The State as an implementing authority has to ensure that the scheme of HSRPs is effectively implemented. Keeping in view the enormous work involved in switching over to new plates within two years for existing vehicles, resort to "trial-and-error" method would prove hazardous.
- The State Government's right to get the right and most competent person cannot be questioned.
- The State Government has to eliminate manufacturers who have developed recently just to enter into the new field.
- The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood.
- The terms and conditions in NITs are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity.
- Only such tenderer has to be selected who can take responsibility for marketing, servicing and providing continuously the specified plates for vehicles in large numbers, firstly in the initial two years, and annually in the next 13 years.

- Capacity and capability are the two most relevant criteria for framing suitable conditions of any notices inviting tenders and the conditions of experience and turnover incorporated as essential conditions are to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations, which, looking to the magnitude of the job, requires huge investment qualitatively and quantitatively.

Facts post 30.11.2004

(A) *West Bengal*

11. After the decision of this Court in *Association of Registration Plates*1 on November 30, 2004, the Government of West Bengal evaluated the bids already submitted in accordance with the NIT and the bid of Shimnit was cleared at the prequalification stage. One M/s. Promuk Hoffman International Ltd., ('Promuk' for short) was also declared qualified. Shimnit challenged the pre-qualification of Promuk by filing a writ petition (468/2005) before Calcutta High Court on the ground that they did not have requisite international experience. On March 11, 2005, the Single Judge of Calcutta High Court by an interim order stayed the finalization of tender.

12. On April 27, 2005, however, the Government of West Bengal (Transport Department) issued a Notification canceling its NIT for supply and fitment of HSRP for motor vehicles issued earlier. The said Notification reads as follows :

"Government of West Bengal

Transport Department

Writers' Building

No. 2672 WT/3M-56/2003 PL III Dated 27.04.2005

<u>NOTIFICATION</u>

WHEREAS Notice Inviting Tender (NIT) was issued and

published in various newspapers on 03.07.2003 & 04.7.2003 respectively, fixing 06.08.2003 as the last date for submission of such Tender papers for supply and fitment of High Security Registration Plates for Motor Vehicles, by the West Bengal Transport Infrastructure Development Corporation Limited (A Government of West Bengal Undertaking) on behalf of the Government of West Bengal under instructions from the Transport Department;

AND WHEREAS only 4 (four) nos. of Bidders participated in the said tender process which was subsequently stayed as per orders of the Hon'ble Supreme Court in Writ Petition (Civil) No. 41 of 2003 and the other connected cases;

AND WHEREAS the Hon'ble Supreme Court of India by an order dated 30.11.2004 disposed of the said Writ Petition (Civil) No. 41 of 2003 and other connected cases with certain observations, holding inter alia, that the concerned State Governments are legally competent to determine the terms and conditions for implementation of the scheme for High Security Registration Plates for Motor Vehicles in conformity with the provisions of the Motor Vehicles Act, 1989 and Rules framed thereudner;

AND WHEREAS the Technical Bids submitted by those Bidders could not yet be processed, evaluated and finalized and whereas due to such non-evaluation of the Technical Bids the Financial Bids as submitted by those Bidders could not also be opened.

AND WHEREAS it has come to the notice of the State Government that subsequent to issue of the said NIT a considerable number of Manufactures of such High Security Registration Plates have obtained the requisite Type Approval Certificates from the Institution approved by the Central Government as per provisions of the Motor Vehicles Act, 1989 and Rules framed thereunder;

AND WHEREAS due passage of time and consequent change in the relevant field due to coming up of a very good number of duly approved manufacturers as aforesaid and keeping in view the observations of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 41 of 2003 and other connected cases as stated hereinabove, the Governor deems it fit that in greater public interest and also in the interest of public safety & security the terms and conditions of the said Notice Inviting Tenders (NIT) for supply and fitment of High Security Registration Plates for Motor Vehicles be reviewed and determined afresh.

