PUBLIC SERVICE COMMISSION, UTTARANCHAL

v.

MAMTA BISHT AND ORS.

(Civil Appeal No. 5987 of 2007)

JUNE 03, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law:

Selection – Of Civil Judge (Junior Division) in the State of Uttaranchal – Reservation policy adopted by the State – Vertical reservation [i.e. social reservations in favour of SC, ST and OBC under Article 16(4)] and horizontal reservation [i.e. special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3)] – Application of horizontal (special) reservation in favour of women – Discussed – Extent of difference between horizontal (special) reservation and vertical (social) reservation re-iterated – Constitution of India , 1950 – Articles 15(3) and 16(4).

Selection – Select list challenged by unsuccessful candidate – Writ petition filed – Held: The writ petition could not have been entertained by the High Court since the last selected candidate, a necessary party, was not impleaded – Constitution of India, 1950 – Article 226 – Writ petition – Non-impleadment of necessary party – Code of Civil Procedure, 1908 – Order I, Rule IX, proviso.

The Public Service Commission, Uttaranchal issued advertisement inviting applications for posts of Civil Judge (Junior Division) with a clarification that the reservation policy adopted by the State of Uttaranchal i.e. vertical (social) reservation in favour of SC/ST/OBC and horizontal (special) reservation in favour of handicapped, women etc. belonging to Uttaranchal would be applicable.

Respondent no.1 applied in pursuance of the said advertisement seeking benefit of horizontal reservation in favour of Uttaranchal women. She qualified in the written examination but was not selected in the interview.

Respondent no.1 filed writ petition challenging the select list. The High Court allowed the writ petition and directed the appellants to appoint respondent no.1 as Civil Judge (Junior Division) in the State of Uttaranchal on the ground that horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social). The High Court held that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in general category; that the said candidate ought to have been appointed against the general category vacancy and respondent no.1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women.

The appellants *inter alia* contended before this Court that the writ petition ought to have been dismissed by the High Court for not impleading the necessary parties since not even a single successful candidate was impleaded as a respondent before the High Court. It was further contended that the High Court had failed to consider the principle that if a reserved category candidate secures more marks than the last selected candidate in general category, then he is to be appointed against the general category vacancy, does not apply while giving the benefit of horizontal reservation.

Allowing the appeals, the Court

HELD:1. In case respondent no.1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party

and without impleading her, the writ petition could not have been entertained by the High Court. If a person, who is likely to suffer from the order of the Court, has not been impleaded as a party, he has a right to ignore the said order as it has been passed in violation of the principles of natural justice. Moreso, proviso to Order I, Rule IX of CPC provides that non-joinder of necessary party be fatal. Though the provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. [Paras 7 and 8] [297-B-G]

Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar & Anr. **AIR 1963 SC 786;** *Gulabchand Chhotalal Parikh v. State of Gujarat* **AIR 1965 SC 1153;** *Babubhai Muljibhai Patel v. Nandlal, Khodidas Barat & Ors.* **AIR 1974 SC 2105;** *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior & Ors.* **AIR 1987 SC 88;** *Prabodh Verma & Ors. v. State of U.P. & Ors.* **AIR 1985 SC 167 and** *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.* **(2009) 1 SCC 768, relied on.**

Rakhi Ray & Ors. v. The High Court of Delhi & Ors. **AIR 2010 SC 932, referred to.**

2. There is a difference between the nature of vertical reservation [i.e. social reservations in favour of SC, ST and OBC under Article 16(4)] and horizontal reservation [i.e. special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3)]. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court. In an earlier case, it has been laid down by this Court that where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-

reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Since the judgment of the High Court is not in consonance with law laid down by this Court in the said earlier case, it is liable to be set aside and all consequential orders become unenforceable and inconsequential. [Paras 13, 14] [299-B-H; 300-A-C]

Rajesh Kumar Daria v. Rajasthan Public Service Commission & Ors. **AIR 2007 SC 3127, relied on.**

Indra Sawhney v. Union of India **AIR 1993 SC 477, referred to.**

Case Law Reference:

AIR 2010 SC 932	**referred to**	**Para 6**
AIR 1963 SC 786	**relied on**	**Para 7**
AIR 1965 SC 1153	**relied on**	**Para 7**
AIR 1974 SC 2105	**relied on**	**Para 7**
AIR 1987 SC 88	**relied on**	**Para 7**
AIR 1985 SC 167	**relied on**	**Para 8**
(2009) 1 SCC 768	**relied on**	**Para 8**
AIR 1993 SC 477	**referred to**	**Para 10**
AIR 2007 SC 3127	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5987 of 2007.

From the Judgment & Order dated 26.10.2005 of the High Court of Uttaranchal at Nainital in Writ Petition No. 780 of 2003 (M/B).

WITH

C.A. No. 5982 of 2007

R. Venkataramani, S.S. Shamshery (for Jatinder Kumar Bhatia), A.S. Rawat, Rajiv Kumar Bansal (for Raj Singh Rana), Ashok K. Mahajan, Mukesh K. Giri for the appearing parties.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. These appeals have been preferred by the Public Service Commission and the State Government of Uttaranchal being aggrieved of the judgment and order of the High Court of Uttaranchal, Nainital dated 26.10.2005 allowing the Writ Petition No.780 of 2003 (M/B) and directing the present appellants to appoint respondent No.1-Ms. Mamta Bisht as Civil Judge, Junior Division in the State of Uttaranchal.

2. Facts and circumstances giving rise to these appeals are that Public Service Commission, Uttaranchal (hereinafter referred to as the 'Commission') issued an advertisement dated 7.6.2002 inviting applications for 35 posts of Civil Judge, (Junior Division) with a stipulation that the number of vacancies may be increased or decreased. It clarified that the reservation policy adopted by the State i.e. reservation in favour of SC/ST/OBC and horizontal reservation in favour of handicapped, and women etc. belonging to Uttaranchal would be applicable. Respondent No.1 applied in pursuance of the said advertisement seeking benefit of reservation in favour of Uttaranchal women. She qualified in the written examination and thus faced the interview held by the Commission. The final result of the selection was declared on 31.7.2003 and it was evident from the result that respondent No.1 was not selected. Instead of filling of 35 vacancies, recommendations to fill up 42 vacancies were made as the decision had been taken in this regard prior to declaration of result. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates. Some women candidates stood selected in general category while others had been given the benefit of horizontal reservation being resident of Uttaranchal. Respondent No.1, being aggrieved preferred Writ Petition No.780 of 2003 (M/B) in the High Court of Uttaranchal seeking quashment of select list dated 31.7.2003 mainly on the ground that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in general category and had it been done so, respondent No.1 could have been selected in reserved category being a woman of Uttaranchal. It had also been pleaded in the petition that some of the women candidates who not only claimed the benefit of horizontal

reservation but have been selected giving the said benefit, did not submit their respective certificate of domicile at the time of filling up the application forms but they produced the said certificate at a later stage and it was accepted. The High Court accepted the first submission of respondent No.1 after examining the record of selection and came to the conclusion that last selected woman candidate who was given benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in general category. Thus, the said candidate ought to have been appointed against the general category vacancy and respondent No.1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women. Hence, these appeals.

3. Shri S.S. Shamshery, Advocate appearing for the Commission and Shri Ashok Mahajan, Advocate appearing for the High Court have submitted that all the vacancies advertised had already been filled up before the writ petition could be filed. Not a single successful candidate had been impleaded as a respondent before the High Court. Thus, the petition ought to have been dismissed for not impleading the necessary parties. The High Court did not consider the issue of acceptance of domicile certificates by the Uttaranchal women at a belated stage nor any finding has been recorded on the said issue. The High Court failed to consider the principle that if a reserved category candidate secures more marks than the last selected candidate in general category, then he is to be appointed against the general category vacancy, does not apply while giving the benefit of horizontal reservation. The writ petition filed by the respondent did not have any factual foundation or proper pleadings and thus was not worth entertaining. It is well neigh impossible to implement the judgment of the High Court at this belated stage, for the reasons that all the vacancies advertised stood filled up in 2003. Subsequent to the selection involved herein appointments have been made several times. Judicial Officers appointed from the said selection have been promoted

as Civil Judge (Senior Division). Respondent No.1 cannot be given seniority over and above the officers appointed in subsequent selections. Thus, appeals deserve to be allowed.

4. On the contrary, Shri R. Venkataramani, learned senior counsel appearing for respondent No.1 has vehemently opposed the appeals contending that great injustice has been done to respondent No.1. She has succeeded before the High Court on the sole ground that the last selected candidate receiving the benefit of horizontal reservation in favour of Uttaranchal women could be appointed against the general category vacancy and the respondent No.1 ought to have been selected giving her the benefit of horizontal reservation in favour of Uttaranchal women. There are still some vacancies from the said selection as two successful candidates have resigned after joining. Thus, respondent No.1 can be adjusted against one of such vacancies. Respondent No.1 has been issued appointment letter dated 17.5.2010 in pursuance of the impugned judgment, but has not yet been given posting by the High Court. Thus, she could not join the service. Thus, the appeals are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. It is settled legal proposition that vacancies over and above the number of vacancies advertised cannot be filled up. Once all the vacancies are filled up, the selection process comes to an end. In case a selected candidate after joining resigns or dies, the vacancy, so occurred cannot be filled up from the panel, which stood already exhausted. (Vide *Rakhi Ray & Ors. Vs. The High Court of Delhi & Ors.* AIR 2010 SC 932).

However, in the instant case, the advertisement itself made it clear that the vacancies could be increased and decreased and before completion of the selection process, a decision had

been taken to fill up 42 instead of 35 vacancies and reservation policy had been implemented accordingly.

7. In case the respondent No.1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar & Anr.,* AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh Vs. State of Gujarat;* AIR 1965 SC 1153; *Babubhai Muljibhai Patel Vs. Nandlal, Khodidas Barat & Ors.,* AIR 1974 SC 2105; and *Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior & Ors.* AIR 1987 SC 88).

8. In *Prabodh Verma & Ors. Vs. State of U.P. & Ors.* AIR 1985 SC 167; and *Tridip Kumar Dingal & Ors. Vs. State of West Bengal & Ors.* (2009) 1 SCC 768), It has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties.

9. All the 42 vacancies had been filled up, implementing the reservation policy. All the women candidates selected from reserved category indisputably belong to Uttaranchal and none of them is from another State.

10. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in *Indra Sawhney Vs. Union of India,* AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Writ Petition No.816/2002 (M/B) (*Km. Sikha Agarwal Vs. State of Uttaranchal & Ors.*) decided on 16.4.2003, and respondent no.1 ought to have appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.

11. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

> "In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."

12. Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court.

13. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria Vs. Rajasthan Public Service*

Commission & Ors. AIR 2007 SC 3127, wherein dealing with a similar issue this Court held as under:

> "9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney*, *R.K. Sabharwal* v. *State of Punjab*, *Union of India* v. *Virpal Singh Chauhan* and *Ritesh R. Sah* v. *Dr.Y.L. Yamul*.) But *the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations.* Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". *If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota.* Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken

> by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. *To this extent, horizontal (special) reservation differs from vertical (social) reservation.* Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women." (Emphasis added)

14. In view of the above, it is evident that the judgment and order of the High Court is not in consonance with law laid down by this Court in *Rajesh Kumar Daria* (supra). The judgment and order impugned herein is liable to be set aside and all consequential orders become unenforceable and inconsequential.

Thus, appeals succeed and are allowed. Judgment and order of the High Court dated 26.10.2005 passed in Writ Petition no.780/2003 (M/B) is hereby set aside. No costs.

B.B.B. Appeals allowed.

STATE OF ORISSA & ANR.
v.
RAJKISHORE NANDA & ORS.
(Civil Appeal No. 2808 of 2008)

JUNE 3, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law:

Recruitment – Select List prepared – Appointment made on the notified vacancies – Candidates, who were not appointed, but whose names were in the Select List, approaching Tribunal seeking direction for appointment – Tribunal directing the State to give appointment to all the candidates in the Select List – High Court, in appeal directing to give appointment only to the candidates who approached the tribunal – On appeal, held: Filling up vacancies, over the notified vacancies is not permissible as it amounts to filling up future vacancies –Such rule can be deviated only in exceptional circumstances and in emergent situation only after adopting policy decision based on some rational – A person whose name appears in the Select List does not acquire any indefeasible right of appointment – Select List not to be treated as a reservoir for the purpose of appointments – Vacancies to be filled up as per statutory rules and in conformity with constitutional mandate – Once the selection process in respect of certain number of vacancies is over, it is not open to offer appointment to persons from the unexhausted Select List – Courts/Tribunals are not competent to issue direction to initiate selection process to fill up vacancies – Orissa Ministerial Service (Method of Recruitment to Posts of Junior Clerks in the District Offices) Rules, 1985 – rr. 6, 11 (1) and 12.

To fill up 33 vacancies of Junior Clerks a Select List of 66 candidates was published. Appointments were

made. Respondents, whose names appeared in the Select List and were not offered appointment, filed applications before Central Administrative Tribunal seeking direction to offer them appointment. The Tribunal concluded that appointments were to be offered to all the candidates till the entire Select List stood exhausted. Tribunal directed to offer appointment to all the left-over candidates in the Select List.

In the writ petition, High Court modified the order of the Tribunal, directing the appellants to offer appointment to those who had approached the tribunal. Hence the appeal.

Allowing the appeal, the Court

HELD: 1. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. [Para 10] [310-G-H; 311-A-B]

State of Bihar and Ors. vs. The Secretariat Assistant S.E. Union 1986 and Ors. **AIR 1994 SC 736;** *Prem Singh and Ors. vs. Haryana State Electricity Board and Ors.* **(1996) 4 SCC 319;** *Ashok Kumar and Ors. vs. Chairman, Banking Service Recruitment Board and Ors.* **AIR 1996 SC 976;** *Surinder Singh and Ors. vs. State of Punjab and Ors.* **AIR 1998 SC 18;** *Rakhi Ray and Ors. vs. High Court of Delhi* **AIR 2010 SC 932;** *State of Punjab v. Raghbir Chand Sharma and Ors.* **AIR 2001 SC 2900;** *Mukul Saikia and Ors. v. State of Assam and Ors*. **AIR 2009 SC 747, relied on.**

2. A person whose name appears in the Select List

does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. Select List cannot be treated as a reservoir for the purpose of appointments. [Paras 13 and 15] [312-B-C; G-H]

Shankarsan Dash vs. Union of India **AIR 1991 SC 1612;** *Asha Kaul and Anr. vs. State of J & K and Ors. (***1993) 2 SCC 573;** *Union of India vs. S.S Uppal* **AIR 1996 SC 2340;** *Bihar Public Service Commission vs. State of Bihar* **AIR 1997 SC 2280;** *Simanchal Panda vs. State of Orissa and Ors.* **(2002) 2 SCC 669;** *Punjab State Electricity Board and Ors. vs. Malkiat Singh* **(2005) 9 SCC 22;** *Union of India and Ors. vs. Kali Dass Batish and Anr.* **AIR 2006 SC 789;** *Divisional Forest Officers and Ors. vs. M. Ramalinga Reddy* **AIR 2007 SC 2226;** *Subha B. Nair and Ors. vs. State of Kerala and Ors.* **(2008) 7 SCC 210;** *Mukul Saikia and Ors. vs. State of Assam and Ors.* **AIR 2009 SC 747;** *S.S. Balu and Anr. vs. State of Kerala and Ors.* **(2009) 2 SCC 479, relied on.**

3. No relief can be granted to the candidate if he approaches the court after expiry of the Select List. If the selection process is over, Select List has expired and appointments had been made, no relief can be granted by the court at a belated stage. [Para 15] [312-H; 313-A-B]

J. Ashok Kumar vs. State of Andhra Pradesh and Ors. **(1996) 3 SCC 225;** *State of Bihar and Ors. vs. Md. Kalimuddin and Ors.* **AIR 1996 SC 1145;** *State of U.P. and Ors. vs. Harish Chandra and Ors*. **AIR 1996 SC 2173;** *Sushma Suri vs. Government of National Capital Territory of Delhi and Anr.* **(1999) 1 SCC 330;** *State of U.P. and Ors. vs. Ram Swarup Saroj* **(2000) 3 SCC 699;** *K. Thulaseedharan vs. Kerala State*

Public Service Commission, Trivendrum and Ors. **(2007) 6 SCC 190;** *Deepa Keyes vs. Kerala State Electricity Board and Anr*. **(2007) 6 SCC 194;** *Subha B. Nair and Ors. vs. State of Kerala and Ors.* **(2008) 7 SCC 210, relied on.**

4. Orissa Ministerial Service (Method of Recruitment to Posts of Junior Clerks in the District Offices) Rules, 1985 provide for determining the number of vacancies and holding competitive examination ordinarily once in a year. Select list prepared so is also valid for one year. In the instant case, 15 vacancies were advertised with a clear stipulation that number of vacancies may increase. The authorities had taken a decision to fill up 33 vacancies, thus, select list of 66 persons was prepared. It is also evident from the record that some more appointments had been made over and above the 33 determined vacancies. Thus, once the selection process in respect of number of vacancies so determined came to an end, it is no more open to offer appointment to persons from the unexhausted list. It is exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for making appointments. *Bonafide* decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the Select List cannot be assailed. The Courts/ Tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. [Para 16] [313-D-H; 314-A]

5. As the appointments had been made as per the select list prepared in 1995 and selection process came to an end, there was no occasion for the Tribunal to entertain the applications in 1997, 1998 and 1999 for the simple reason that once the number of vacancies determined are filled, the selection process came to an

end, no further appointment could be made from 1995 panel. The purpose of making the list of double of the vacancies determined is to offer the appointment to the persons from the waiting list in case persons who are offered appointment do not join. But it does not give any vested right in favour of the candidates whose names appeared therein. [Para 17] [314-B-D]

6. Rule 11(1) of the Rules, 1985 did not provide originally to prepare the list double the number of determined vacancies and it was only for preparing the list containing the names equal to the number of vacancies advertised/determined. In such a fact-situation, the select list could have been prepared only containing 33 names i.e. equivalent to the number of vacancies determined and the selection process would come to an end automatically whenever 33 candidates are appointed. However, if the appellant had prepared a list double the number of vacancies determined, that would not create any vested right in favour of the respondents. Thus, Tribunal committed grave error issuing direction to offer appointments to all the left-over candidates. [Para 18] [314-E-G]

7. The view taken by the High Court that a cumulative reading of Rules 6 and 11(1) of the Rules, 1985 vis-a-vis the Select List which contained the names of 66 successful candidates leads to conclusion that the number of vacancies at the time of publication of the Select List was 66 cannot be held to be in consonance with law. More so, if the State has committed an error in preparing the merit list containing the names of candidates double the number of vacancies determined, that would not mean that Select List has become immortal and all those persons whose names appeared in the list would be offered appointment even after expiry of the life of Select List. [Paras 21 and 22] [315-E-H; 316-A-C]

Case Law Reference:

AIR 1994 SC 736	Relied on	Para 10
(1996) 4 SCC 319	Relied on	Para 10
AIR 1996 SC 976	Relied on	Para 10
AIR 1998 SC 18	Relied on	Para 10
AIR 2010 SC 932	Relied on	Para 10
AIR 2001 SC 2900	Relied on	Para 11
AIR 2009 SC 747	Relied on	Paras 12 and 14
AIR 1991 SC 1612	Relied on	Para 14
(1993) 2 SCC 573	Relied on	Para 14
AIR 1996 SC 2340	Relied on	Para 14
AIR 1997 SC 2280	Relied on	Para 14
(2002) 2 SCC 669	Relied on	Para 14
(2005) 9 SCC 22	Relied on	Para 14
AIR 2006 SC 789	Relied on	Para 14
AIR 2007 SC 2226	Relied on	Para 14
(2008) 7 SCC 210	Relied on	Paras 14 and 15
(2009) 2 SCC 479	Relied on	Para 14
(1996) 3 SCC 225	Relied on	Para 15
AIR 1996 SC 1145	Relied on	Para 15
AIR 1996 SC 2173	Relied on	Para 15
(1999) 1 SCC 330	Relied on	Para 15
(2000) 3 SCC 699	Relied on	Para 15

(2007) 6 SCC 190	**Relied on**	**Para 15**
(2007) 6 SCC 194	**Relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2008 of 2808.