NOW, THEREFORE, the Governor is pleased to direct that the entire tender process so far followed pursuant to the aforesaid Notice Inviting Tenders (NIT) for supply and fitment of High Security Registration Plates for Motor Vehicles as issued by the West Bengal Transport Infrastructure Development Corporation Limited on behalf of the State Government be cancelled and fresh process for inviting such bids be commenced after due determination of the terms and conditions thereof in the light of what has been stated herein above. The Governor is further pleased to direct that the Bidders (four numbers) who had participated in the previous tender process to be initiated hereafter, if they so desire and the Earnest Money Deposit (EMD) made by them be returned forthwith.

This order shall come into effect immediately.

By Order of the Governor.

Sd/-

Sumantra Choudhury,

Principal Secretary,

to the Government of West Bengal."

13. Shimnit was also informed by WBTIDCL vide communication dated April 27, 2005 that the bidding process

in terms of earlier NIT has been cancelled and requested them to collect the refund of their earnest money.

14. On October 4, 2005, a fresh NIT (hereinafter referred to as 'second NIT') came to be issued by WBTIDCL for manufacture and supply of HSRP, inter alia, to the following effect :

"BID

FOR

NOTICE

INVITING BIDS FOR HIGH SECURITY REGISTRATION PLATES

> The Transport Department, Government of West Bengal has decided to implement through WBTIDC Ltd. the revised Rule 50 of Central Motor Vehicle Rules, 1989 as modified by the Government of India, Ministry of Roads, Transport and Highway vide Notification issued from time to time for implementation of High Security Registration for all existing registered vehicles and also new vehicles to be registered in West Bengal for a period of 10 years.
>
> Now, on behalf of the Transport Department, Government of West Bengal, The Managing Director/West Bengal Transport Infrastructure Development Corporation Limited (WBTIDC), invites bids for selection of eligible bidders having Type Approval from authorized agencies of Government of India and adequate financial resources to undertake the production of High Security Regulation Plates in conformity with the specifications. A panel of Bidders will be finally selected to implement and operate in two designated zones of the States on Build, Operate and Transport (BOT) basis.
>
> The intending Bidders which may be single firm, Joint Venture or a Consortium should have in addition to above a minimum annual average Turnover of Rs. 50 crores and

> net worth of Rs. 20 crores as per audit balance sheet of 2003-04.
>
> Bid documents containing detail scope of work and other terms and conditions may be purchased from the office of the Managing Director, WBTIDC, between 04.10.2005 and 20.10.2005 both days inclusive during office hours, but excluding holidays, by paying a non-refundable cost of the same amount of Rs. 50,000/- (Rupees Fifty Thousand only) for each set of two copies of Bid Documents, in the form of Demand Draft drawn in favour of "West Bengal Transport Infrastructure Development Corporation Ltd." payable in Kolkata.
>
> Bid must be accompanied with the Earnest Money Deposit (EMD) of Rs. 25,00,000/- (Rupees Twenty five lacs only) in the form as specified in bid documents. No exemption certificate in this regard will be accepted.
>
> Bids completed in all respect must be submitted in a sealed cover super scribed Bid for HSRP, WB at the office of the Managing Director, WBTIDC Ltd. on or before 14.00 hrs on 14.11.2005 and will be opened as per schedule indicated in the Bid Document. In case the date of receiving the Bids happens to be a holiday, bids will be received on the next working day.
>
> WBTIDC Ltd. reserves the right to reject any or all bids or annual bidding process without assigning any reason, thereof………"

15. In the second NIT, clauses pertaining to experience in the foreign countries and the minimum prescribed turnover from such business were done away with; the period was also reduced from 15 years to 10 years.