From the Judgment & Order dated 26.10.2005 of the High Court of Orissa at Cuttack in OJC Nos. 10582, 11262, 11265, 11268, 11269, 11271, 11273, 11274, 11275, 11279, 11280, 11282, 11324 & 11326 of 2000.

Janaranjan Das, Swetaketu Mishra, P.P. Nayak for the Appellants.

H.P. Sahu, Abhisth Kumar, J.P. Mishra, Shankar Divate for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN 1. The present appeal has been preferred against the Judgment and Order of the Orissa High Court dated 26.10.2005 passed in OJC Nos. 10582, 11262, 11268, 11269, 11271, 11273, 11275, 11279, 11280, 11324 & 11326 of 2000, by which the High Court dismissed the Writ Petition filed by the State of Orissa/Appellant against the Judgment and order of the Orissa Administrative Tribunal, Cuttack (hereinafter called as, "the Tribunal") dated 7.4.2000 issuing direction to the appellant to appoint all the persons whose names appeared in the panel for the selection on the post of Junior Clerk held in 1995.

2. Facts and circumstances giving rise to the present appeal are that in order to fill up 15 posts of Junior Clerks in District Sonepur, applications were invited by an advertisement dated 25.06.1995. The advertisement made it clear that number of vacancies could be increased. The respondents applied in pursuance of the said advertisement along with large number of persons and written examination was held in

accordance with the Orissa Ministerial Service (Method of Recruitment to Posts of Junior Clerks in the District Offices) Rules, 1985 (hereinafter called as, "Rules, 1985"). Before the selection process could complete, the number of vacancies were increased from 15 to 33 and as per the requirement of Rules, 1985, a merit list of 66 candidates was published on 6.11.1995. The appointments were made on the said posts. The respondents, whose names appeared in the merit list and could not be offered appointment, being much below in the merit list, filed applications before the Tribunal praying for a direction to the State to offer them appointments. The Tribunal, vide its Judgment and Order dated 7.4.2000, came to the conclusion that appointments were to be offered to all the candidates till the entire select list stood exhausted. Therefore, the Tribunal directed to offer appointment to all left over candidates in the select list of 1995.

3. Being aggrieved, the State preferred the writ petition against the said common Judgment and order of the Tribunal in the High Court of Orissa and the High Court, vide Judgment and order dated 26.10.2005, modified the order of the Tribunal issuing direction to the appellants to offer appointment to those persons who had approached the Tribunal. Hence, this appeal.

4. Sh. Janaranjan Das, learned counsel appearing for the appellant-State, has submitted that number of vacancies cannot be filed up over and above the number of vacancies advertised. Once the advertised vacancies are filled up, the selection process stands exhausted and the selection process comes to an end. Where the Rules provide to determine the vacancy yearly, life of select list cannot be more than one year and once the life of the select list expires, no appointment can be offered from the panel so prepared. The Tribunal and the High Court committed an error issuing directions to appoint the candidates from the unexhausted part of the select list, which is not permissible in law. Thus, the appeal deserves to be allowed.

5. Per contra, Sh. H.P. Sahu and Sh. J.P. Mishra, learned counsel appearing for the respondents vehemently opposed the appeal contending that if the selection is not held in subsequent years, candidates whose names appear in the panel have to be offered appointments. Therefore, no interference is required with the impugned Judgment and order of the High Court. The appeal lacks merit and thus, liable to be dismissed.

6. We have considered the rival submissions of the learned counsel for the parties and perused the record.

7. Relevant Rules from Rules, 1985, which are necessary to be considered for deciding the appeal, read as under :-

"Rule 2 *Definitions* – In these rules unless the context otherwise requires -

..... "Year" means a calendar year.

Rule 3 *Recruitment*

Recruitment to the posts shall be made through direct recruitment by means of a competitive examination to be held ordinarily once in every year.

Rule 6 *Notification of vacancies*

On the receipt of the requisite information from the District Officers the Chairman of the Board shall notify the total number of vacancies to the local employment exchange indicating therein the number of reserved vacancies for the purpose of conducting the competitive examination.

Rule 11 (1) *Allotment of successful candidates*

The Chairman of the Board shall ensure completion of evaluation of answer papers and preparation of the list of successful candidates who have qualified by such standards as will be decided by him ordinarily within two

months from the date of examination. The candidates' names shall be arranged in order of merit on the basis of marks secured by them in the examination conducted by the Board. This list of successful candidates drawn in order of merit shall not ordinarily exceed double the number of vacancies as determined under Rule 6.

Rule 12 The list prepared under Sub-rule (1) of Rule 11 shall remain valid for a period of one year from the date of publication of the same or till drawal of the next year's list, whichever is earlier.

8. If the aforesaid relevant Rules are read together, the cumulative effect thereof comes to that after determining the number of vacancies taking into consideration the expected vacancies, the same shall stand notified to local Employment Exchange and advertise the same through other means. The select list, after holding the test as required under the Rules, 1985, shall be prepared and published, which shall contain the names of candidates, double the number of vacancies so advertised/determined.

9. Rule 14 merely enables the State Government to relax the eligibility conditions by recording reasons in respect of any class or categories of persons in public interest.

10. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is

permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide *State of Bihar & Ors. Vs. The Secretariat Assistant S.E. Union 1986 & Ors.* AIR 1994 SC 736; *Prem Singh & Ors. Vs. Haryana State Electricity Board & Ors.* (1996) 4 SCC 319; *Ashok Kumar & Ors. Vs. Chairman, Banking Service Recruitment Board & Ors.* AIR 1996 SC 976; *Surinder Singh & Ors. Vs. State of Punjab & Ors.* AIR 1998 SC 18; and *Rakhi Ray & Ors. Vs. High Court of Delhi* AIR 2010 SC 932).

11. In *State of Punjab v. Raghbir Chand Sharma and Ors.* AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:

> "*With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."*

12. In *Mukul Saikia and Ors. v. State of Assam and Ors.* AIR 2009 SC 747, this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The

"*currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies*" and said course is impermissible in law.

13. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

14. A Constitution Bench of this Court in *Shankarsan Dash Vs. Union of India,* AIR 1991 SC 1612, held that *appearance of the name of a candidate in the select list does not give him a right of appointment.* Mere inclusion of candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination. (see also *Asha Kaul & Anr. Vs. State of J & K & Ors.,* (1993) 2 SCC 573; *Union of India Vs. S.S.Uppal,* AIR 1996 SC 2340; *Bihar Public Service Commission Vs. State of Bihar* AIR 1997 SC 2280; *Simanchal Panda Vs. State of Orissa & Ors.,* (2002) 2 SCC 669; *Punjab State Electricity Board & Ors. Vs. Malkiat Singh* (2005) 9 SCC 22; *Union of India & Ors. Vs. Kali Dass Batish & Anr.* AIR 2006 SC 789; *Divisional Forests Officers & Ors. Vs. M. Ramalinga Reddy* AIR 2007 SC 2226; *Subha B. Nair & Ors. Vs. State of Kerala & Ors.,* (2008) 7 SCC 210; *Mukul Saikia & Ors. Vs. State of Assam & Ors.,* (2009) 1 SCC 386; and *S.S. Balu & Anr. Vs. State of Kerala & Ors.,* (2009) 2 SCC 479).

15. Select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required.

It is the settled legal proposition that no relief can be

granted to the candidate if he approaches the Court after expiry of the Select List. If the selection process is over, select list has expired and appointments had been made, no relief can be granted by the Court at a belated stage. (Vide *J.Ashok Kumar Vs. State of Andhra Pradesh & Ors.,* (1996) 3 SCC 225; *State of Bihar & Ors. Vs. Md. Kalimuddin & Ors.,* AIR 1996 SC 1145; *State of U.P. & Ors. Vs. Harish Chandra & Ors.,* AIR 1996 SC 2173; *Sushma Suri Vs. Government of National Capital Territory of Delhi & Anr.,* (1999) 1 SCC 330; *State of U.P. & Ors. Vs. Ram Swarup Saroj,* (2000) 3 SCC 699; *K. Thulaseedharan Vs. Kerala State Public Service Commission, Trivendrum & Ors.,* (2007) 6 SCC 190; *Deepa Keyes -Vs.- Kerala State Electricity Board & Anr.,* (2007) 6 SCC 194; and *Subha B. Nair & Ors.* (supra).

16. The instant case is required to be examined in view of the aforesaid settled legal proposition. The Rules, 1985 provide for determining the number of vacancies and holding competitive examination ordinarily once in a year. Select list prepared so also valid for one year. In the instant case, 15 vacancies were advertised with a clear stipulation that number of vacancies may increase. The authorities had taken a decision to fill up 33 vacancies, thus, select list of 66 persons was prepared. It is also evident from the record that some more appointments had been made over and above the 33 determined vacancies. Thus, once the selection process in respect of number of vacancies so determined came to an end, it is no more open to offer appointment to persons from the unexhausted list. It is exclusive prerogative of the employer/ State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for making appointments. Bonafide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list cannot be assailed. The Courts/ Tribunals have no competence to issue direction to the State

to initiate selection process to fill up the vacancies. A candidate only has a right to be considered for appointment, when the vacancies are advertised and selection process commences, if he possess the requisite eligibility.

17. As the appointments had been made as per the select list prepared in 1995 and selection process came to an end, there was no occasion for the Tribunal to entertain the Applications in 1997, 1998 and 1999 for the simple reason that once the number of vacancies determined are filled, the selection process came to an end, no further appointment could be made from 1995 panel. The purpose of making the list of double of the vacancies determined is to offer the appointment to the persons from the waiting list in case persons who are offered appointment do not join. But it does not give any vested right in favour of the candidates whose names appeared therein.

18. It appears from the Judgment of the Tribunal that Rule 11(1) of the Rules, 1985 did not provide originally to prepare the list double the number of determined vacancies and it was only for preparing the list containing the names equal to the number of vacancies advertised/determined. In such a fact-situation, the select list could have been prepared only containing 33 names i.e. equivalent to the number of vacancies determined. In such a fact-situation, selection process would come to an end automatically whenever 33 candidates are appointed. However, if the appellant had prepared a list double the number of vacancies determined, that would not create any vested right in favour of the respondents. Thus, Tribunal committed grave error issuing direction to offer appointments to all the left over candidates.

19. The Tribunal held as under :-

"In this case by preparing the panel far exceeding the number of vacancies, the Rules have been violated. For this lapse on the part fo the Collector, the candidates who

have been subjected to a rigorous selection at more than one stage, should not be penalised……*The validity of the select list has expired long since.* Both learned counsel for the applicant and the learned Government Advocate concede that no further recruitment has been conducted by the Collector, Sonepur. During this intervening period of four years vacancies must be arisen due to promotion, retirement, creation of new posts etc. in different offices." (Emphasis added)

20. The Tribunal, after recording the finding of fact that life of select list had expired, held that as the selection could not be held in subsequent years, thus, candidates whose names appeared in the panel should be offered appointment by granting relaxation of Rules. Issuance of such a direction is not permissible in law as no appointment can be made from the panel after expiry of the life of select list.

21. The High Court has concluded as under :-

"Here the advertisement stipulated that there were vacancies and the vacancy position might go up. The select list prepared admittedly contained the names of 66 successful candidates. A cumulative reading of Rules 6 & 11(1) of the OMS Rules, 1985 vis-à-vis the select list which contained the names of 66 successful candidates leads to an irresistible conclusion that the number of vacancies at the time of publication of the select list was 66. the stand of the State before this Court is that under the impression that the select list should contain double the number of vacancies, a lsit of 66 candidates was published. But then, if the said statement is accepted, the vacancies that existed at the time of publication of the select list would have been 33. But it appears that the total number of candidates already appointed is 40……The submission of the State that as one year had expired from the date of publication of the select list, the same had spent its validity

cannot also be accepted. If vacancies were available, the candidates selected but illegally not sponsored for appointment should not suffer."

In view of the above, the High Court directed to offer the appointment to the persons whose names appeared in the panel and had approached the Tribunal.

22. The aforesaid view taken by the High Court cannot be held to be in consonance with law. More so, if the State has committed an error in preparing the merit list containing the names of candidates double the number of vacancies determined, that would not mean that select list has become immortal and all those persons whose names appeared in the list would be offered appointment even after expiry of the life of select list.

23. In view of the above, the Judgment and order impugned hereinabove cannot be sustained in the eyes of law. The appeal is allowed. The Judgments and orders of the Tribunal dated 7.4.2000 and the High Court dated 26.10.2005 are set aside. No order as to costs.

K.K.T. Appeal allowed.

FULJIT KAUR
v.
STATE OF PUNJAB & ORS.
(Civil Appeal No. 5292 of 2004)

JUNE 3, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Punjab Urban Estate (Sale of Sites) Rules, 1965:

rr. 2(aa), 2(e), 4, 5-A – 'Additional price', 'tentative price', 'sale price' and 'liability to pay additional price' – 'Provisional price' and 'tentative price' – Connotation of – Allotment of plot in haste – Allottee asked to deposit 'provisional price' – Subsequently, demand raised for additional price – High Court upholding the demand notice – HELD: There is a difference between 'provisional price' and 'tentative price' and it may take a long time for the State to determine the tentative price – There is nothing in the scheme of the Act or the Rules indicating that a person to whom the plot has been allotted cannot be asked to pay the 'tentative price' – Further, the sale price in the cases covered by the land acquisition Act is the aggregate of the tentative price and, the 'additional price' which is attributable to the enhanced compensation awarded by the reference court – High Court has rightly relied upon the case of Preeta Singh wherein Supreme Court upheld the 'sale price' as determined under r.4

Punjab Urban Estates (Development and Regulation) Act, 1964:

Urban Development – Housing – Constitution of India, 1950 – Articles 14 and 136.

Constitution of India, 1950:

Article 136 – Dismissal of SLP in limine – HELD: Does

not operate as res judicata – Nor does it mean that the judgment of High Court has been affirmed – Nor can the impugned judgment be said to have merged with such a dismissal order passed by Supreme Court – An order rejecting a special leave petition at the threshold without detailed reasons therefor does not constitute any declaration of law or a binding precedent – Punjab Urban Estate (Sale of Sites) Rules, 1965 – Doctrine of merger - Precedents.

Article 14 – Equality before law – HELD: Is a trite, which cannot be claimed in illegality and, therefore, cannot be claimed by a citizen or enforced by a court in a negative manner – A wrong decision in favour of any particular party does not entitle any other party to claim its benefits – Punjab Urban Estate (Sale of Sites) Rules, 1965.

The appellant applied on 23.2.1987 for allotment of a residential plot in an urban area. On 25.2.1987, an allotment letter allotting a 400 sq. yard plot was issued to the appellant asking her to deposit the "provisional price". Subsequently, by letter dated 25.3.1992 the additional demand was made. The allottee filed a writ petition before the High Court challenging the additional demand as arbitrary and unreasonable. The High Court upheld the demand notice.

In the instant appeal filed by the allottee, it was contended for the appellant that the High Court committed an error in dismissing the writ petition of the appellant and relying upon the judgment of the Supreme Court in *Preeta Singh's* ***case*****[1]. It was submitted that in the case of** *D.S. Laungia*[2] **such unreasonable and arbitrary demand was quashed by the High Court and the said judgment attained finality as the special leave petition**

1. *Preeta Singh & Ors. vs. Haryana Urban Development Authority & Ors.* **1996 (1) Suppl. SCR 621 = (1996) 8 SCC 756.**
2. *D.S. Laungia & Anr. vs. The State of Punjab & Ors.* **AIR 1993 Pub. & Har. 54.**

preferred by the State against the said judgment was withdrawn; that pursuant to the direction of the Supreme Court, though the additional price was determined, but no recovery was made from D.S. Laungia and, therefore, the appeal deserved to be allowed.