16. Pursuant to the second NIT, Shimnit submitted its tender on November 21, 2005 and simultaneously filed a writ petition before Calcutta High Court challenging the conditions of second NIT, principally on the ground that the essential

conditions pertaining to experience in foreign countries and the prescribed turnover from such business having been approved by the Supreme Court could not have been done away with. Shimnit also prayed for interim order during the pendency of writ petition. The controversy relating thereto reached this Court and by an order dated January 5, 2006, this Court while disposing of SLPs directed that the interim order that contract shall not be awarded until further orders will continue to operate till the matter is decided by the Single Judge. The Single Judge by his judgment dated February 20, 2006 dismissed Shimnit's writ petition. An intra court appeal was preferred by Shimnit before the Division Bench in which the interim order of status quo was passed. The Division Bench ultimately dismissed the intra court appeal vide judgment dated June 27, 2006 giving rise to the present appeal by special leave.

(B) *Orissa*

17. On April 11, 2007, the Government of Orissa issued NIT inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and the vehicles to be registered in the State of Orissa. The eligibility criteria provided therein did not contain conditions like experience in the foreign countries and minimum prescribed turnover from the said business, although, the tender document did lay down that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules.

18. After issuance of NIT dated April 11, 2007, Tonnjes submitted representations to the Government of Orissa on May 9, 2007 and May 15, 2007 requesting for amendment/ modification of the tender conditions so as to bring it in conformity with the conditions approved by this Court in *Association of Registration Plates*1.

19. On May 16, 2007, a Corrigendum-III was issued by the Transport Commissioner-cum-Chairman, State Transport Authority, Government of Orissa extending the due date beyond

May 24, 2007. It is the case of Tonnjes that no further steps were taken by the Government of Orissa in pursuance of the said NIT.

20. On July 6, 2009, a fresh NIT was issued by the Government of Orissa for manufacture, distribution and affixation of HSRP at a Build Own Operate (BOO) basis. Tonnjes again made a representation to the Government of Orissa for bringing the terms and conditions of the fresh NIT in conformity with the decision of this Court in *Association of Registration Plates*1. When nothing was heard from the Government of Orissa, Tonnjes filed a writ petition before the Orissa High Court for quashing that NIT. The High Court, by way of an interim order, directed that the bids pursuant to the said NIT may be permitted to be filed by the bidders as per the tender rules but no further action shall be taken without leave of the Court.

21. The Division Bench of the Orissa High Court heard the arguments and by its judgment dated March 23, 2010 dismissed the writ petition filed by Tonnjes.

Writ Petition (PIL) by Maninderjit Singh Bitta

22. One Maninderjit Singh Bitta filed a writ petition before this Court in public interest seeking implementation of the judgment by this Court in *Association of Registration Plates*1. It was urged that though in the aforesaid judgment norms were fixed and the desirability of having HSRP has been highlighted but nothing concrete has been done by the States and UTs. This Court disposed of writ petition on May 8, 2008 and gave time of six months to States and UTs to take decision as to whether there is need for giving effect to the amended Rule 50 and the scheme of HSRP and the modalities to be followed.

23. Maninderjit Singh Bitta filed an Interlocutory Application No. 5 before this Court seeking clarification of the order dated May 8, 2008. The said application was disposed of by this Court on May 5, 2009 by the following order :

"It is made clear that there was no discretion given to the

States/UTs not to give effect to the amended Rule 50 and the claim of HSRP and the modalities to be followed. It is stated by learned counsel for the petitioner that in some cases no action has been taken by the concerned States and the UTs within the period of six months as was given. Needless to say that if same is the position, the directions shall be carried out immediately and not later than three months from today."

24. On August 26, 2009, the Government of India, Ministry of Road Transport and Highways addressed a letter to the States and UTs requesting them to take all necessary steps for implementation of HSRP scheme by the end of 2009. In the said letter the Government of India brought to the notice of the States and UTs the order of this Court dated May 5, 2009 and also informed them to keep in view the judgment of this Court in *Association of Registration Plates*1.

25. On September 11, 2009, a further letter was sent by the Government of India to the States and UTs informing them that a committee has been constituted by the Ministry to review the progress of implementation of HSRP and other related issues. The States and UTs were requested to implement the scheme of HSRP as early as possible.