Dismissing the appeal, the Court

1.1. There is a difference between the "provisional price" and the "tentative price" and it may take a long time for the State to determine the tentative price. A perusal of rr. 2(aa), 2(e), 4 and 5-A of the Punjab Urban Estate (Sale of Sites) Rules, 1965 shows that the "tentative price" means the price determined by the State Government from time to time in respect of a sale of site by allotment and while doing so, the Government has to take into consideration various factors including the amount paid as compensation; the phrase "additional price" has been defined as the price determined by the State Government having regard to the enhanced compensation payable to the land owners in pursuance of the award passed by the court on a reference made u/s 18 or further appeal under the Land Acquisition Act 1894; and the "sale price" is the price payable in respect of an allotment of site, which is the aggregate of the tentative price and the additional price, in case the land has been acquired under the 1894 Act. There is nothing in the scheme of the Punjab Urban Estates (Development and Regulation) Act 1964 or the 1965 Rules from which it can be inferred that tentative price is synonymous with the provisional price, and that a person, to whom the plot has been allotted on provisional price, cannot be asked to pay the tentative price determined by the government. [para 18-19] [335-A-G]

1.2. In the instant case, the calculations were furnished by the respondents as to on what basis tentative price had been determined. There is nothing on

record to show that the tentative price determined by the State was unreasonable or arbitrary nor is it the case of the allottee that the market value of the land has not been enhanced while deciding the reference under the 1894 Act. While deciding this case, the High Court placed heavy reliance upon the judgment of this Court in *Preeta Singh,* wherein, after taking note of various statutory provisions of Act of 1964 and the 1965 Rules, particularly, r.2(aa), the Court upheld the sale price as determined in Rule 4. The High Court has taken into consideration all statutory provisions, the calculations made by the respondents as to under what circumstances the "tentative- price" had been fixed, and reached the conclusion that the demand was justified. The High Court also rejected the plea that judgment in *D.S. Laungia* was an authority on the issue. [para 16, 20 and 22] [335-H; 338-B-C; 333-B-C]

Preeta Singh & Ors. Vs. Haryana Urban Development Authority & Ors. **1996 (1) Suppl. SCR 621 = (1996) 8 SCC 756;** *Bangalore Development Authority Vs. Syndicate Bank* **(2007) 6 SCC 711;** *Tamil Nadu Housing Board & Ors. Vs. Sea Shore Apartments Owners' Welfare Association* **2008 (1) SCR 370 = (2008) 3 SCC 21, relied on.**

D.S. Laungia & Anr. Vs. The State of Punjab & Ors. **AIR1993 Pub.&Har. 54, disapproved.**

1.3. It may be pertinent to mention here that the allotment had been made to the appellant within 48 hours of submission of her application though in ordinary cases, it takes about a year. The appellant was further favoured to pay the provisional price in four instalments in two years, as is evident from the letter dated 8.4.1987. Making the allotment in such a hasty manner itself is arbitrary and unreasonable and is hit by Article 14 of the Constitution. This Court has consistently held that "when a thing is done in a post-haste manner, malafide would

be presumed." Anything done in undue haste can also be termed as "arbitrary and cannot be condoned in law." Thus, such an allotment in favour of the appellant is liable to be declared to have been made in arbitrary and unreasonable manner. However, the Court is not inclined to take such drastic steps as the appellant has developed the land subsequent to allotment. [para 26] [340-B-F]

Dr. S.P. Kapoor Vs. State of Himachal Pradesh & Ors. **1982 (1) SCR 1043 = AIR 1981 SC 2181;** *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. Vs. Devendra Kumar Jain & Ors*. **1994 (6) Suppl. SCR 344 = (1995) 1 SCC 638;** *Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia & Ors*. **2003 (6) Suppl. SCR 1023 =AIR 2004 SC 1159; and** *Zenit Mataplast P. LTd. Vs. State of Maharashtra & Ors*. **2009 (14) SCR 403 = (2009)10 SCC 388, relied on**

2.1. There is no dispute to the settled proposition of law that dismissal of a special leave petition *in limine* by this Court does not mean that the reasoning of the judgment of the High Court against which the special leave petition has been filed stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for the reason, which may be other than merit of the case. Nor such an order of this Court operates as *res judicata*. An order rejecting the special leave petition at the threshold without detailed reasons therefor does not constitute any declaration of law nor a binding precedent. [para 8] [328-B-D]

Kunhayammed & Ors. v. State of Kerala & Anr. **2000 (1) Suppl. SCR 538 = AIR 2000 SC 2587;** *The Workmen of Cochin Port Trust Vs. The Board of Trustees of the Cochin Port Trust & Anr*. **1978 (3) SCR 971 = AIR 1978 SC 1283;** *Ahmedabad Manufacturing & Calico Printing Co. Ltd. Vs. The Workmen & Anr*. **1981 (3) SCR 213 =AIR 1981 SC 960;**

Indian Oil Corporation Ltd. Vs. State of Bihar & Ors. **1986 (3) SCR 553 =AIR 1986 SC 1780;** *Supreme Court Employees' Welfare Association Vs. Union of India & Ors.* **1989 (3) SCR 488 = AIR 1990 SC 334;** *Yogendra Narayan Chowdhury & Ors. Vs. Union of India & Ors*. **1995 (6) Suppl. SCR 17 = AIR 1996 SC 751;** *Union of India & Anr. Vs. Sher Singh & Ors*. **1997 (1) SCR 1048 = AIR 1997 SC 1796;** *V.M. Salgaocar & Bros. (P) Ltd. Vs. Commissioner of Income Tax* **2000 (2) SCR 1169 = AIR 2000 SC 1623;** *Saurashtra Oil Mills Assn., Gujrat Vs. State of Gujrat & Anr*. **2002 (1) SCR 1099 = AIR 2002 SC 1130;** *Union of India & Ors. Vs. Jaipal Singh* **2003 (5) Suppl. SCR 115 = (2004) 1 SCC 121; and** *Y. Satyanarayan Reddy Vs. Mandal Revenue Officer, Andhra Pradesh* **2009 (13) SCR 872 = (2009) 9 SCC 447, relied on.**

State of Maharashtra Vs. Digambar **1995 (1) Suppl. SCR 492 = AIR 1995 SC 1991, referred to.**

2.2. In the fact-situation of the case in *D.S. Laungia*, the question of application of doctrine of merger did not arise and even by no stretch of imagination it can be held that this Court has approved the judgment in D.S. Laungia, rather a different view is required to be taken in view of the fact that this Court had expressed doubts about the correctness of the said impugned Judgment. [para 12] [331-D]

2.3. The respondent cannot claim parity with D.S. Laungia in view of the settled legal proposition that Article 14 of the Constitution of India does not envisage for negative equality. Article 14 is not meant to perpetuate illegality or fraud. It has a positive concept. Equality is a trite, which cannot be claimed in illegality and, therefore, cannot be claimed by a citizen or enforced by a court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of

individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision. Even otherwise Art.14 cannot be stretched too far, otherwise it would make function of the administration impossible. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the appellant to get the same relief. [para 13-14] [332-A-F]

Coromandel Fertilizers Ltd. Vs. Union of India & Ors. **1985 SCR 523 = AIR 1984 SC 1772;** *Panchi Devi Vs. State of Rajasthan & Ors*. **2008 (17) SCR 1325 = (2009) 2 SCC 589; and** *Shanti Sports Club & Anr. Vs. Union of India & Ors.* **2009 (13) SCR 710 = (2009) 15 SCC 705;** *Chandigarh Administration & Anr Vs. Jagjit Singh & Anr*. **1995 (1) SCR 126 = AIR 1995 SC 705;** *Smt Sneh Prabha Vs. State of U.P. & Ors*., **AIR 1996 SC 540;** *Jalandhar Improvement Trust Vs. Sampuran Singh*, **AIR 1999 SC 1347;** *State of Bihar & Ors. Vs. Kameshwar Prasad Singh & Anr.*, **2000 (3) SCR 764 =AIR 2000 SC 2306;** *Union of India & Ors. Vs. Rakesh Kumar,* **2001 (2) SCR 927 =AIR 2001 SC 1877;** *Yogesh Kumar & Ors. Vs. Government of NCT Delhi & Ors.*, **2003 (2) SCR 662 = AIR 2003 SC 1241;** *Union of India & Anr. Vs. International Trading Company & Anr*., **2003 (1) Suppl. SCR 55 = AIR 2003 SC 3983;** *M/s Anand Button Ltd. Vs. State of Haryana & Ors.,* **AIR 2005 SC 565;** *K.K. Bhalla Vs. State of M.P. & Ors*., **2006 SCR 342 = AIR 2006 SC 898; and** *Maharaj Krishan Bhatt & Anr. Vs. State of Jammu & Kashmir & Ors*., **2008 (11) SCR 670 = (2008) 9 SCC 24, relied on.**

2.4. It cannot be said that the State could not make

any recovery from D.S. Laungia. This Court, vide order dated 20.05.2010, asked the respondents to explain this aspect and file an affidavit of the Administrator of the Authority. In response thereto, an Affidavit was filed explaining the entire position in respect of the allotment and recovery of dues furnishing all details and according to the said affidavit, the money is being recovered from all defaulters including D.S. Laungia along with interest. [para 27] [340-G-H; 341-A-B]

Case Law Reference

1996 (1) Suppl. SCR 621	relied on	para 4
AIR1993 Pub.&Har. 54	disapproved	para 4
1978 (3) SCR 971	relied on	para 8
1981 (3) SCR 213	relied on	para 8
1986 (3) SCR 553	relied on	para 8
1989 (3) SCR 488	relied on	para 8
1995 (6) Suppl. SCR 17	relied on	para 8
1997 (1) SCR 1048	relied on	para 8
2000 (2) SCR 1169	relied on	para 8
2002 (1) SCR 1099	relied on	para 8
2003 (5) Suppl. SCR 115	relied on	para 8
2009 (13) SCR 872	relied on	para 8
1995 (1) Suppl. SCR 492	referred to	para 9
2000 (1) Suppl. SCR 538	relied on	para 10
(1985) SCR 523	relied on	para 13
2008 (17) SCR 1325	relied on	para 13

2009 (13) SCR 710	**relied on**	**para 13**
1995 (1) SCR 126	**relied on**	**para 14**
AIR 1996 SC 540	**relied on**	**para 14**
AIR 1999 SC 1347	**relied on**	**para 14**
Anr., 2000 (3) SCR 764	**relied on**	**para 14**
2001 (2) SCR 927	**relied on**	**para 14**
2003 (2) SCR 662	**relied on**	**para 14**
2003 (1) Suppl. SCR 55	**relied on**	**para 14**
AIR 2005 SC 565	**relied on**	**para 14**
2006 SCR 342	**relied on**	**para 14**
2008 (11) SCR 670	**relied on**	**para 14**
2007) 6 SCC 711	**relied on**	**para 23**
2008 (1) SCR 370	**relied on**	**para 24**
1982 (1) SCR 1043	**relied on**	**para 26**
1994 (6) Suppl. SCR 344	**relied on**	**para 26**
2003 (6) Suppl. SCR 1023	**relied on**	**para 26**
2009 (14) SCR 403	**relied on**	**para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5292 of 2004.

From the Judgment and Order date 21.12.1999 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 4763 of 1992.

Sanjay Sarin and Ashok Mathur for the Appellant.

Rachana Joshi Issar and Shailendra Kumar for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This is a unique case which reveals that an influential person can have allotment of a residential plot in discretionary quota within 48 hours of submission of application and then assert in Court that she has a right to have a land on a throwaway price and not to deposit the sale price for quarter of a century.

2. This appeal has been preferred against a Judgment and Order dated 21.12.1999 in Writ Petition No. 4763 of 1992 of the High Court of Punjab & Haryana at Chandigarh, dismissing the petition against the Demand Notice of additional price for residential plot.

3. Facts and circumstances giving rise to this case are that the appellant made an application on 23.02.1987 for allotment of a residential plot in Urban Estates, SAS Nagar, Punjab. The Administration, vide letter dated 25.02.1987, issued the allotment letter in favour of the appellant in respect of plot No. 702, measuring 400 sq. yards in Sector 70 Urban Estate SAS Nagar, making it clear that as the proper calculation could not be made and tentative price had not been determined, the allottee has to deposit provisional price of Rs. 93000/- in four installments upto 15.10.1989. Subsequently, vide letter dated 25.03.1992, additional demand of Rs. 2,19,000/- was made, however, instead of depositing the said amount, appellant challenged the said Demand Notice by filing Writ Petition No. 4763 of 1992 before the High Court of Punjab & Haryana contending that the additional demand was arbitrary and unreasonable. A large number of similar cases were also pending before the High Court and some had earlier been disposed of. However, the Writ Petition filed by the appellant has been dismissed by the High Court vide impugned Judgment and Order dated 21.12.1999 upholding the demand dated 25.03.1992. Hence this appeal.

4. Sh. Vijay Hansaria, learned senior counsel appearing

for the appellant, has submitted that the High Court committed an error in dismissing the said Writ Petition relying upon the Judgment of this Court in *Preeta Singh & Ors. Vs. Haryana Urban Development Authority & Ors.* (1996) 8 SCC 756. In *D.S. Laungia & Anr. Vs. The State of Punjab & Ors.* AIR 1993 Pub.&Har. 54, such unreasonable and arbitrary demand had been quashed by the High Court and the State Government was issued direction to re-determine the amount taking into consideration the provisions of the Punjab Urban Estate (Sale of Sites) Rules, 1965 (hereinafter called as, "the Rules") and provisions of Punjab Urban Estates (Development and Regulation) Act, 1964 (hereinafter called as, "the Act"). The said Judgment has attained finality as the State had preferred Special Leave Petition against the said Judgment & Order before this Court but later on, it was withdrawn. After re-determining the additional price, no recovery has been made from Sh. D.S. Laungia till date. Therefore, the appeal deserves to be allowed.

5. On the other hand, Ms. Rachna Joshi Issar, learned counsel appearing for the respondent vehemently opposed the appeal contending that the High Court has rightly relied upon the Judgment in *Preeta Singh* (supra). In *D.S. Laungia* (supra), the State Government, being aggrieved, had challenged the said Judgment and Order before this Court by filing the Special Leave Petition but it was withdrawn for certain reasons. Therefore, it cannot be held that the Judgment in *D.S. Laungia* (supra) stood approved by this Court. Calculations had been made strictly in consonance with the Statutory provisions of the Act and the Rules, particularly taking note of Rule 2(aa) and 2(e) of the Rules and it is to be recovered from *D.S. Laungia* also. The High Court was fully satisfied regarding determination of the additional price and therefore, no fault can be found with impugned Judgment and Order. Hence, the appeal is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

7. The questions do arise as to whether such an order of withdrawal passed by this Court amounts to confirmation/ approval of the judgment and order of the High Court and as to whether appellant could be treated differently.

8. There is no dispute to the settled proposition of law that dismissal of the Special Leave Petition in limine by this Court does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for the reason, which may be other than merit of the case. Nor such an order of this Court operates as res judicata. An order rejecting the Special Leave Petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent. [Vide *The Workmen of Cochin Port Trust Vs. The Board of Trustees of the Cochin Port Trust & Anr.* AIR 1978 SC 1283; *Ahmedabad Manufacturing & Calico Printing Co. Ltd. Vs. The Workmen & Anr.* AIR 1981 SC 960; *Indian Oil Corporation Ltd. Vs. State of Bihar & Ors.* AIR 1986 SC 1780; *Supreme Court Employees' Welfare Association Vs. Union of India & Ors.* AIR 1990 SC 334; *Yogendra Narayan Chowdhury & Ors. Vs. Union of India & Ors.* AIR 1996 SC 751; *Union of India & Anr. Vs. Sher Singh & Ors.* AIR 1997 SC 1796; *V.M. Salgaocar & Bros. (P) Ltd. Vs. Commissioner of Income Tax* AIR 2000 SC 1623; *Saurashtra Oil Mills Assn., Gujrat Vs. State of Gujrat & Anr.* AIR 2002 SC 1130; *Union of India & Ors. Vs. Jaipal Singh* (2004) 1 SCC 121; and *Y. Satyanarayan Reddy Vs. Mandal Revenue Officer, Andhra Pradesh* (2009) 9 SCC 447].

9. In *State of Maharashtra Vs. Digambar* AIR 1995 SC 1991, this Court considered a case wherein against the judgment and order of the High Court, special leave petition was not filed but when other matters were disposed of by the

High Court in terms of its earlier judgment, the Authorities approached this Court challenging the correctness of the same. It was submitted in that case that if the State Authorities had accepted the earlier judgment and given effect to it, it was not permissible for the Authority to challenge the subsequent judgments/orders passed in terms of the earlier judgment which had attained finality. This Court repealed the contention observing that the circumstances for non-filing the appeals in some other or similar matters or rejection of the SLP against such Judgment in limine by this Court, in some other similar matters by itself, would not preclude the State Authorities to challenge the other orders for the reason that non-filing of such SLP and pursuing them may seriously jeopardize the interest of the State or public interest.

10. *In Kunhayammed & Ors. v. State of Kerala & Anr.* AIR 2000 SC 2587, this Court reconsidered the issue and some of the above referred judgments and came to the conclusion that dismissal of special leave petition in limine by a non-speaking order may not be a bar for further reconsideration of the case for the reason that this Court might not have been inclined to exercise its discretion under Article 136 of the Constitution. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment as in that case doctrine of merger would come into play. This Court laid down the following principles:-

> "(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
>
> (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is

upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the

Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

11. The Court came to the conclusion that where the matter has been decided by a non-speaking order in limine the party may approach the Court for reconsideration of the case in exceptional circumstances.