26. On behalf of Union of India, few applications came to be filed (I.A. Nos. 6-9) before this Court in disposed of writ petition no. 510 of 2005 (Maninderjit Singh Bitta) for extension of time to ensure compliance with the directions contained in order dated May 5, 2009. These applications were disposed of by this Court on December 15, 2009 by extending time upto May 31, 2010.

Contentions

27. Mr. F.S. Nariman, learned senior counsel appearing for Shimnit submitted that in *Association of Registration Plates*1, after considering the scheme of HSRP including the guidelines issued by the Central Government and the

conditions in the NIT pertaining to experience in the foreign countries and the turnover from the said business, this Court held that these are essential conditions of the tender aimed to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations keeping in view the magnitude of the job and the huge investment required in the project. He submitted that these conditions having got the seal of approval from this Court could not have been done away with in second NIT and if for any reason the State Government thought of cancelling the first NIT and decided to issue fresh NIT dispensing with the conditions of experience in foreign countries and prescribed minimum turn over from such business, they ought to have approached this Court for an appropriate direction. Mr. F.S. Nariman submitted that in *Association of Registration Plates,* the case pertaining to the State of West Bengal was treated as a lead case and the State of West Bengal vehemently defended the conditions in the first NIT before this Court and now doing away with essential conditions in the second NIT flies in the face of the law laid down by this Court. Learned senior counsel submitted that it was unfortunate that the State of West Bengal did not consider itself bound by the law of land declared by the highest Court of the country in a decision to which it was a party. He also contended that the second NIT was designed to favour some of the bidders and was clearly *mala fide* as the Shimnit had challenged the prequalification of Promuk by filing a writ petition before the Calcutta High Court and an interim order was passed therein by the Single Judge staying the finalization of tender. He, thus, submitted that the High Court was not correct in dismissing Shimnit's writ petition.

28. Mr. R.F. Nariman, learned senior counsel for Tonnjes adopted the arguments of Mr. F.S. Nariman and also invited our attention to the fact that as of now, except West Bengal and Orissa, all other States have followed the essential conditions approved by this Court in the case of *Association of*

Registration Plates in the NIT.

29. On the other hand, Mr. S. Ganesh, learned senior counsel appearing for State of West Bengal and Mr. L. Nageshwar Rao, learned senior counsel for State of Orissa submitted that the conditions in the NIT issued by these two States respectively are in the public interest and do not violate constitutional or any other provision of law. They submitted that the whole idea of not having the experience in the foreign countries and the prescribed turnover from the said business is to make available HSRP of the specifications as notified to the motor vehicles in these States at reasonable rates without in any manner compromising on safety, security, quality or sustainable delivery capacity. Mr. S. Ganesh extensively read the reasoning given by the Division Bench of the Calcutta High Court in the impugned order and submitted that no interference was called for in that order.

30. Mr. F.S. Nariman, learned senior counsel, in rejoinder vehemently contended that the judgment of this Court in *Association of Registration Plates1* must be read as read by this Court subsequently in Maninderjit Singh Bitta's case. He would contend that acquisition of Type of Approval Certificates (TAC) does not mean that such manufacturers are commercially competent to manufacture HSRP as TAC have limited efficacy. Learned senior counsel also submitted that if public interest could be served by the fulfillment of conditions in first NIT, then how by deleting these essential conditions, public interest could be achieved.

Tenders, Government contracts and change in policy : Judicial Review

31. Before we refer to some of the important decisions of this Court dealing with the aspects of judicial review in the matters of government contracts, tenders and change in policy, it is appropriate to notice the observations made in a couple of English decisions and one Australian case on judicial review in the matters of change in administrative policy.

32. In *Hughes* v. *Deptt. of Health and Social Security*[2], Lord Diplock, J. said:

> "….Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government….."