12. In view of the above, in the fact-situation of the case in *D.S. Laungia* (supra), question of application of doctrine of merger did not arise and even by no stretch of imagination it can be held that this Court has approved the judgment in *D.S. Laungia* (supra), rather a different view is required to be taken in view of the fact that this Court had expressed doubts about the correctness of the impugned Judgment by making the following observations :-

"In the instant matter as also in the matters enumerated in the letter of Mr. G.K. Bansal, Advocate for the petitioners dated January 25, 1994, seeking withdrawal of all these matters, we are constrained to remark that no reasons have been assigned as to why the State of Punjab is submitting to the *impugned orders of the High Court which prima facie appear to us to be unsustainable.* The direct result of the withdrawal would not only be compounding to an illegality but would otherwise cause tremendous loss to the State exchequer. We, therefore, direct that the reasons which impelled the State to seek withdrawal of these matters be placed before us in the form of an affidavit by the Chief Secretary, Punjab or the Secretary of the Department concerned justifying the step for seeking withdrawal." (Emphasis added)

13. The respondent cannot claim parity with *D.S. Laungia* (supra) in view of the settled legal proposition that Article 14 of the Constitution of India does not envisage for negative equality. Article 14 is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a Judicial Forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision. Even otherwise Art.14 cannot be stretched too far otherwise it would make function of the administration impossible. [vide *Coromandel Fertilizers Ltd. Vs. Union of India & Ors.* AIR 1984 SC 1772; *Panchi Devi Vs. State of Rajasthan & Ors.* (2009) 2 SCC 589; and *Shanti Sports Club & Anr. Vs. Union of India & Ors.* (2009) 15 SCC 705].

14. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide *Chandigarh Administration & Anr Vs. Jagjit Singh & Anr.,* AIR 1995 SC 705; *Smt Sneh Prabha Vs. State of U.P. & Ors.,* AIR 1996 SC 540; *Jalandhar Improvement Trust Vs. Sampuran Singh,* AIR 1999 SC 1347; *State of Bihar & Ors. Vs. Kameshwar Prasad Singh & Anr.,* AIR 2000 SC 2306; *Union of India & Ors. Vs. Rakesh Kumar,* AIR 2001 SC 1877; *Yogesh Kumar & Ors. Vs. Government of NCT Delhi & Ors.,* AIR 2003 SC 1241; *Union of India & Anr. Vs. International Trading Company & Anr.,* AIR 2003 SC 3983; *M/s Anand Button Ltd. Vs. State of Haryana & Ors.,* AIR 2005 SC 565; *K.K. Bhalla Vs. State of M.P. & Ors.,* AIR 2006

SC 898; and *Maharaj Krishan Bhatt & Anr. Vs. State of Jammu & Kashmir & Ors.,* (2008) 9 SCC 24).

15. In view of the above, the submissions made by Shri Hansaria, Amicus Curiae in this regard are preposterous and not worth consideration.

16. In the instant case, the High Court has taken into consideration all statutory provisions and calculations made by the respondents as under what circumstances the "tentative-price" had been fixed and reached the conclusion that the demand was justified. The Court also rejected the submissions made on behalf of the allottees that judgment in *D.S. Laungia* (supra) was an authority on the issue.

17. Rules 2(aa), 2(e), 4 and 5 of the Rules which have direct bearing on the questions raised in this appeal read as under:

"2(aa)- 'Additional Price' means such sum of money as may be determined by the State Government, in respect of the sale of a site by allotment, having regard to the amount of compensation by which the compensation awarded by the Collector for the land acquired by the State Government of which the site sold forms a part, is enhanced by the Court on a reference made under Section 18 of the Land Acquisition Act, 1894, and the amount of cost incurred by the State Government in respect of such reference.

2(e)- 'tentative price' means such sum of money as may be determined by the State Government from time to time, in respect of the sale of a site by allotment, having regard among other matters, to the amount of compensation awarded by the Collector under Land Acquisition Act, 1894 for the land acquired by the State Government of which the site sold forms a part.

4. Sale Price:- In the case of sale of a site by allotment the sale price shall be:

(a) where such site forms part of the land acquired by the State Government under the Land Acquisition Act, 1894; and

(i) no reference under Section 18 thereof is made against the award of the Collector of such reference having been made has failed, the tentative price.

(ii) On a reference made under Section 18 thereof the compensation awarded by the Collector is enhanced by the Court. The aggregate of the tentative price and the additional price;

(b) in any other case, such final price as may be determined by the State Government from time to time.

(2) In case of sale of site by auction the sale price shall be such reserve price as may be recommended by the State Government from time to time or any higher price determined as a result of bidding in an open auction.

5-A: Liability to pay additional price.

(1) In the case of sale of site by allotment the transferee shall be liable to pay to the State Government in addition to the tentative price, the additional price, if any determined in respect thereto under these rules.

(2) The additional price shall be payable by the transferee within a period of thirty days of the date of demand made in this behalf by the Estate Officer.

Provided that the Chief Administrator may in a particular case, and for reasons to be recorded in writing allow the applicant to make payment of the said amount within a further period not exceeding thirty days."

18. A perusal of the above quoted rules shows that the "tentative price" means the price determined by the State Government from time to time in respect of a sale of site by allotment and while doing so, the Government has to take into consideration various factors including the amount paid as compensation.

19. The phrase 'additional price' has been defined as the price determined by the State Government having regard to the enhanced compensation payable to the land owners in pursuance of the award passed by the court on a reference made under Section 18 or further appeal under the Act 1894. The sale price is the price payable in respect of an allotment of site. If the site sold by the competent authority forms part of the land acquired by the State Government under the Act 1894 and no reference under Section 18 thereof is made against the award of the Collector or such reference having been made has failed, the sale price is the tentative price as defined in Rule 2(e) of the Rules but if the compensation awarded by the Collector is enhanced by the court on a reference made under Section 18 of the Act 1894, then the sale price means the aggregate of the tentative price and the additional price. If the site allotted by the competent authority does not form part of the land acquired by the State Government under the Act 1894, then the sale price would mean such final price as may be determined by the State Government. However, there is nothing in the scheme of the Act 1964 and the rules from which it can be inferred that tentative price is synonymous with the provisional price, and that a person, to whom the plot has been allotted on provisional price, cannot be asked to pay the tentative price determined by the government. There is a difference between the "provisional price" and the "tentative price" and it may take a long time for the State to determine the tentative price.

20. In the instant case, the calculations had been furnished by the respondents as on what basis tentative price had been determined.

A. Cost of land

1.	Cost of land per acre of Sector 70 SAS Nagar	Rs.90,000/-
2.	Solatium charges @30%	Rs.27,000/-
3.	Interest charges from the date of Notification till the date of Award @12% from 1980 to 1984 for 4 Years	Rs.43,000/-
4.	Interest charges 15% from 1984 to 1990 for 6 years on the cost of land	Rs.1,44,180/-
		Rs.3,04,380/-

B. Cost of Internal and External Development

1.	Water Supply @ Rs.1.35 lacs.	Rs.1,35,000/-
2.	Sewerage @ Rs.59,000/-	Rs. 59,000/-
3.	Sterm Water @ Rs.1,32,000/-	Rs. 1,32,000/-
4.	Roads @ Rs.55,000/- per acre	Rs. 55,000/-
5.	Bridges & Others @Rs.11,000/- per acre	Rs. 11,000/-
6.	Horticulture @ Rs.36,000/- per acre	Rs. 36,000/-
7.	Street lightening @Rs.15,000/-per acre	Rs. 15,000/-
8.	Electrification @Rs.15,000/-per acre	Rs. 15,000/-
9.	Conservancy charges @Rs.9,000/-per acre	Rs. 9,000/-
10.	Utility services @Rs.20,000/-per acre	Rs. 20,000/-
11.	Maintenance & Re-surfacing of roads for 5 years @ Rs.63,000/- per acre	Rs. 63,000/-

12.	Maintenance of Public Health service @ Rs.39,000/- per acre	Rs. 39,000/-
13.	Maintenance & Re-surfacing of roads Beyond 5 years @Rs.45,000/- per acre	Rs. 45,000/-
14.	Division of H.T. Line@ Rs.7,000/- per acre	Rs. 7,000/-
15.	Earth Filling @Rs.10,000/- per acre	Rs. 10,000/-
		Rs.6,51,000/-
C. (i)	Establishment charges@14% + 3% on the cost of land.	Rs. 51,745/-
(ii)	Interest charges @1% for plotable area(55%)	Rs. 2,662/-
(iii)	Interest charges for 3 years @10% each Year on development charges	Rs.1,51,200/-
(iv)	Unforeseen charges as well as escalation Charges @10%	Rs.1,16,098/-
	Total expenditure per acre	Rs.12,77,064/-

Total Expenditure of 306.59 acres of land
Acquired for Sector 70 SAS Nagar Rs.39,15,34,824/-
Saleable area 6,74,233 Sq.yds.
Rate per sq.yd. $\frac{39,15,34,824}{6,74,233}$ = Rs.580/-

21. The plots measuring 100 sq.yds. were to be allotted at tentative price calculated at subsidized rate of 10% less than the reserve price while plots measuring 150, 200 and 250 sq.yds. were to be allotted at tentative price equal to the reserve price. The plots measuring 300 and 400 sq.yds. area are to be allotted at tentative price equal to 1-1/2 times of the reserve price and plots measuring 500 sq.yds. were to be allotted at tentative price equal to double the reserve price. Taking the overall position into account, the Government fixed the reserve price at Rs.520/- per sq.yd. for calculating the

tentative prices, in the above manner, for plots of various sizes.

22. There is nothing on record to show that the tentative price determined by the State could be unreasonable or arbitrary and it is not the case of the allottee that the market value of the land has not been enhanced while deciding the reference under the Act 1894. While deciding this case, the High Court placed heavy reliance upon the judgment of this Court in *Preeta Singh* (supra) wherein after taking note of various statutory provisions of Act 1964 and Rules 1965, particularly, Rule 2(aa) and sale price as determined in Rule 4, this Court came to the following conclusion:

> "7. A conjoint reading of the above Rules would clearly indicate that the allottee is liable to pay a sale price including the additional price and the cost incurred and also the cost of improvement of the sites. It is to be remembered that the respondent HUDA is only a statutory body for catering to the housing requirement of the persons eligible to claim for allotment. They acquire the land, develop it and construct buildings and allot the buildings or the sites, as the case may be. Under these circumstances, the entire expenditure incurred in connection with the acquisition of the land and development thereon is required to be borne by the allottees when the sites or the buildings sold after the development are offered on the date of the sale in accordance with the regulations and also conditions of sale. It is seen that in the notice dated 9-8-1990, the total area, net area, the payable amount for the gross acreage, the acreage left for the developmental purpose, balance recoverable from the plot-holders, plot-table area have been given for each of the areas and recovery rate also has been mentioned under the said notice. Under these circumstances, there is no ambiguity left in the calculations. If, at all, the appellants had got any doubt, they would have approached the authority and sought for further information. It is not the case that they had sought the information and

the same was withheld. Under these circumstances, we do not find any illegality in the action taken by the respondents. The High Court, therefore, was right in refusing to interfere with the order."

23. In *Bangalore Development Authority Vs. Syndicate Bank* (2007) 6 SCC 711, this Court, while considering a similar issue, laid down large number of principles including the following : -

"Where the plot/flat/house has been allotted at a tentative or provisional price, subject to final determination of price on completion of the project (that is acquisition proceedings and development activities), the development authority will be entitled to revise or increase the price. But where the allotment is at a fixed price, and a higher price or extra payments are illegally or unjustifiably demanded and collected, the allottee will be entitled to refund of such excess with such interest, as may be determined with reference to the facts of the case."

24. In *Tamil Nadu Housing Board & Ors. Vs. Sea Shore Apartments Owners' Welfare Association* (2008) 3 SCC 21, while deciding the similar issue, this Court held as under :-

"So far as price is concerned, in 1991, when the names of applicants were registered, it was clarified that the price indicated was 'tentative price' and it was subject to 'final price' being fixed by the Board. In any case when the scheme was altered from seven types to fifteen types flats, it was stated that the amount shown was merely tentative selling price. The intending purchasers, therefore, were aware of the fact that the final price was to be fixed by the Board. In fact an agreement to that effect was executed by all prospective allottees wherein they agreed that they would pay the amount which would be finally fixed by the Board……In the circumstances, it cannot be said that the allottees were not aware of the above condition

and they were compelled to make payment and thus were treated unfairly or unreasonably by the Board."

25. The instant case is squarely covered by the aforesaid Judgments of this Court and particularly, *Preeta Singh* (supra) and in view thereof, the appeal is liable to be dismissed.

26. Before parting with the case, it may be pertinent to mention here that the allotment had been made to the appellant within 48 hours of submission of her application though in ordinary cases, it takes about a year. Appellant had further been favoured to pay the aforesaid provisional price of Rs. 93,000/- in four installments in two years, as is evident from the letter dated 8.4.1987. Making the allotment in such a hasty manner itself is arbitrary and unreasonable and is hit by Article 14 of the Constitution. This Court has consistently held that *"when a thing is done in a post-haste manner, malafide would be presumed."* Anything done in undue haste can also be termed as *"arbitrary and cannot be condoned in law."* [vide *Dr. S.P. Kapoor Vs. State of Himachal Pradesh & Ors.* AIR 1981 SC 2181; *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. Vs. Devendra Kumar Jain & Ors.* (1995) 1 SCC 638; *Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia & Ors.* AIR 2004 SC 1159; and *Zenit Mataplast P. LTd. Vs. State of Maharashtra & Ors.* (2009)10 SCC 388].

Thus, such an allotment in favour of the appellant is liable to be declared to have been made in arbitrary and unreasonable manner. However, we are not inclined to take such drastic steps as the appellant has developed the land subsequent to allotment.

27. We further find no force in submission made by Sh. Vijay Hansaria, Sr. Advocate, that in spite of making recalculation in view of the directions issued by the High Court in the case of *D.S. Laungia* (supra), State could not make any recovery from Sh. Laungia. This Court, vide order dated

20.05.2010, asked the respondents to explain this aspect and file an affidavit of the Administrator of the Authority. In response thereto, an Affidavit had been filed by the Chief Administrator, Greater Mohali Development Authority, explaining the entire position in respect of the allotment and recovery of dues furnishing all details and according to this Affidavit, the money is being recovered from all defaulters including Shri D.S. Laungia along with interest.

28. In view of the above, we find no force in the appeal, it lacks merit and is, accordingly, dismissed. No order as to costs.

R.P. Appeal dismissed.

STATE OF PUNJAB & ORS.
v.
G.S. RANDHAWA
(Civil Appeal No. 3392 of 2007)

JUNE 3, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Punjab Urban Estate (Sale of Sites) Rules, 1965:

Allotment of plot – Liability of allottee to pay additional price ***– HELD:*** *In view of the decision of the Court in Smt. Fuljit Kaur* the judgment of the High Court is set aside – The demand notice is upheld –The appellants are entitled to make recovery in accordance with law.*

Smt. Fuljit Kaur vs. state of Punjab & Ors.* **[2010] 7 SCR 317, relied on.

Case Law Reference:

[2010] 7 SCR 317 relied on para 2

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3392 of 2007.

From the Judgment and Order dated 6.12.2006 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 2800 of 1992.

Vijay Hansaria, (A.C.) and Ashok Mathur for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. We have heard Ms. Rachna Joshi Issar, learned counsel appearing for the appellant. In spite of notice, respondent did not enter appearance. We requested

Sh. Vijay Hansaria, learned senior counsel for the respondent, to assist the Court as Amicus Curiae.

2. For the reasons recorded in Civil Appeal No. 5292 of 2004 (Smt. *Fuljit Kaur Vs. State of Punjab & Ors.*) decided on this date, the appeal stands allowed. Judgment and Order of the High Court dated 06.12.2006 is set aside and the Demand Notice is upheld. The appellant is entitled to make recovery in accordance with law.

R.P. Appeal allowed.

STATE OF PUNJAB & ORS.
v.
COL. KULDEEP SINGH
(Civil Appeal No. 3546 of 2007)

JUNE 3, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Punjab Urban Estate (Sale of Sites) Rules, 1965:

Allotment of plot – Liability of allottee to pay additional price ***– HELD:*** *In view of the decision of the Court in Smt. Fuljit Kaur* the judgment of the High Court is set aside – The demand notice is upheld –The appellants are entitled to make recovery in accordance with law.*

Smt. Fuljit Kaur vs. state of Punjab & Ors.* **[2010] 7 SCR 317, relied on.

Case Law Reference:

[2010] 7 SCR 317 relied on para 2

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3546 of 2007.

From the Judgment and Order dated 6.12.2006 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 18110 of 1991.

Vijay Hansaria, (A.C.) and Ashok Mathur for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. We have heard Ms. Rachna Joshi Issar, learned counsel appearing for the appellant. In spite of notice, respondent did not enter appearance. We requested

Sh. Vijay Hansaria, learned senior counsel for the respondent, to assist the Court as Amicus Curiae.

2. For the reasons recorded in Civil Appeal No. 5292 of 2004 (Smt. *Fuljit Kaur Vs. State of Punjab & Ors.*) decided on this date, the appeal stands allowed. Judgment and Order of the High Court dated 06.12.2006 is set aside and the Demand Notice is upheld. The appellant is entitled to make recovery in accordance with law.

R.P. Appeal allowed.

MANOHAR LAL (D) BY LRS.
v.
UGRASEN (D) BY LRS. & ORS.
(Civil Appeal No. 973 of 2007)

JUNE 3, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Urban Development:

U.P. Urban Planning and Development Act, 1973 – s. 41 – Control by State Government – State Government-revisional Authority under the Statute, if could take upon itself the task of lower statutory authority – Held: Higher authority in hierarchy or appellate or revisional authority cannot exercise the power of statutory authority nor can direct statutory authority to act in a particular manner – Such order would be unenforceable – Aggrieved person can prefer appeal before appellate authority and against the said order he may file revision application before State Government – However, State Government cannot pass order without giving opportunity of hearing to the person adversely affected – On facts, State Government directly entertained application for allotment of land without hearing the other party – Chief Minister directed allotment of land in favour of one of the applicants – Thus, order passed by State Government stood vitiated since it took the task of the Development Authority upon itself – It was a case of colourable exercise of power – Chief Minister had no competence to deal with the subject – More so, land was allotted contrary to the Land Policy – Land Acquisition Act, 1894.

Interim order – Order passed or action taken by statutory authority in contravention of interim order – Enforceability of – Held: Is a nullity – On facts, interim order passed by High Court was in force and it restrained the Authorities to make

allotment of land in dispute in favour of anyone else – State Government as well as the Development Authority aware of the factum of subsistence of interim order – Thus, allotment of land in favour of other applicant by State Government, not enforceable and remains inexecutable.

Pleadings – Grant of relief not specifically prayed by parties – Held: Cannot be granted – Issuance of direction by High Court to make allotment of land in favour of petitioner, when relief sought was limited only to quash the allotment of land made in favour of other party, not permissible in law.

Constitution of India, 1950 – Article 226/227 – Extra-ordinary jurisdiction under – Held: When person approaches Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective – On facts, litigant did not approach the court with disclosure of true facts, thus his case stands vitiated – Equity.

The predecessor-in-interest of the appellant-M and respondent-U owned certain lands. The said lands were acquired under the provisions of the Land Acquisition Act, 1894 and an award was passed. M and U filed applications to claim the benefit of Land Policy. M was allotted land as per the directions of the Chief Minister of Uttar Pradesh. U filed writ petition challenging the allotment order. Thereafter, the land allotted to M was changed. M filed a writ petition and the High Court restrained the authorities from making allotment to anyone else from the land allotted to M. On direction by the State Government, Ghaziabad Development Authority allotted land in favour of U, though it was covered by the interim order passed by the High Court. U refused to take the plots. GDA allotted some other plots to M. U then filed a writ petition seeking quashing of the allotment made in

favour of M. The High Court allowed the writ petition and directed the allotment of land in favour of U. Hence these appeals.

The questions which arose for consideration in these appeals are whether the State Government-a Revisional Authority under the Statute, could take upon itself the task of a lower statutory authority; whether the order passed or action taken by a statutory authority in contravention of the interim order of the Court is enforceable; and whether the Court could grant relief which had not been prayed for.

Allowing CA No. 974/2007 and dismissing CA No. 973/2007, the Court

HELD: 1. The State Government, being the revisional authority, could not entertain directly the applications by the applicants-U and M. The action of the State Government smacks of arbitrariness and is nothing but abuse of power as the State Government deprived the Ghaziabad Development Authority-GDA to exercise its power under the Land Policy, and deprived the aggrieved party to file appeal against the order of allotment. Thus, orders passed by the State Government stood vitiated. More so, it was a clear cut case of colourable exercise of power. The case of allotment in favour of M is by no means better than the case of U as the initial allotment had been made by GDA in his favour consequent to the directions of the Chief Minister of Uttar Pradesh who had no competence to deal with the subject under the Statute and he has already been put in possession of a part of the allotted land in commercial area, contrary to the Land Policy. [Paras 43 and 44] [372-B-C; 372-D-E]

2.1. No higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor the superior authority can

mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional Authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act. [Para 22] [365-D-E]

Rakesh Ranjan Verma & Ors. Vs. State of Bihar & Ors. **AIR 1992 SC 1348;** *U.P. State Electricity Board Vs. Ram Autar and Anr.* **(1996) 8 SCC 506;** *Bangalore Development Authority and Ors. Vs. R. Hanumaiah and Ors.* **(2005) 12 SCC 508;** *Bangalore Medical Trust Vs. B.S. Muddappa & Ors.* **AIR 1991 SC 1902;** *Poonam Verma & Ors. Vs. Delhi Development Authority* **AIR 2008 SC 870;** *State of U.P. Vs. Neeraj Awasthi and Ors.* **(2006) 1 SCC 667;** *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Ors.* **AIR 1970 SC 1896;** *Chandrika Jha Vs. State of Bihar and Ors.* **AIR 1984 SC 322;** *Anirudhsinhji Karansinghji Jadeja & Anr. Vs. State of Gujarat* **AIR 1995 SC 2390;** *K.K. Bhalla Vs. State of M.P. & Ors.* **AIR 2006 SC 898;** *Indore Municipality vs. Niyamatulla (Dead through L.Rs.)* **AIR 1971 SC 97;** *Tarlochan Dev Sharma Vs. State of Punjab & Ors.* **(2001) 6 SCC 260, relied on.**

2.2. Section 41 Clause (1) of the U.P. Urban Planning and Development Act, 1973 empowers the State Government to issue general directions which are necessary to properly enforce the provisions of the Act. Clause (3) thereof make it crystal clear that the State Government is a revisional authority. Therefore, the scheme of the Act makes it clear that if a person is aggrieved by an order of the authority, he can prefer an appeal before the Appellate Authority-Divisional Commissioner and the person aggrieved of that order may file Revision Application before the State Government. However, the State Government cannot pass an order without giving opportunity of hearing to the

person, who may be adversely affected. [Para 35] [368-F-G]

2.3 In the instant case, it is the revisional authority which has issued direction to GDA to make allotment in favour of both the parties. Orders had been passed without hearing the other party. The authority, i.e. GDA did not have the opportunity to examine the case of either of the said parties. The High Court erred in holding that Clause (1) of Section 41 empowers the State Government to deal with the application of an individual. The State Government can take only policy decisions as to how the statutory provisions would be enforced but cannot deal with an individual application. Revisional authority can exercise its jurisdiction provided there is an order passed by the lower authority under the Act as it can examine only legality or propriety of the order passed or direction issued by the authority therein. In view thereof, there was no occasion for the State Government to entertain the applications of the said parties for allotment of land directly and issue directions to GDA for allotment of land in their favour. [Paras 36 and 37] [368-H; 369-A-D]

3. Any order passed by any authority inspite of the knowledge of the interim order of the court is of no consequence as it remains a nullity. The interim order passed by the High Court in favour of appellant-M in Writ Petition was in force and it restrained the Authorities to make allotment of the land in dispute in favour of anyone else. Indisputably, the State Government as well as the GDA remained fully alive of the factum of subsistence of the said interim order as is evident from the correspondence between them. The order passed by the State Government in contravention of the interim order, remains unenforceable and inexecutable. [Paras 28 and 38] [366-G-H; 369-D-F]

Mulraj Vs. Murti Raghunathji Maharaj **AIR 1967 SC 1386;** *Surjit Singh Vs. Harbans Singh* **AIR 1996 SC 135;** *All Bengal Excise Licensees Association Vs. Raghabendra Singh & Ors* **AIR 2007 SC 1386;** *Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. & Anr.* **AIR 1996 SC 2005;** *Gurunath Manohar Pavaskar Vs. Nagesh Siddappa Navalgund* **AIR 2008 SC 901, relied on.**

4. The Court cannot grant a relief which has not been specifically prayed by the parties. In the writ petition filed by respondent-U, relief sought was limited only to quash the allotment made in favour of M. No relief was sought for making the allotment in favour of the writ petitioner-U. However, the High Court issued direction to make the allotment in his favour. Thus, the issuance of such a direction was not permissible in law. Even otherwise as U's land had been acquired for roads, he could not make application for taking benefit of the Land Policy, particularly, when the Land Policy was not declared to be invalid or violative of equality clause enshrined in Article 14 of the Constitution. [Paras 33 and 38] [367-G; 369-G-H; 370-A]

Messrs. Trojan & Co. Vs. RM.N.N. Nagappa Chettiar **AIR 1953 SC 235;** *Krishna Priya Ganguly etc.etc. Vs. University of Lucknow & Ors. etc.* **AIR 1984 SC 186;** *Om Prakash & Ors. Vs. Ram Kumar & Ors.* **AIR 1991 SC 409;** *Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi & Ors.* **AIR 2010 SC 475;** *Fertilizer Corporation of India Ltd. & Anr. Vs. Sarat Chandra Rath & Ors.* **AIR 1996 SC 2744, relied on.**

5.1. The burden lies on the person, who alleges/avers/pleads for existence of a fact. U was under an obligation to establish the fact of submission of the application in time. Entry in respect of his application has been made in Postal Receipt Register. As the said application was sent by post, U could explain as to

whether the application was sent by Registered Post/Ordinary Post or under Postal Certificate and as to whether he could produce the receipt, if any, for the same. In such a fact-situation, the application filed by U could not have been entertained at all, even if he was entitled for the benefit of the Land Policy. [Para 40] [370-F-H]

5.2. The High Court committed an error observing that if the State Government had allowed the application filed by U it was implicit that delay, if any, in making the claim stood condoned. Such an observation is not in consonance with law for the reason that if there is a delay in filing application, the question would arise as to whether the authority has a right to condone the delay. Even if, the delay can be condoned, the authority had to examine as to whether there was sufficient cause preventing the applicant to approach the authority in time. But, once the delay has been considered without application of mind, in a fact-situation like in the instant case, the question of deemed condonation would not arise. More so, the High Court could not examine the question of fact as to whether the application was made within time or not, particularly, in view of the fact that the authority had been making the allotment though application had not been made at all in time and it was only manipulation of the record of the authority with the collusion of its staff. In fact, such exercise by the State amounts to colourable exercise of power. [Paras 41 and 42] [371-A-E]

State of Punjab & Anr. Vs. Gurdial Singh & Ors. **AIR 1980 SC 319, relied on.**

5.3. Regarding the dates of Section 6 declaration, taking of possession of land and of making Awards so far as the land of M is concerned, none of the parties considered it proper to place the authentic documents

before the Court so that the real facts be determined. In such a fact situation, it cannot be decided as to whether M's application was filed in time. However, one thing is clearly evident from the affidavit filed by Vice Chairman, GDA that the land allotted to both of these parties has been part of commercial area and not of residential area. In view thereof, any allotment made in favour of M so far, had been illegal as the application could not have been entertained by the Chief Minister and further appellant could not get allotment in commercial area. The Land Policy provided only for allotment of land in residential area. [Para 45] [372-F-H; 373-A-C]

6.1. When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/ 227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. "Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice."Who seeks equity must do equity. The legal maxim "*Jure naturaw aequum est neminum cum alterius detrimento et injuria fieri locupletiorem***", means that it is a law of nature that one should not be enriched by the loss or injury to another. [Para 47] [373-G-H; 374-A-B]**

6.2. The fact of illegal allotment of land in commercial area has been brought to the notice of the Court first time by affidavit of the Vice-Chairman, GDA dated 27.5.2010. Thus, it is crystal clear that such facts had not been brought on record before the High Court by GDA at any stage in any of the writ petitions nor it had been pointed out to the State Government when applications of both these parties had been entertained directly by the Chief Minister and the State Government. Only explanation furnished by the Vice-Chairman, GDA, in his affidavit is that due to inadvertence it escaped the notice of GDA that the plots had been categorized as commercial in the

Master Plan and could not be allotted in favour of any applicant. Even today, the said plots continue to be in commercial area and not in residential area. The appellants had also not disclosed that land allotted to them falls in commercial area. [Paras 46 and 47] [373-D-F]

6.3. M did not approach the Court with disclosure of true facts, and particularly, that he had been allotted the land in the commercial area by GDA on the instruction of the Chief Minister of Uttar Pradesh. [Para 51] [375-B]

The Ramjas Foundation & Ors. Vs. Union of India & Ors. **AIR 1993 SC 852;** *K.P. Srinivas Vs. R.M. Premchand & ors.* ***(1994) 6 SCC 620;*** *Nooruddin Vs. (Dr.) K.L. Anand* **(1995) 1 SCC 242;** *Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors.* **AIR 1997 SC 1236;** *M/s Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr.* **AIR 1970 SC 898;** *State of Haryana Vs. Karnal Distillery* **AIR 1977 SC 781;** *Sabia Khan & Ors. Vs. State of U.P. & Ors.* **AIR 1999 SC 2284;** *Abdul Rahman Vs. Prasony Bai & Anr.* **AIR 2003 SC 718;** *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.* **(2004) 7 SCC 166;** *Oswal Fats & Oils Ltd. Vs. Addl. Commissioner (Admn), Bareily Division, Bareily & Ors*. **JT 2010 (3) SC 510, relied on.**

7. It is left open for the State Government and GDA to take decision in regard to these issues and as to whether GDA wants to recover the possession of the land already allotted to these applicants in commercial area contrary to the Land Policy or value thereof adjusting the amount of compensation deposited by them, if any. [Para 52] [375-E-F]

Case Law Reference:

AIR 1992 SC 1348	**Relied on.**	**Para 11**
(1996) 8 SCC 506	**Relied on.**	**Para 11**

(2005) 12 SCC 508	**Relied on.**	**Para 12**
AIR 1991 SC 1902	**Relied on.**	**Para 13**
AIR 2008 SC 870	**Relied on.**	**Para 14**
(2006) 1 SCC 667	**Relied on.**	**Para 15**
AIR 1970 SC 1896	**Relied on.**	**Para 16**
AIR 1984 SC 322	**Relied on.**	**Para 17**
AIR 1995 SC 2390	**Relied on.**	**Para 18**
AIR 2006 SC 898	**Relied on.**	**Para 19**
AIR 1971 SC 97	**Relied on.**	**Para 20**
(2001) 6 SCC 260	**Relied on.**	**Para 21**
AIR 1967 SC 1386	**Relied on.**	**Para 23**
AIR 1996 SC 135	**Relied on.**	**Para 24**
AIR 2007 SC 1386	**Relied on.**	**Para 25**
AIR 1996 SC 2005	**Relied on.**	**Para 26**
AIR 2008 SC 901	**Relied on.**	**Para 27**
AIR 1953 SC 235	**Relied on.**	**Para 29**
AIR 1984 SC 186	**Relied on.**	**Para 30**
AIR 1991 SC 409	**Relied on.**	**Para 30**
AIR 2010 SC 475	**Relied on.**	**Para 31**
AIR 1996 SC 2744	**Relied on.**	**Para 32**
AIR 1980 SC 319	**Relied on.**	**Para 42**
AIR 1993 SC 852	**Relied on.**	**Para 47**
(1994) 6 SCC 620	**Relied on.**	**Para 47**
(1995) 1 SCC 242	**Relied on.**	**Para 47**

AIR 1997 SC 1236	**Relied on.**	**Para 48**
AIR 1970 SC 898	**Relied on.**	**Para 49**
AIR 1977 SC 781	**Relied on.**	**Para 49**
AIR 1999 SC 2284	**Relied on.**	**Para 49**
AIR 2003 SC 718	**Relied on.**	**Para 50**
(2004) 7 SCC 166	**Relied on.**	**Para 50**
JT 2010 (3) SC 510	**Relied on.**	**Para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 973 of 2007.

From the Judgment & Order dated 22.07.2003 of the High Court of Judicature at Allahabad in C.W.P. No. 6644 of 1989.

WITH

C.A. No. 974 of 2007.

R.P. Bhatt, Neeraj Kishan Kaul, Reena Singh, Dr. Vipin Gupta, Arvind Kumar Gupta, Shailender Paul for the Appellants.

Debal Kumar Banerji, Pramod Swarup, Ruby Singh Ahuja, Ravi Prakash Mehrotra, Kamlendra Mishra, Manoj Dwivedi, Vandana Mishra, Gunnam Venkateswara Rao, Anuvrat Sharma for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these appeals have been preferred by the appellants being aggrieved of the judgment and order of the Allahabad High Court dated 22nd July, 2003 passed in C.M.W.P. No.6644 of 1989 by which the High Court has allowed the Writ Petition filed by respondent No.1-Ugrasen quashing the allotment of land made in favour of appellant-Manohar Lal and further directed to make the allotment of land in favour of the said respondent-Ugrasen.

2. In these appeals, three substantial questions of law for consideration of this Court are involved, they are, namely:

(a) As to whether the State Government – a Revisional Authority under the Statute, could take upon itself the task of a lower statutory authority?;

(b) Whether the order passed or action taken by a statutory authority in contravention of the interim order of the Court is enforceable?; and

(c) Whether Court can grant relief which had not been asked for?

3. Facts and circumstances giving rise to these appeals are that lands owned and possessed by predecessor-in-interest of private appellant Manohar Lal and respondent Ugrasen were acquired under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'). Notification under Section 4 of the Act was issued on 13.08.1962 covering about 32 acres of land in the Revenue Estates of Kaila Pargana Loni Dist. Meerut (now Ghaziabad). Declaration under Section 6 of the Act in respect of the said land was made on 24.05.1965 along with Notification under Section 17(1) invoking the urgency clause. Possession of the land except one acre was taken on 13.07.1965 and award under Section 11 of the Act was made on 11.05.1970.

The Government of Uttar Pradesh had framed Land Policy dated 30/31.07.1963 to the effect that where a big chunk of land belonging to one person is acquired for planned development, except the land covered by roads, he shall be entitled to the extent of 40% of his total acquired land in a residential area after development in lieu of compensation. The High-Powered Committee dealing with the issue laid down that applications for that purpose be filed within a period of one month from the date of taking the possession of the land which was subsequently changed to within one month from the date of completion of acquisition proceedings.

4. Both the private parties, i.e. Manohar Lal and Ugrasen claimed that they had made applications to claim the benefit under the said policy within time. Shri Ugrasen claimed that he had submitted the application on 31.12.1966 but no action was taken on the said application. Therefore, he filed another application on 7.9.1971. Manohar Lal-appellant claimed to have filed application for the said purpose on 22.6.1969 and was allotted land bearing plot Nos. 5, 7 to 16 and 25 to 33 in Sector 3N vide order dated 27.12.1979 as per the direction of the Chief Minister of Uttar Pradesh. Shri Ugrasen filed Writ Petition No. 1932 of 1980 before Allahabad High Court challenging the said order dated 27.12.1979. Subsequently, vide order dated 7.3.1980, the land allotted to Manohar Lal was changed to Plot Nos. 25 to 33. At the time of consideration of application of Ugrasen by the State Government, the Ghaziabad Development Authority (hereinafter called GDA) vide letter dated 18.3.1980 pointed out that submission of application by Shri Ugrasen was surrounded by suspicious circumstances as it was the last entry made on 31.12.1966 and signature of the receiving clerk had been made by a person who joined service only in 1979. In the meanwhile, Shri Manohar Lal filed Writ Petition No. 4159 of 1980 and the High Court restrained the authorities from making allotment to anyone else from the land allotted to him as per letter dated 7.3.1980.