33. In *Attorney-General for the State of New South Wales* v. *Quin*[3], Mason C.J. (majority view, Australian High Court) observed :

> "Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. The Executive cannot by representation or promise disable itself from; or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power……"

34. In *R.* v. *Secretary of State for Transport, Ex parte Richmond upon Thames London Borough Council & Ors*[4]. while laying down that the *Wednesbury* reasonableness test alone was applicable for finding out if the change from one policy to another was justified, Laws, J. stated :

> "The court is not the Judge of the merits of the decision-maker's policy. … the public authority in question is the

2. 1985 AC 776.

3. 1990 64 ALJR 327.

4. (1994) 1 ALL E.R. 577.

Judge of the issue whether 'overriding public interest' justifies such a change in policy…. But this is no more than to assert that a change in policy, like any discretionary decision by a public authority, must not transgress *Wednesbury* principles….."

35. Now, we consider the decisions of this Court. In *Mohd. Fida Karim and Anr.* v. *State of Bihar & Ors*[5]*.,* while dealing with a case of change in Government policy for licence under Bihar Excise Act, this Court held thus :

"……The new policy of adopting the method of auction-cum-tender is certainly a change of policy. The reason for change of policy given by the Government is that it realised that making settlement for five years would give rise to monopolistic tendency, which will not be in public interest, at the same time the interest of revenue was not fully protected in the former policy. This clearly goes to show that the Government wanted to adopt a new policy in public interest to be made applicable from the year 1991-92. Learned Counsel appearing on behalf of the State of Bihar submitted in clear terms that the earlier policy was wrong and the Government realised its mistake and thus adopted a new policy to augment its revenue and to avoid monopolistic tendency. We do not find anything wrong in taking such view by the State Government and to change its policy considering the same to be in public interest……………."

36. This Court in *Sterling Computers Limited* v. *M/s. M & N Publications Limited & Ors.*[6]*,* while dealing with judicial review in a matter relating to publication of telephone directories of Mahanagar Telephone Nigam Limited (a Government of India Undertaking) made the following observations :

"**12.** At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

37. In the case of *Tata Cellular* v. *Union of India*[7], a three-Judge Bench of this Court extensively considered the English

5. (1992) 2 SCC 631.

6. (1993) 1 SCC 445.

7. (1994) 6 SCC 651.

decisions as well as the previous decisions of this Court in the matter of judicial review and scope relating to government contracts and tenders and deduced the legal principles in paragraph 94 of the report thus :

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

38. That the award of a contract, whether it is by private party or by a public body or the State is essentially a commercial transaction was highlighted by this Court in Raunaq *International Ltd.* v. *I.V.R. Construction Ltd. & Ors*[8]. In that case, this Court spelt out the following considerations that weigh in making a commercial decision :

"(*1*) the price at which the other side is willing to do the work;

(*2*) whether the goods or services offered are of the requisite specifications;

(*3*) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(*4*) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(*5*) past experience of the tenderer and whether he has successfully completed similar work earlier;

(*6*) time which will be taken to deliver the goods or services; and often

(*7*) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services."

39. Again in the case of *Punjab Communications Ltd.* v. *Union of India & Ors.*[9]*,* a two-Judge Bench of this Court elaborately examined the principles of legitimate expectation and a change in policy by the Government. While dealing with second question formulated by the Court viz., whether if

8. (1999) 1 SCC 492.

9. (1999) 4 SCC 727.

essentially the Government decided to fund the proposed contract for Eastern U.P. from its own resources, it was permissible for the Government to change its policy into one for providing telephones for rural areas in the entire country and whether 'legitimate expectation' of the appellant in regard to the earlier notification required the Court to direct that a notification for Eastern U.P. should be continued, this Court held in paragraph 45 of the report thus :

> "45. It will be noticed that at one stage when the ADB loan lapsed, the Government took a decision to go ahead with the project on its own funds. But later it thought that the scheme regarding telephones in rural areas must cover not only the villages in Eastern U.P. but also in other backward rural areas in other States. The statistics given in the counter-affidavits of the Union of India to which we have already referred, show that there are other States in the country where the percentage of telephones is far less than what it is in Eastern U.P. The said facts are the reason for the change in the policy of the Government and for giving up the notification calling for bids for Eastern U.P. Such a change in policy cannot, in our opinion, be said to be irrational or perverse according to *Wednesbury* principles. In the circumstances, on the basis of the clear principles laid down in *ex p Hargreaves* and *ex p Unilever*, the *Wednesbury* principle of irrationality or perversity is not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate expectation of the appellant which warrants interference in judicial review proceedings."