5. In spite of the said interim order in force, the State Government vide order dated 12.12.1980 directed GDA to make the allotment of land in favour of Shri Ugrasen and thus, in compliance of the same, GDA issued letter of allotment dated 22.12.1980 in his favour. Shri Ugrasen submitted letter dated 1.1.1981 to GDA to give an alternative land as the land covered by Plot Nos. 5 to 16 had been subject matter of the interim order of the High Court in a writ petition filed by Shri Manohar Lal.

6. Shri Ugrasen withdrew his Writ Petition No.1932 of 1980 on 6.3.1981 and deposited the compensation amount,

i.e. Rs.32,010.60 on 3.3.1981. GDA allotted the land to Shri Ugrasen in Plot Nos. 36, 38, 39, 44, 46 and 47 vide order dated 02.01.1985, though it was also the land in dispute i.e. covered by the interim order passed by the High Court. Shri Ugrasen refused to take those plots as is evident from letter dated 7.1.1985 as certain encroachment had been made upon the said lands. GDA, vide letter dated 27.3.1989, allotted Plot Nos. 5, 7 to 16 to Shri Manohar Lal. Thus, being aggrieved, Shri Ugrasen filed Writ Petition No. 6644 of 1989 before the High Court for quashing of the said allotment in favour of Shri Manohar Lal.

7. Parties exchanged the affidavits and after hearing the parties and considering the material on record, the High Court allowed the said Writ Petition vide judgment and order dated 22nd July, 2003. Hence, these appeals.

8. Shri P.S. Patwalia, learned Senior counsel appearing for the appellant-Manohar Lal and Shri Vijay Hansaria, learned Senior counsel appearing for GDA have contended that Shri Ugrasen had never filed application for allotment in time. There had been manipulation in registration of the said application and it has been surrounded with suspicious circumstances. The application of Shri Ugrasen had been considered directly by the State Government-the revisional authority, though the State Government could not take the task of GDA upon itself. Land of Shri Ugrasen had been acquired for roads, thus, as per the Land Policy he was not entitled for any benefit of the same. Shri Ugrasen in his writ petition had asked only for quashing the allotment in favour of Manohar Lal and there was no prayer that the said land be allotted to him. Therefore, while issuing a direction for making the allotment in favour of Ugrasen, the High Court has exceeded its jurisdiction. Thus, appeals deserve to be allowed.

9. On the other hand, Shri Debal Banerji, learned Senior counsel appearing for the respondent-Ugrasen and Shri Pramod Swarup, learned Senior counsel appearing for the

State of U.P. have vehemently opposed the appeals contending that once a decision has been taken as per the entitlement of the respondent-Ugrasen and the High Court has examined each and every fact, question of re-appreciation of evidence etc. is not permissible in exercise of the discretionary jurisdiction by this Court. Manohar Lal had also been allotted the land by the Chief Minister and not by GDA, thus no fault can be found with allotment in favour of Shri Ugrasen. Appeals lack merit and are liable to be dismissed.

10. We have considered the rival submissions made by learned counsel for the parties and perused the records.

11. In *Rakesh Ranjan Verma & Ors. Vs. State of Bihar & Ors.,* AIR 1992 SC 1348, the question arose as to whether the State Government, in exercise of its statutory powers could issue any direction to the Electricity Board in respect of appointment of its officers and employees. After examining the statutory provisions, the Court came to the conclusion that the State Government could only take the policy decisions as how the Board will carry out its functions under the Act. So far as the directions issued in respect of appointment of its officers was concerned, it fell within the exclusive domain of the Board and the State Government had no competence to issue any such direction. The said judgment has been approved and followed by this Court in *U.P. State Electricity Board Vs. Ram Autar and Anr.* (1996) 8 SCC 506.

12. In *Bangalore Development Authority and Ors. Vs. R. Hanumaiah and Ors.* (2005) 12 SCC 508, this Court held that the power of the Government under Section 65 of the Bangalore Development Authority Act, 1976 was not unrestricted and the directions which could be issued were those which were to carry out the objective of the Act and not those which are contrary to the Act and further held that the directions issued by the Chief Minister to release the lands were destructive of the purposes of the Act and the purposes for which the BDA was created.

13. In *Bangalore Medical Trust Vs. B.S. Muddappa & Ors.* AIR 1991 SC 1902, this Court considered the provisions of a similar Act, namely, Bangalore Development Authority Act, 1976 containing a similar provision and held that Government was competent only to give such directions to the authority as were in its opinion necessary or expedient and for carrying out the purposes of the Act. The Government could not have issued any other direction for the reason that Government had not been conferred upon unfettered powers in this regard. The object of the direction must be only to carry out the object of the Act and only such directions as were reasonably necessary or expedient for carrying out the object of the enactment were contemplated under the Act. Any other direction not covered by such powers was illegal.

14. In *Poonam Verma & Ors. Vs. Delhi Development Authority,* AIR 2008 SC 870, a similar view has been re-iterated by this Court dealing with the provisions of Delhi Development Authority Act, 1957. In the said case, the Central Government had issued a direction to make allotment of flat out of turn. The Court held as under:

> ".....Section 41 of the Act, only envisages that the respondent would carry out such directions that may be issued by the Central Government from time to time for the efficient administration of the Act. The same does not take within its fold an order which can be passed by the Central Government in the matter of allotment of flats by the Authority. Section 41 speaks about policy decision. Any direction issued must have a nexus with the efficient administration of the Act. It has nothing to do with carrying out of the plans of the authority in respect of a particular scheme.....Evidently, the Central Government had no say in the matter either on its own or under the Act. In terms of the brochure, Section 41 of the Act does not clothe any jurisdiction upon the Central Government to issue such a direction."

15. In *State of U.P. Vs. Neeraj Awasthi and Ors.* (2006) 1 SCC 667, this Court held as follows in context of Government directions:

> "36. Such a decision on the part of the State Government must be taken in terms of the constitutional scheme, i.e., upon compliance of the requirement of Article 162 read with Article 166 of the Constitution of India. In the instant case, the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution of India."

16. In *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Ors.* AIR 1970 SC 1896, this Court has observed:

> "The power exercisable by the Cane Commissioner under Clause 6(1) is a statutory power. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone - not even in favour of the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner. In this case what has happened is that the power of the Cane Commissioner has been exercised by the Chief Minister, an authority not recognised by Clause (6) read with Clause (11) but the responsibility for making those orders was asked to be taken by the Cane Commissioner.
>
> The executive officers entrusted with statutory discretions may in some cases be obliged to take into account considerations of public policy and in some context the policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory

provision has been made for them to be given binding instructions by a superior."

17. In *Chandrika Jha Vs. State of Bihar and Ors.* AIR 1984 SC 322, this Court while dealing with the provisions of Bihar and Orissa Co-operative Societies Act, 1935, held as under:

"The action of the then Chief Minister cannot also be supported by the terms of Section 65A of the Act which essentially confers revisional power on the State Government. There was no proceeding pending before the Registrar in relation to any of the matters specified in Section 65A of the Act nor had the Registrar passed any order in respect thereto. In the absence of any such proceeding or such order, there was no occasion for the State Government to invoke its powers under Section 65A of the Act. In our opinion, the State Government cannot for itself exercise the statutory functions of the Registrar under the Act or the Rules."

18. In *Anirudhsinhji Karansinghji Jadeja & Anr. Vs. State of Gujarat* AIR 1995 SC 2390, it was observed :

"This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether." (Emphasis added)

19. In *K.K. Bhalla Vs. State of M.P. & Ors.* AIR 2006 SC 898, this Court has de-lineated the functions of the State Government and the Development Authority, observing that :

"59. Both the State and the JDA have been assigned specific functions under the statute. The JDA was constituted for a specific purpose. It could not take action contrary to the scheme framed by it nor take any action

which could defeat such purpose. The State could not have interfered with the day-to-day functioning of a statutory authority. Section 72 of the 1973 Act authorizes the State to exercise superintendence and control over the acts and proceedings of the officers appointed under Section 3 and the authorities constituted under the Act but thereby the State cannot usurp the jurisdiction of the Board itself. The Act does not contemplate any independent function by the State except as specifically provided therein…. the State in exercise of its executive power could not have directed that lands meant for use for commercial purposes may be used for industrial purposes….. the power of the State Government to issue direction to the officers appended under Section 3 and the authorities constituted under the Act is confined only to matters of policy and not any other. Such matters of policy yet again must be in relation to discharge of duties by the officers of the authority and not in derogation thereof…. The direction of the Chief Minister being de'hors the provisions of the Act is void and of no effect."

20. In *Indore Municipality Vs. Niyamatulla (Dead through L.Rs.)* AIR 1971 SC 97, this Court considered a case of dismissal of an employee by an authority other than the authority competent to pass such an order i.e. the Municipal Commissioner, the order was held to be without jurisdiction and thus could be termed to have been passed under the relevant Act. This Court held that *"to such a case the Statute under which action was purported to be taken could afford no protection".*

21. In *Tarlochan Dev Sharma Vs. State of Punjab & Ors.* (2001) 6 SCC 260, this Court, after placing reliance upon a large number of its earlier judgments, observed as under:

"In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed *to*

mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior." (Emphasis added)

22. Therefore, the law on the question can be summarised to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor the superior authority can mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional Authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act.

23. In *Mulraj Vs. Murti Raghunathji Maharaj,* AIR 1967 SC 1386, this Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal. *Subsequent action would be a nullity.*

24. In *Surjit Singh Vs. Harbans Singh,* AIR 1996 SC 135, this Court while dealing with the similar issue held as under:

"In defiance of the restraint order, the alienation/ assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is

not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes."

25. In *All Bengal Excise Licensees Association Vs. Raghabendra Singh & Ors,* AIR 2007 SC 1386, this court held as under:

"A party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof..... the wrong perpetrated by the respondents in utter disregard of the order of the High Court should not be permitted to hold good."

26. In *Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. & Anr.* AIR 1996 SC 2005, this court after making reference to many of the earlier judgments held:

"On principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

27. In *Gurunath Manohar Pavaskar Vs. Nagesh Siddappa Navalgund,* AIR 2008 SC 901, this Court while dealing with the similar issues held that even a Court in exercise of its inherent jurisdiction under Section 151 of the Code of Civil Procedure, 1908, in the event of coming to the conclusion that a breach to an order of restraint had taken place, may bring back the parties to the same position as if the order of injunction has not been violated.

28. In view of the above, it is evident that any order passed by any authority in spite of the knowledge of the interim order of the court is of no consequence as it remains a nullity.

29. In *Messrs. Trojan & Co. Vs. RM.N.N. Nagappa*

Chettiar AIR 1953 SC 235, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:

> "It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

30. A similar view has been re-iterated by this Court in *Krishna Priya Ganguly etc.etc. Vs. University of Lucknow & Ors. etc.* AIR 1984 SC 186; and *Om Prakash & Ors. Vs. Ram Kumar & Ors.,* AIR 1991 SC 409, observing that a party cannot be granted a relief which is not claimed.

31. Dealing with the same issue, this Court in *Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi & Ors.,* AIR 2010 SC 475 held:

> "Though the Court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

32. In *Fertilizer Corporation of India Ltd. & Anr. Vs. Sarat Chandra Rath & Ors.,* AIR 1996 SC 2744, this Court held that *"the High Court ought not to have granted reliefs to the respondents which they had not even prayed for."*

33. In view of the above, law on the issue can be summarised that the Court cannot grant a relief which has not been specifically prayed by the parties.

34. The instant case requires to be examined in the light of the aforesaid certain legal propositions.

Section 41 of the U.P. Urban Planning and Development Act, 1973 reads as under:

> *41. Control by State Government*-(1) The Authority, the Chairman or the Vice-Chairman shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.
>
> (2) …….....
>
> (3) The State Government may, at any time, either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the authority or Chairman for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit:
>
> Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard.
>
> (4) ……."

35. Clause (1) thereof empowers the State Government to issue general directions which are necessary to properly enforce the provisions of the Act. Clause (3) thereof make it crystal clear that the State Government is a revisional authority. Therefore, the scheme of the Act makes it clear that if a person is aggrieved by an order of the authority, he can prefer an appeal before the Appellate Authority i.e. Divisional Commissioner and the person aggrieved of that order may file Revision Application before the State Government. However, the State Government cannot pass an order without giving opportunity of hearing to the person, who may be adversely affected.

36. In the instant case, it is the revisional authority which

has issued direction to GDA to make allotment in favour of both the parties. Orders had been passed without hearing the other party. The authority, i.e. GDA did not have the opportunity to examine the case of either of the said parties. The High Court erred in holding that Clause (1) of Section 41 empowers the State Government to deal with the application of an individual. The State Government can take only policy decisions as to how the statutory provisions would be enforced but cannot deal with an individual application. Revisional authority can exercise its jurisdiction provided there is an order passed by the lower authority under the Act as it can examine only legality or propriety of the order passed or direction issued by the authority therein.

37. In view thereof, we are of the considered opinion that there was no occasion for the State Government to entertain the applications of the said parties for allotment of land directly and issue directions to GDA for allotment of land in their favour.

38. Admittedly, the interim order passed by the High Court in favour of Shri Manohar Lal in Writ Petition No. 4159 of 1980 was in force and it restrained the Authorities to make allotment of the land in dispute in favour of anyone else. Indisputably, the State Government as well as the GDA remained fully alive of the factum of subsistence of the said interim order as is evident from the correspondence between them. In view of the law referred to hereinabove, order passed by the State Government in contravention of the interim order, remains unenforceable and inexecutable.

More so, in the writ petition filed by Shri Ugrasen relief sought was limited only to quash the allotment made in favour of Shri Manohar Lal. No relief was sought for making the allotment in favour of the writ petitioner/Shri Ugrasen. However, the High Court vide impugned judgment and order has issued direction to make the allotment in his favour. Thus, we are of the view that issuance of such a direction was not permissible in law. Even otherwise as Shri Ugrasen's land had been acquired for roads, he could not make application for taking

benefit of the Land Policy, particularly, when the Land Policy was not declared to be invalid or violative of equality clause enshrined in Article 14 of the Constitution.

39. The High Court failed to consider objections raised on behalf of GDA in its letter dated 19.4.1980 to the State Government pointing out as follows:

(a) Application of Ugrasen is entered on 31.12.1966 as the last entry in Postal Receipt register.

(b) Entry is at Sl. 15498.

(c) Entry is in different ink.

(d) True copy of application now submitted bears the date 13.12.1966.

(e) There is no signature on the cyclostyled copy.

(f) Application was made in 1971 and was rejected in 1977 by Shri Watal. Decision not challenged. Ugrasen kept quiet till 1980.

(g) Clerk Mr. Jai Prakash was not working before 1979.

40. It is settled legal proposition that burden lies on the person, who alleges/avers/pleads for existence of a fact. Sh. Ugrasen was under an obligation to establish the fact of submission of the application in time. Entry in respect of his application has been made in *Postal Receipt Register.* As said application was sent by post, Sh. Ugrasen could explain as to whether the application was sent by Registered Post/Ordinary Post or under Postal Certificate and as to whether he could produce the receipt, if any, for the same. In such a fact-situation, the application filed by Shri Ugrasen could not have been entertained at all, even if he was entitled for the benefit of the Land Policy.

41. The High Court committed an error observing that if the State Government had allowed the application filed by Ugrasen it was implicit that delay, if any, in making the claim stood condoned. Such an observation is not in consonance with law for the reason that if there is a delay in filing application, the question would arise as to whether the authority has a right to condone the delay. Even if, the delay can be condoned, the authority had to examine as to whether there was sufficient cause preventing the applicant to approach the authority in time. But, once the delay has been considered without application of mind, in a fact-situation like in the instant case, the question of deemed condonation would not arise. More so, the High Court could not examine the question of fact as to whether the application was made within time or not, particularly, in view of the fact that the authority had been making the allotment though application had not been made at all in time and it was only manipulation of the record of the authority with the collusion of its staff.

42. In fact, such exercise by the State amounts to colourable exercise of power. In *State of Punjab & Anr. Vs. Gurdial Singh & Ors.* AIR 1980 SC 319, this Court dealing with such an issue observed as under:

> "Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfaction - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the

> entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion."

43. The State Government, being the revisional authority, could not entertain directly the applications by the said applicants, namely, Sh.Ugrasen and Sh. Manohar Lal. The action of the State Government smacks of arbitrariness and is nothing but abuse of power as the State Government deprived GDA to exercise its power under the Act, and deprived the aggrieved party to file appeal against the order of allotment. Thus, orders passed by the State Government stood vitiated. More so, it was a clear cut case of colourable exercise of power.

44. So far as the case of allotment in favour of Manohar Lal is concerned in more than one respect, it is by no means better than the case of Ugrasen as the initial allotment had been made by GDA in his favour consequent to the directions of the Chief Minister of Uttar Pradesh who had *no competence* to deal with the subject under the Statute and he has already been put in possession of a part of allotted land in commercial area, contrary to the Land Policy.

45. There are claims and counter claims regarding the dates of Section 6 declaration; taking of possession of land; and of making Awards so far as the land of Manohar Lal is concerned. As per the affidavit filed by the Vice-Chairman, GDA, Section 6 declaration was made on 24.5.1965 invoking the urgency clause under section 17(1); possession was taken on 13.7.1965; and Award was made on 11.5.1970. Manohar Lal preferred writ petition no.4159/1980 before the Allahabad High Court stating that Section 6 declaration in respect of his land was made on 30.1.1969, possession was taken on 29.5.1969 and Award was made on 11.6.1971. None of the parties considered it proper to place the authentic documents before the Court so that the real facts be determined. In such

a fact situation, we are not in a position to decide as to whether Manohar Lal's application was filed in time as he had claimed in the said writ petition that he filed the First Application on 22.6.1969. However, one thing is clearly evident from the affidavit filed by Vice Chairman, GDA that the land allotted to both of these parties has been part of commercial area and not of residential area. In view thereof, any allotment made in favour of Manohar Lal so far, had been illegal as the application could not have been entertained by the Chief Minister and further appellant could not get allotment in commercial area. The Land Policy provided only for allotment of land in residential area.

46. The fact of illegal allotment of land in commercial area has been brought to the notice of the Court first time vide affidavit of the Vice-Chairman, GDA dated 27.5.2010. Thus, it is crystal clear that such facts had not been brought on record before the High Court by GDA at any stage in any of the writ petitions nor it had been pointed out to the State Government when applications of both these parties had been entertained directly by the Chief Minister and the State Government. Only explanation furnished by the Vice-Chairman, GDA, in his affidavit is that due to inadvertence it escaped the notice of GDA that the plots had been categorized as commercial in the Master Plan and could not be allotted in favour of any applicant. Even today, the said plots continue to be in commercial area and not in residential area.

47. The present appellants had also not disclosed that land allotted to them falls in commercial area. When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. *"Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice."* Who seeks equity must do equity. The legal maxim

"Jure naturaw aequum est neminum cum alterius detrimento et injuria fieri locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another. (vide *The Ramjas Foundation & Ors. Vs. Union of India & Ors.* AIR 1993 SC 852; *K.P. Srinivas Vs. R.M. Premchand & ors.* (1994) 6 SCC 620 and *Nooruddin Vs. (Dr.) K.L. Anand* (1995) 1 SCC 242).

48. Similarly, in *Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors.* AIR 1997 SC 1236, this Court observed as under:-

> "The power under Article 226 is discretionary. It will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point…..the interest of justice and the public interest coalesce. They are very often one and the same. ….. The Courts have to weigh the public interest vis-à-vis the private interest while exercising….any of their discretionary powers (Emphasis added).

49. In *M/s Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr.* AIR 1970 SC 898; *State of Haryana Vs. Karnal Distillery,* AIR 1977 SC 781; and *Sabia Khan & Ors. Vs. State of U.P. & Ors.* AIR 1999 SC 2284, this Court held that filing totally misconceived petition amounts to abuse of the process of the Court. Such a litigant is not required to be death with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court. A litigant is bound to make *"full and true disclosure of facts."*

50. In *Abdul Rahman Vs. Prasony Bai & Anr.* AIR 2003 SC 718; *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.* (2004) 7 SCC 166; and *Oswal Fats & Oils Ltd. Vs. Addl. Commissioner (Admn), Bareily Division, Bareily & Ors.* JT 2010 (3) SC 510, this Ciourt held that whenever the Court comes to the conclusion that the process of the Court is

being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it.

51. In view of the above, we are of the considered opinion that Shri Manohar Lal did not approach the Court with disclosure of true facts, and particularly, that he had been allotted the land in the commercial area by GDA on the instruction of the Chief Minister of Uttar Pradesh.

52. It is a fit case for ordering enquiry or initiating proceedings for committing criminal contempt of the Court as the parties succeeded in misleading the Court by not disclosing the true facts. However, we are not inclined to waste court's time further in these cases. Our experience has been that the so-called administration is not likely to wake-up from its deep slumber and is never interested to redeem the limping society from such hapless situations. We further apprehend that our pious hope that administration may muster the courage one day to initiate disciplinary/criminal proceedings against such applicants/erring officers/employees of the authority, may not come true. However, we leave the course open for the State Government and GDA to take decision in regard to these issues and as to whether GDA wants to recover the possession of the land already allotted to these applicants in commercial area contrary to the Land Policy or value thereof adjusting the amount of compensation deposited by them, if any.

53. In view of the above, Civil Appeal No. 974 of 2007 filed by GDA is allowed. The Judgment and order of the High Court dated 22.7.2003 passed in Writ Petition No. 6644 of 1989 is hereby set aside. Civil Appeal No. 973 of 2007 filed by Manohar Lal is dismissed. No costs.

N.J. Appeals disposed of.

IMPROVEMENT TRUST, LUDHIANA ETC.

v.

UJAGAR SINGH & ORS. ETC.

(Civil Appeal No. 2395 of 2008)

JUNE 9, 2010

[DEEPAK VERMA AND K.S. RADHAKRISHNAN, JJ.]

Limitation Act, 1963:

s. 5 – Delay in filing objections under O. 21 r.90 and, on rejection of objections, two and half months' delay in filing appeal against order of executing court – Appeal dismissed as barred by time – HELD: Justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it of on such technicalities and that too at the threshold – While considering the application for condonation of delay no straight jacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not – Each case has to be weighed from its facts and the circumstances in which the party acts and behaves – It is pertinent to point out that unless malafides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned – In the instant case, the delay in filing the first appeal before the District Judge, for setting aside the sale has not been so huge as to warrant its dismissal on such hypertechnical ground – In fact, the appellant had taken all possible steps to prosecute the matter within time – Had there been an intimation sent to the appellant by its erstwhile Advocate, and if even thereafter appellant had acted callously, then it could be understood that the appellant was negligent, but that was not the case here – From the conduct, behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter – No sooner the appellant came to know about the dismissal of its objections filed before the executing court

under O.21 r. 90 CPC, it made enquiries and filed the appeal – Ends of justice would be met by setting aside the impugned orders – Matter is remitted to the executing court to consider and dispose of appellant's objections filed under O. 21 r.90 CPC on merits and in accordance with law, at an early date – The auction purchaser has been put to inconvenience and harassment as admittedly it had deposited a huge amount of Rs.22,65,000/- in the year 1992 but has not been able to get any fruits thereof till date – Therefore, appellant's appeal is allowed subject to payment of Rs.50,000/- to the auction purchaser within three weeks – Payment of cost is condition precedent, without which the appellant would not be allowed to prosecute its objections – Appellant to bear the costs through out – Code of Civil Procedure, 1908 – O.21, r.90 - Costs.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1483 of 2005.

From the Judgment & Order dated 2.06.2004 of the High Court of Karnataka at Bangalore in W.A. No. 1303 of 2000.

Basava Prabhu S. Patil, Ajay Kumar M. (for A.S. Bhasme) for the Appellant.

S.N. Bhat, Lakshmi Raman Singh for the Respondent.

The following Order of the Court was delivered

1. Heard counsel on either side at length. Records perused.

2. Even though both sides had cited several decisions of this Court on the scope and application of Section 5 of the Limitation Act, but it is neither necessary nor required to deal with those cases in the peculiar facts and circumstances of this case.

3. Land belonging to Respondent Nos. 1 to 4 was acquired by the appellant Improvement Trust, Ludhiana, for development scheme popularly known as "550 Acres Scheme". Reference Court had passed the Award and fixed the amount of compensation at rupees 4,27,068.20 paise together with interest at the rate of 9% per annum from the date of the issuance of the notification in favour of Respondent Nos. 1 to 4. The appellant did not deposit the amount. Respondent Nos. 1 to 4 had to approach the Executing Court for recovery of the amount awarded. The property described as Khewat No.867 Khautani No.971 Khasra No.272 admeasuring 7K-18M entered in jamabandi for the year 1988-89 in village Jabaddi No.160 Tehsil and District Ludhiana was attached for realisation of the decretal amount. Later a notice under Order 21 Rule 66 of the Code of Civil Procedure (hereinafter shall be referred to as 'C.P.C.') was stated to have been issued to the appellant. However, despite service of notice, none appeared on behalf of the appellant /judgment debtor.

4. The property was put to an auction sale on 12/8/1992. Respondent No. 5 herein, M/s. Jagan Singh and Company (hereinafter shall be referred to as 'the Company') offered Rs.22,65,000/-, and thus was declared as the highest bidder. Sale was knocked down in its favour, and later confirmed in its favour.

5. The appellant then woke up from its slumber and filed objections under Order 21 Rule 90 CPC raising various grounds. Executing Court then framed issues, reproduced by the learned Single Judge in the impugned order. The case was thereafter fixed for recording of the evidence of judgment-debtor on 19/3/1993, 17/4/1993, 8/5/1993 and 29/5/1993. However, on the aforesaid dates none appeared on behalf of the appellant. Consequently, the evidence of appellant/judgment debtor was closed. As a necessary consequence thereof appellant's objections came to be dismissed in default due to non-appearance.

6. Mr. P.K. Jain, Advocate used to appear for the appellant-Trust, but did not appear on the above mentioned dates. The order-sheet dated 29/5/1993 reproduced in the impugned order passed by the learned Single Judge reflected the same. Case was posted for confirmation of sale on 5/6/1993, again there was no appearance and the sale was confirmed in favour of respondent No.5. It is reported pursuant thereto sale deed was executed in its favour through court. Out of the bid amount of Rs.22,65,000/- the awarded amount due to respondents 1 to 4 was released, and remaining is lying in deposit with the Executing Court.

7. The appellant thereafter filed miscellaneous appeal before the District Judge, Ludhiana, challenging the correctness propriety and validity of the orders passed on 29/5/1993 and 5/6/1993, made over to Additional District Judge, Ludhiana. Said appeal was barred by limitation by two months and few days, exact delay has not been reflected in any of the orders. But after going through the files it appears that delay was for about two months and few days. An application under Section 5 of the Limitation Act was filed to condone delay but was dismissed by the Appellate Court stating therein that no good and sufficient grounds were shown for condonation of delay. Consequently the appeal was also dismissed.

8. Thereafter, appellant under some mistaken advice filed execution second appeal in the High Court of Punjab and Haryana at Chandigarh registered as Execution Second Appeal No. 820 of 1994. On objections being raised with regard to its maintainability, in the light of the specific bar created under Section 104 of the CPC, learned Single Judge converted the appeal into civil revision and proceeded to decide as such.

9. Respondent No.5 contended that no error was committed by the Executing Court in dismissing the appellant's application for setting aside the sale. Similarly the first Appellate Court also committed no error in dismissing the Appellant's

appeal as no good and sufficient cause were shown for condoning delay. The objections raised by respondent No.5 found favour by the learned Single Judge of the High Court and the appeal/revision of the appellant was dismissed on 9/5/2003. In the light of the aforesaid orders the objections preferred by appellant herein purportedly filed under Order 21 Rule 90 of the CPC met with the fate of dismissal. Appellant also filed an application for review of the order dated 9/5/2003 passed by High Court under Order 47 Rule 1 of the CPC but was also dismissed on 8/7/2004, against which C.A. No. 2395/2008 has been filed before this Court. Since parties are same and common issues arise for consideration they are heard analogously and disposed of by a common order.

10. Learned senior counsel appearing for appellant Mr. Salil Sagar with Mr. Arun K. Sinha, contended that appellant had been contesting the matter in right earnest right from the very beginning and had implicit faith and confidence in his Advocate Mr. P.K. Jain, who had been appearing for the appellant not only in this case but in several other cases. According to him there was no reason to doubt that he would not appear on various dates of hearing and then would not even inform the appellant about the progress of the case. In other words, it has been contended that whatever best was possible to be done by the appellant that had been done, therefore even though there has been some delay, on account of non-communication of the passing of the impugned order challenged in appeal, delay should have been condoned and the matter should not have been thrown at the threshold. To show its bonafides various order-sheets passed by Trial Court and the Executing Court have been brought to our notice. The envelop maintained by Mr. P.K.Jain, Advocate, for keeping the brief, has been filed to show that dates of hearing were mentioned therein.

11. On the other hand, Mr. Vijay Hansaria, learned senior counsel appearing for respondent No.5, with his polite yet usual

vehemence submitted that list of dates as filed by the Company would show and reveal the callous and negligent attitude of the appellant or its Advocate, therefore no indulgence should be shown to it. It was contended that the indifferent attitude of the appellant in prosecuting the matter had not come to an end and Appellant had learnt no lessons from its previous defaults.

12. Even though appeal was dismissed by First Appellate Court on the ground of delay, stood confirmed by the High Court but even the Special Leave Petition was delayed by 258 days in refiling there was further delay of 90 days. No doubt it is true that this Court after considering the appellant's application was pleased to condone delay and leave was granted. But this has been argued by Mr. Vijay Hansaria to show the conduct, behaviour and attitude of the appellant in prosecuting the matter.

13. Be that as it may, we are of the opinion that the delay in filing the first appeal before District Judge, Ludhiana, for setting aside the sale has not been so huge warranting its dismissal on such hypertechnical ground. In fact, according to us, appellant had taken all possible steps to prosecute the matter within time. Had there been an intimation sent to the appellant by Mr. P.K. Jain, its erstwhile Advocate, and if even thereafter appellant had acted callously then we could have understood the negligent attitude of the appellant but that was not the case here. No sooner the appellant came to know about the dismissal of its objection filed before the Executing Court, under Order 21 Rule 90 of the CPC it made enquiries and filed the appeal. While considering the application for condonation of delay no straight jacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. Each case has to be weighed from its facts and the circumstances in which the party acts and behaves. From the conduct behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter. Even though Mr. Vijay Hansaria

appearing for the respondent No.5 has argued the matter at length and tried his best to persuade us to come to the conclusion that no sufficient grounds made out to interfere with the concurrent findings of facts but we are afraid, we are not satisfied with the line of arguments so adopted by the counsel for respondent No.5 and cannot subscribe to the same.

14. After all, justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it of on such technicalities and that too at the threshold. Both sides had tried to argue the matter on merits but we refrain ourselves from touching the merits of the matter as that can best be done by the Executing Court which had denied an opportunity to the appellant to lead evidence and to prove the issues so formulated.

15. In our opinion, ends of justice would be met by setting aside the impugned orders and matter is remitted to the Executing Court to consider and dispose of appellant's objections filed under Order 21 Rule 90 of CPC on merits and in accordance with law, at an early date. It is pertinent to point out that unless malafides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it on such technalities.

16. Apart from the above, appellant would not have gained in any manner whatsoever, by not filing the appeal within the period of limitation. It is also worth noticing that delay was also not that huge, which could not have been condoned, without putting the respondents to harm or prejudice. It is the duty of the Court to see to it that justice should be done between the parties.

17. For the aforesaid reasons the impugned orders passed by Appellate Court, and order passed by the High Court, are hereby set aside and quashed. As a consequence,

the matter stands remitted to the Executing Court for deciding the appellant's application filed under Order 21 Rule 90 of CPC at an early date on merits. Since there are only two contesting parties to the litigation that is to say the appellant and respondent No.5, both would appear before the Executing Court on 20/7/2010. Being an old case an endeavour would be made by the Executing Court to take up the case as far as possible, on day-to-day basis and no party would seek an undue adjournment in the matter. We make it clear that we have expressed no opinion, on the merits of the matter and any observation made herein would not be construed as an expression of opinion on merits.

18. We are conscious of the fact that respondent No.5 has been put to inconvenience and harassment as admittedly it had deposited a huge amount of Rs.22,65,000/- in the year 1992 but has not been able to get any fruits thereof till date. Therefore the appellant's appeal is allowed subject to payment of Rs.50,000/- (Rupees fifty thousand) to respondent No.5 within three weeks hereof. Payment of cost is condition precedent, without which the appellant would not be allowed to prosecute its objections. The appeal therefore stands allowed to the aforesaid extent. The appellant to bear the cost through out. In the light of this order, other civil appeal No. 2397/2008 stands allowed to the aforesaid extent only.

R.P. Appeals disposed of.

NANHAR AND ORS.
v.
STATE OF HARYANA
(Criminal Appeal No. 2496 of 2009)

JUNE 11, 2010

[DEEPAK VERMA AND K.S. RADHAKRISHNAN, JJ.]

Penal Code, 1860: ss. 302/149 – Conviction under – Note said to be dying declaration recovered from pocket of deceased which stated that he was administered poison mixed in a drink by the accused – Conviction of accused on the basis of purported dying declaration and circumstantial evidence – High Court upheld the conviction – On appeal, held: Prosecution could not establish that the chain of circumstances was complete – With a broken chain of circumstantial evidence, accused could not be held guilty – Moreover, the said note did not fall in the category of dying declaration – A person after consuming excessive liquor cannot write such note with so much precision and with a steady hand – Thus the said note did not inspire confidence and was not admissible – Order of conviction not sustainable – Evidence – Circumstantial evidence – Dying declaration.

Prosecution case was that the wife of accused 3 developed illicit relations with the deceased. When accused 3 came to know about such relationship, he developed grudge against the deceased and planned to eliminate him. On the fateful day, dead body of the deceased was found in his field. A note stated to be his dying declaration was recovered from the match box found in his pocket which stated that the accused persons administered poison on him by mixing it in a drink. Trial Court convicted the accused under Sections 302/149 IPC based on the circumstances and dying

declaration. The High Court affirmed the conviction. Hence these appeals.