40. In the case of *Monarch Infrastructure (P) Ltd.* v. *Commissioner., Ulhasnagar Municipal Corporation & Ors.*[10], this Court was concerned with the question relating to NIT issued by Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. This Court held :

10. (2000) 5 SCC 287.

> "…..The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(*a*) and 6(*b*) of the Tender Booklet and the bid offered much earlier by Konark Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with a direction for calling for fresh tenders…………"

41. In *Union of India and Anr.* v. *International Trading Co. and Anr.*[11], this Court held that non-renewal of permit by the Government to a private party on ground of change in its policy cannot be faulted if such change is founded on *Wednesbury* reasonableness and is otherwise not arbitrary, irrational and perverse. It was held :

> "22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.
>
> 23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the

11. (2003) 5 SCC 437.

interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

42. In the case of *Directorate of Education and Ors.* v. *Educomp Datamatics Ltd. and Ors.*[12]*,* this Court, inter alia, applied the principles enunciated in *Tata Cellular*[7] and *Monarch Infrastructure (P) Ltd.10* and held as follows :

"**12.** It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

12. (2004) 4 SCC 19.

43. In *Bannari Amman Sugars Ltd.* v. *Commercial Tax Officer & Ors.*[13], this Court was concerned with the question relating to withdrawal of benefits extended to appellant therein as subsidy and it was held :

"………We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn."

44. In *Global Energy Limited & Anr.* v. *Adani Exports Ltd. and Ors.*[14]*,* this Court reiterated the principles that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

45. In *Master Marine Services (P) Ltd.* v. *Metcalfe & Hodgkinson (P) Ltd. & Anr.*[15]*,* the legal position highlighted in *Tata Cellular7* was reiterated in the following words :

"**12.** After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative

13. (2005) 1 SCC 625.

14. (2005) 4 SCC 435.

15. (2005) 6 SCC 138.

body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

Our View

46. In the light of the afore-noticed legal position, we shall now examine whether judicial intervention is called for in NIT issued by the State of West Bengal and State of Orissa for manufacture and supply of HSRP. Insofar as State of West Bengal is concerned, the first NIT was issued in the month of July, 2003 fixing August 6, 2003 as the last date for submission of tender papers. Pursuant thereto, four bidders participated. The finalization of the tender process could not take place because of interim order passed by this Court in *Association of Registration Plates*[1] and other connected cases. These cases were decided by this Court on November 30, 2004. Of the four bidders, who initially participated in the tender process, one withdrew and as regards Promuk, an objection was raised by Shimnit about their eligibility. Shimnit approached Calcutta High Court and obtained an interim order from the Single Judge that tender process shall not be finalized. As a matter of fact, due to litigation no substantial progress took place for two years in finalization of process for which NIT was issued in July, 2003 and practically two bidders in the entire tender process remained in fray. In interregnum, considerable number of indigenous manufacturers obtained the requisite TAC from the approved institutions as per the provisions of 1988 Act and thereby acquired capacity and ability to manufacture HSRP. In the backdrop of these reasons, the State Government seemed to have formed an opinion that by increasing competition, greater public interest could be achieved and, accordingly, decided to cancel first NIT and issued second NIT doing away

with conditions like experience in foreign countries and prescribed minimum turnover from that business. Whether State Government could have changed terms of NIT despite the judgment of this Court in *Association of Registration Plates1*? Once a particular matter relating to conditions in NIT has been finally decided by the highest Court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects as aforenoticed, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality. In considering whether there has been a change of circumstances sufficient to justify departure from the previous stance, the Division Bench of Calcutta High Court recorded a finding that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be sub-served because of financial implications. We have no justifiable reason to take a view different from the High Court insofar as correctness of these reasons is concerned. The courts have repeatedly held that government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

47. In *Association of Registration Plates*[1], this Court while dealing with the challenge to the conditions with regard to

experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable. On the contentions advanced, this Court examined the impugned conditions and did not find any fault and overruled all objections raised by the petitioners therein in challenge to these conditions. This Court has neither laid down as an absolute proposition that manufacturer of HSRP must have the foreign experience and a particular financial capacity to fulfill the contractual obligations nor it has been held that these conditions must necessarily be insisted upon in the NIT. The judgment of this Court in *Association of Registration Plates1* cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial review and recognized the right of the States in formulating tender conditions. In our opinion, there is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having TAC from the approved institutes without compromising on the quality and specifications of HSRP as set out in Rule 50, Order 2001 and Amendment Order, 2001.

48. Mr. F.S. Nariman, learned senior counsel heavily relied upon a decision of this Court in *S. Nagaraj & Ors.* v. *State of Karnataka & Anr.*[16] and submitted that the decision of this Court in A*ssociation of Registration Plates*[1] was binding on all States and the said judgment has to be enforced and obeyed strictly and any deviation from those conditions by the States on their own is impermissible.

49. In *S. Nagaraj & Ors.*[16], this Court observed as follows:

"Was it so? Could the Government take up this stand? Law on the binding effect of an order passed by a court of law is well settled. Nor there can be any conflict of opinion that if an order had been passed by a court which had jurisdiction to pass it then the error or mistake in the order can be got corrected by a higher court or by an application for clarification, modification or recall of the order and not by ignoring the order by any authority actively or passively or disobeying it expressly or impliedly. Even if the order has been improperly obtained the authorities cannot assume on themselves the role of substituting it or clarifying and modifying it as they consider proper. In *Halsbury's Laws of England* (Fourth Edn., Vol. 9, p. 35, para 55) the law on orders improperly obtained is stated thus:

> "The opinion has been expressed that the fact that an order ought not to have been made is not a sufficient excuse for disobeying it, that disobedience to it constitutes a contempt, and that the party aggrieved should apply to the court for relief from compliance with the order."

Any order passed by a court of law, more so by the higher courts and especially this Court whose decisions are declarations of law are not only entitled to respect but are binding and have to be enforced and obeyed strictly. No court much less an authority howsoever high can ignore

16. 1993 Suppl. (4) SCC 595.

it. Any doubt or ambiguity can be removed by the court which passed the order and not by an authority according to its own understanding."

50. The statement of law exposited in S. Nagaraj[16] is beyond question. As noticed above, in the case of Association of Registration Plates[1], this Court did not find any fault with the controversial conditions in the NIT and overruled all objections raised by the petitioners therein in challenge to those conditions. The impugned conditions of NIT in that group of cases were not held to be arbitrary, discriminatory or irrational nor amounted to creation of any monopoly as alleged. The declaration of law by this Court in Association of Registration Plates1 is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. We find it difficult to hold that by virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. In our view, the decision of this Court in A*ssociation of Registration Plates1* did not create any impediment for the States to alter or modify the conditions in the NIT if the circumstances changed in material respects by lapse of time.

51. In the PIL filed by Maninderjit Singh Bitta, it was prayed that the States and UTs be directed to implement the judgment of this Court in *Association of Registration Plates*[1] . This Court disposed of the writ petition on May 8, 2008 by observing, 'we feel it would be in the interest of all concerned if the States and Union Territories take definite decision as to whether there is need for giving effect to the amended Rule 50 and the scheme of HSRP and the modalities to be followed'. It was further observed that while taking the decision, the aspects highlighted by this Court in *Association of Registration Plates1* shall be kept in view. After disposal of the PIL, the petitioner therein filed I.A. No. 5 for clarification of the order dated May 8, 2008 and this Court while disposing of the said I.A. on May 5, 2009

clarified that there was no discretion given to the States/UTs not to give effect to the amended Rule 50 and the claim of HSRP and the modalities to be followed. Thereafter, I.A. was filed by the Central Government on September 17, 2009 before this Court for extension of time wherein the following statement was made:

"The primary reason for non implementation of the scheme has been the challenges to certain conditions of the tender floated by various States. The issues such as experience in foreign countries, minimum net worth and turnover with a certain prescribed percentage of turn over from number plate business in the immediately preceding last three years and long term contract to a single vendor for the entire State had been the subject matter of WP(C) No. 41 of 2003—Association of Registration Plates Vs. UOI & Ors. That this Hon'ble Court in the judgment dated 30th November, 2004, laid to rest all such issues by holding that all such conditions were essential and mandatory conditions of the HSRP tender to ensure that the vendors selected by the States would be technically and financially competent to fulfill the contractual obligations which looking to the magnitude of the job requires huge investment qualitatively and quantitatively."

By order dated December 15, 2009, this Court extended the time for implementation of HSRP upto May 31, 2010. None of these orders holds that while implementing the new system of HSRP, States and UTs are bound to incorporate the conditions of foreign experience and minimum turnover from that business. The statement made by the Central Government in its application as aforenoticed only reflected the reason for non-implementation of HSRP scheme. As a matter of fact, the Central Government has clarified the position in its communication with the States/UTs that draft tender conditions circulated by them are only suggestive. Be that as it may. The decision of this Court in Maninderjit Singh Bitta and the

subsequently clarificatory order therein are hardly relevant and do not help the case of the appellants.

52. It is important to notice that the bids pursuant to the second NIT have been evaluated by WBTIDCL and we have been informed that the lowest bid per HSRP unit for a vehicle is Rs. 469/- while the offer made by Shimnit (appellant) is of about Rs. 1200/-. Such a huge difference in the rate per HSRP unit shows that the action of the State Government in doing away with the conditions of experience in foreign countries and prescribed turnover from such business has been in larger public interest without compromising on safety, security and quality or sustainable capacity.

53. Mr. F.S. Nariman, learned senior counsel contended that cancellation of first NIT and issuance of second NIT by the Government of West Bengal was actuated with malafides as Shimnit had challenged the pre-qualification of Promuk by filing a writ petition before the Calcutta High Court wherein an interim order also came to be passed. We are not impressed by this submission at all and it is noted to be rejected. There is no material much less substantial material to infer any malafides. Merely because Shimnit challenged the pre-qualification of Promuk before Calcutta High Court, it could hardly lead to an inference of malafides.

54. It is true that the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions. It is always open to the State to give effect to new policy which it wished to pursue keeping in view 'overriding public interest' and subject to principles of *Wednesbury* reasonableness. The judgment of Guwahati High Court in *Real Mazon India Ltd.* v. *State of Assam and Ors.*[17] was also pressed into service by the appellants. In that case, the corrigenda dated December 26, 2006, January 6, 2007 and January 16, 2007 issued by the State of Assam deleting the conditions of experience, expertise and exposure of the bidders in the manufacture and supply of HSRP were challenged. Guwahati High Court quashed the impugned corrigenda. We are unable to approve the judgment of the Guwahati High Court in *Real Mazon India Ltd.*[17] for the reasons given above.

55. As regards the State of Orissa, it is an admitted position that it issued NIT for the first time on April 11, 2007 inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and vehicles to be registered in the State of Orissa. The said NIT was not taken to logical conclusion and a fresh NIT was issued on July 6, 2009 on BOO basis. In that NIT, inter alia, eligibility criteria has been provided that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules. However, NIT does not insist on conditions like experience in the foreign countries and minimum prescribed turnover from the said business. In what we have already discussed above, no case for judicial review or intervention in the said NIT is made out.

56. For the foregoing reasons, both appeals must fail and are dismissed with no order as to cost.

B.B.B. Appeals dismissed.

17. 2008 (1) GLT 1020.