Allowing the appeals, the Court

HELD: 1.1. It is well settled law that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weaknesses of the defence. When the case is based on circumstantial evidence, the chain of circumstances should be complete in all respect and the pointer of guilt should continuously be on the accused only. Any deviation of the pointer of guilt on the accused would enure him the benefit of doubt. In the instant case, it is true that the police official who had prepared the Inquest Report had died during the pendency of the trial, but no reason was assigned as to why other police personnel present along with him were not examined. They could have at least explained the true picture and proved recovery of dying declaration and pocket telephone index diary from possession of deceased. [Paras 26, 27, 28] [398-D; 399-C-E]

Sharad Birdhichand Sarda v. State of Maharashtra **1984 (4) SCC 116, relied on.**

1.2. Admittedly, from the evidence of PW-7, the cousin of the deceased, it has come on record that the deceased had a bank account and he was also a member of some society, where his standard signatures were available. But those standard signatures were not made the basis for comparison of his hand-writing alleged to have been found from his possession. [Para 29] [399-F-G]

1.3. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a

legal distinction between 'may be proved' and 'must be or should be proved'. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. They should exclude every possible hypothesis except the one to be proved, and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. The cardinal principles with regard to the completion of chain of circumstantial evidence for holding the appellants guilty could not be established at all by the prosecution in the present case. With such broken chain of circumstantial evidence, at many places, it would neither be safe nor prudent to hold the appellants guilty. Apart from that, it is extremely difficult to come to the conclusion if Exh. PG can fall in the category of dying declaration at all or can be said to be legally admissible. The said document did not inspire confidence, more so, the manner in which it was written. After having consumed excessive liquor, it is not possible for any one, much less for the deceased to write the said dying declaration with so much of precision or with steady hand. Dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts. It should not be the result of tutoring. But dying declaration in the present case did not fulfill these conditions. [Paras 29- 31] [400-C-H; 401-A-D]

1.4. In HWV Cox Medical Jurisprudence and

Toxicology, Seventh Edition, it is described that the blood reaches all the organs, mainly the brain and interferes with normal brain functions like judgment and coordination of muscular movements. The blood alcohol level influences the behaviour of the person. Obviously, it would go to show that after going through the handwriting in the alleged dying declaration Ext. PG, it would have been extremely difficult for him to write it as he could not have been in a mentally fit condition to have written the same. Unfortunately, this aspect of the matter was neither considered by the Trial Judge nor adverted to by the High court and yet the appellants were found guilty for commission of the offence. The said judgment and order of conviction passed by the Trial Court and upheld by the High Court, cannot be sustained in law. [Paras 32-36] [401-E-H; 402-A-D]

HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition, **referred to.**

Case Law Reference:

1984 (4) SCC 116 relied on Paras 26, 29

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2496 of 2009.

From the Judgment and Order dated 07.05.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 919-DB of 2006.

WITH

Criminal Appeal No. 2497 of 2009.

S.K. Dubey, Prem Malhotra, Mrinamayee Sahu, Ajay Veer Singh, B.S. Jain, Mohd. Irshad Hanif, and Susmita Lal (N.P.) for the Appellants.

Manjit Singh, AAG, Kamal Mohan Gupta and Reeta Chaudhary for the Respondent.

The following order of the Court was delivered

O R D E R

1. Appellant five in number, in both the appeals, feeling aggrieved by the judgment and order of conviction dated 7/5/2008 passed in Criminal Appeal No.919-DB/2006 by Division Bench of High Court of Punjab and Haryana at Chandigarh, arising out of the judgment and order of conviction dated 24/11/2006 and order of sentence dated 25/11/2006 pronounced by Additional Sessions Judge, Bhiwani, convicting them for commission of offences under Sections 302/149 of the IPC and awarding sentence to undergo RI for life, together with fine of Rs.2,000/-, are before us challenging the same on variety of grounds.

2. It may be mentioned herein that initially charge-sheet was filed only against four accused namely Nanhar, Virender @ Binder, Rampat and Rajbir @ Meda under Sections 306/34 IPC. The name of the fifth accused Umed Singh was added subsequently by the Trial Court on an application being filed by the prosecution under Section 319 of the Code of Criminal Procedure and allowed on 3.6.2004. The order of committal makes it clear that the first four appellants were charged and prosecuted for commission of offence under Sections 306/34 IPC. Accordingly it was committed to Court of Sessions for being tried for the aforesaid offences. However, on 5.10.2004 charge was framed by the learned Trial Judge under Sections 302/34 IPC. Even though Umed Singh was added subsequently as one of the accused but the charge was not altered to one under Section 149 of the I.P.C.

3. Thumbnail sketch of the facts of the case is as under:

Kartar Singh elder brother of Vijay deceased had filed an

application on 27/2/2004 before the Superintendent of Police Bhiwani, alleging therein that he is resident of village Malkosh Tehsil Charkhi Dadri, District Bhivani and has been serving Armed forces for last 20 years. He has a residential house of his own in Rewari Town wherein his family and aged mother are residing. His younger brother Vijay, the deceased, was residing in Malkosh and was looking after the agricultural land owned by them. One Bhajani wife of Roop Ram, of the same village was on visiting terms to the house of Vijay as he was having small flour mill in his house. She used to come for grinding of wheat. In the course of time she developed family relations with Vijay. There was a rumour in the village that she had forced her own daughter-in-law Kamlesh, wife of Rampat, one of the accused herein, to have illicit relations with deceased Vijay. In lieu whereof it was said that she had received a sum of Rs. 1,000/- from Vijay. It was also the case of the prosecution that Vijay and Kamlesh wife of Rampat - appellant No.3 were seen in the field by many villagers and they had a doubt about their relationship. In fact, their relationship had become talk of the village. Rampat, the accused, came to know about the said relationship. Therefore, he along with other co-accused Nanhar Virender and Rajbir decided to finish Vijay. On coming to know about the motive of the accused, Vijay had left village Malkosh for some time.

4. It was further mentioned that aforesaid four accused had told PW.11 Dalip, uncle of deceased Vijay, about their intention. They wanted to take revenge with Vijay on account of his relationship with Kamlesh, wife of Rampat. They further informed that this illicit relationship will not be tolerated by them and therefore they are planning to kill Vijay.

5. On 24/2/2004 PW.7 Sudesh, cousin of deceased Vijay informed PW.9 Kartar Singh, on telephone that Vijay has been murdered and his dead body was lying in his field. It was further informed that some poisonous substance was administered to Vijay by accused Nanhar, Virender and Rajvir and Rampat. He

was asked to reach Malkosh from Rewari immediately. On the same night, Kartar Singh reached village Malkosh and found his brother dead. On enquiries being made by him it was found from the villagers that he has been done away with by administering poisonous substance to him by aforesaid persons. This fact stood fortified from a small note said to be Vijay's dying declaration, written on the inside paper of the match box, recovered from the pocket of his pants. In the same, name of Meda Panch was also mentioned that they had mixed sulphas in the drink which was administered to him and it is likely to take away his life.

6. The said two pages written complaint dated 27.2.2004 was submitted by Kartar Singh to Superintendent of Police, Bhiwani. A note was endorsed by the Superintendent of Police to Deputy Superintendent of Police to look into the matter and do the needful. DSP sent it to SHO of Police Station Bhond Kalan, who was directed to investigate the matter, in accordance with law. The said written complaint was treated as an F.I.R. and formal FIR came to be registered on 6/3/2004, that is to say almost after 11 days from the date of occurrence of the incident.

7. It is pertinent to mention here that on 24.2.2004, PW.11 Dalip while proceeding to lodge the report had met ASI Raj Kumar (reported to be dead) at the bus stop of Malkosh and had orally informed him about the incident. His statement to the police was entered into Daily Diary (Rojnamcha) by Sub-Inspector Raj Kumar at the Police Station.

8. On such report being received by him, ASI Raj Kumar reached the spot and prepared the inquest report Ext.PN. In column No.12, dealing with in what manner or by what weapon of instrument such marks or injuries appeared to have been inflicted, he recorded: "appears to have taken poisonous substance".

9. In the same inquest report, ASI Raj Kumar recorded

detailed version of Dalip as was given to him. According to Dalip, his nephew Vijay either took poisonous substance himself on account of the fact that villagers had come to know about his illicit relationship with Kamlesh, wife of Rampat or someone had forcibly administered it to him. He further got it recorded that he had left his other nephew PW.7 Sudesh at the place of occurrence for the safety of dead body and had come to the Police Station. But since ASI Raj Kumar met him at the bus stop of Malkosh, he is getting the said statement recorded.

10. ASI Raj Kumar recorded further in the said inquest report that after getting this information he went to the place of occurrence and found dead body of Vijay. The same was lying in a straight posture, mouth and eyes were found to be little open. He was wearing terricot pants along with ready made shirt but no external injuries were found on the body of the deceased. Height of the deceased was about 5' 9". Mouth was full of froth, a steel glass containing poisonous substance, and two bottles containing water and little liquor were found. However, Raj Kumar was not able to come to definite conclusion with regard to cause of death. Therefore, he thought it fit to wait till post- mortem report was received by him.

11. It is pertinent to mention here that neither in the statement of Dalip nor in the Inquest Report, there was any mention with regard to recovery of hand written dying declaration said to have been ascribed by deceased, from his pants.

12. Recovery memo was prepared by Raj Kumar, ASI in presence of two witnesses namely Dalip (PW.11) and Sudesh (PW.7). In the same it is said following articles were seized from the spot:- one hand written note authored by deceased Vijay, on the cover of the match box, two separate bottles, one containing water and another containing little liquor, one steel glass with name of Rampat ingraved. Earth containing white powder said to be poisonous substance was also collected.

They all were sealed in different parcels and taken intopolice custody.

13. Translated copy of Ext.PG, dying declaration has been filed. The exact Hindi version written by him in the slip reads as thus:

""Daru ke sath Sulphas pila rahe hai. Marenge."

(underlining by us)

The said Inquest Report was prepared at the spot. In the site plan prepared there, neither recovery of pocket telephone directory nor recovery of pen was made. The statements of witnesses were recorded.

14. As mentioned hereinabove, initially Raj Kumar, ASI (now dead) did not find commission of any cognizable offence, thus he dropped the proceedings. Only after registration of the FIR on 6/3/2004, the criminal machinery was set into motion.

15. Post-mortem on the dead body of the deceased Vijay was performed by PW.4 Dr. Kuldeep Singh. Post-Mortem Report is marked as Ext.PD. Doctor has opined that deceased was aged about 32 years, well built, having a height of about 5' 6", appears tobe more appropriate than what was mentioned in the Inquest. He has further categorically recorded that on the dead body no bruises or wounds were found. Bladder and stomach both were found to be empty. The time of death was shown to be 36 hours prior to performing of post mortem. The cause of death was shown to be excessive drinking of alcohol with poisonous substance. On the strength of FSL report (Ext.P.1), poisonous substance was found to be aluminium phosphide. According to the doctor, consumption of excessive alcohol coupled with poisonous substance was sufficient to cause death in ordinary course of nature.

16. From the post-mortem report Exh. PE as also from the

deposition of Dr. Kuldeep Singh-PW.4, either deceased had met with homicidal death or committed suicide.

17. Now the question that crops up for consideration before us is whether it was the act of the aforesaid five appellants, on account of which he met with the homicidal death or it was Vijay himself, with an intention to save his status and glory in the society, had consumed poisonous substance, thereby committed suicide.

18. Prosecution in all had examined 12 witnesses on its behalf, to bring home the charges levelled against the appellants. The accused had generally denied the charges levelled against them and submitted that Vijay had committed suicide, on account of his misdeeds. They pleaded innocence. They deposed that they have falsely been roped in by the prosecution on the strength of manufactured and engineered documents. The appellants did not lead any evidence on their behalf.

19. On appreciation of evidence available on record, learned Trial Judge found them guilty for commission of offences under Sections 302/149 of the IPC and awarded them sentences as mentioned hereinabove. The appeal filed by them in the High Court of Punjab and Haryana was dismissed and the findings recorded by the Trial Court were affirmed and the judgment and order of conviction of the Trial Court was maintained. Hence these appeals.

20. We have accordingly heard learned senior counsel Mr. S.K. Dubey with Ms. Mrinamayee Sahu and Sh. Ajay Beer Singh for the appellants and Mr. Kamal Mohan Gupta, learned counsel for the respondent and perused the record. Evidence adduced have also been critically and microscopically gone through by us.

21. Sheet anchor of the prosecution story has been the alleged dying declaration Exh. PG said to have been written

by deceased Vijay, on the inside paper of a match box. English translation thereof reads thus:

Rajbir Singh S/o Bhuru

Rampat S/o Ruppa

Binder

Nanhar

are drinking liquor by mixing the Sulphas and would kill.

It was written in vernacular language and in Hindi, as mentioned earlier, reads as under: "Daru ke sath Sulphas pila rahe hai. Marenge."

22. The aforesaid dying declaration has been found to be sufficient by the two courts below and appellants have been found guilty for commission of offences under Sections 302/149 of the I.P.C. and have been awarded sentence as mentioned hereinabove.

23. Whether the same would fall in the category of dying declaration and if so, if it was sufficient to uphold the conviction and sentence awarded to them on the strength thereof, is required to be examined by us.

24. After critically going through the documents, not only Exh. PG but also the oral and other documentary evidence available on record, we find the following lacunae, shortcoming, lapses and deficiencies in the prosecution story:

(i) the said dying declaration has not been signed by deceased Vijay.

(ii) If the appellants were really present when the said dying declaration was said to have been written, then obviously they would not have allowed him to write the said dying declaration.

(iii) No recovery of pen was made from the site or from the person of the the deceased.

(iv) There is nothing either in the site plan or in the recovery memo to suggest that the deceased was able to get any platform on which he could have written the said dying declaration.

(v) The inner pocket of the match box together with match sticks was not at all recovered.

(vi) It is not established by the prosecution that the deceased was a smoker of bidi or cigarette. No butts or bidis were recovered from the place of occurrence.

(vii) As per the post-mortem report performed on 25.2.2004, the death had occurred within 36 hours from the time of performing of the post-mortem, meaning thereby that the incident must have taken place some time in the night.

(viii) There is nothing on record to show availability of electricity or any source of light at the spot.

(ix) In the Inquest Report prepared by ASI Raj Kumar (now dead), there is no mention with regard to the recovery of the dying declaration Exh. PG or recovery of pocket index telephone directory.

(x) Similarly, in the site plan prepared on the spot, there is no mention with regard to the recovery of dying declaration, pen or pocket diary from the place of occurrence or from the body of the deceased.

(xi) No finger prints either of the deceased or of the accused were taken, even though the same were available.

(xii) Report of the Chemical Examiner dated

6.10.2004 shows that the packets were received by him only on 10.3.2004 but no remnants of poisonous substance were found either in the two bottles or in the steel glass but were found only in the earth so collected from the place of occurrence. The poisonous substance has been described as Aluminium Phosphide.

(xiii) Except for the evidence of PW-7 Sudesh, PW-8 Ramesh, PW-9 Kartar Singh, PW-11 Dalip, who all happened to be closely related to the deceased, evidence of an independent witness was not recorded, even though there is evidence available to show that many villagers were available.

(xiv) The evidence of PW-7 Sudesh and PW-11 Dalip is highly contradictory inasmuch as Sudesh has not deposed anything with regard to recovery of pocket index telephone diary from the person of the deceased; whereas Dalip has categorically deposed with regard to recovery of pocket index telephone diary from his possession.

It is pertinent to mention here that PW-7 Sudesh and PW-11 Dalip are the witnesses to the recovery memo said to have been prepared by ASI Raj Kumar who is said to have died during the pendency of the sessions trial, also does not record its recovery.

(xv) It is extremely difficult to comprehend if the deceased was in a position to write the dying declaration, more so, after having consumed excessive amount of Alcohol mixed with poisonous substance. Fact of excessive amount of Alcohol mixed with poison stands proved from the evidence of PW-4 Dr. Kuldeep Singh, who had performed post-mortem(Exh. PD) on the person of the deceased.

(xvi) The post-moretm report further reveals that the deceased was aged about 32 years having a height of 5

feet 6 inches with a robust body. It is inconceivable to believe that if the appellants would have tried to administer him Alcohol mixed with poisonous substance, he would not have resisted to the same or at least would not have made any hue and cry. It also stands proved from the evidence of PW-4 Dr. Kuldeep Singh and the post-mortem report that no bruises and external injuries were found on the person of the deceased.

(xvii) No explanation has been offered by the prosecution as to why the blank pages of the pocket index telephone diary were not used to scribe it, if the same had been recovered from his possession.

(xviii) The doctrine of motive could not be established by the prosecution at all. Thus another ground of holding them guilty on account of motive, completely shatters the prosecution story and falls flat.

(xix) It could not be established that dying declaration and pocket index telephone diary belonged to the deceased only. This aspect of the matter has not been established by the prosecution.

(xx) Even if it stood established from the opinion of the Handwriting Expert that dying declaration and pocket index telephone diary were in the same hand, still it could not be established that it belonged to the deceased only.

(xxi) Possibility of implanting of these documents cannot be ruled out.

(xxii) The said dying declaration does not inspire confidence, much less to hold the appellants guilty for commission of the said offence.

25. In fact, the salient features noted above with regard to the deficiencies are sufficient, in our considered opinion, to come to the conclusion that the Courts below committed grave

error in holding the appellants guilty for commission of offence under Sections 302/149 of the I.P.C.

But with intention to fortify our views, we would like to reiterate what this Court has already held in its earlier leading judgments.

26. Almost 25 years back, this Court in celebrated judgment in Sharad Birdhichand Sarda vs. State of Maharashtra, reported in 1984 (4) SCC 116, held in paragraph 151 and 161 thereof that it is well settled law that the prosecution must stand or fall on its own legs and it cannot derive any strength form the weaknesses of the defence. For ready reference, the said paragraphs are reproduced hereunder:

> "151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.
>
> 161. This Court, therefore, has in no way departed from the five conditions laid down in *Hanumant's* case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is

added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in *Hanumant's* case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

27. Similarly, when the case is based on circumstantial evidence, it has now been well settled by several authorities of this Court that the chain of circumstances should be complete in all respect and the pointer of guilt should continuously be on the accused only. Any deviation of the pointer of guilt on the accused would enure him the benefit of doubt.

28. No doubt it is true that ASI Raj Kumar, who had prepared the Inquest Report had died during the pendency of the trial, but no reasons have been assigned as to why other police personnel present along with ASI Raj Kumar, were not examined. They could have at least explained the true picture and proved recovery of dying declaration and pocket telephone index diary from possession of deceased Vijay.

29. Admittedly, from the evidence of PW-7 Sudesh, it has come on record that the deceased Vijay was having bank account and he was also a member of some society, where his standard signatures were available. But those standard signatures were not made the basis for comparison of his hand-writing alleged to have been found from his possession. In the case of *Sharad Birdhichand Sarda* (supra), it has been dealt with elaborately as to how the chain of circumstantial evidence has to be complete in all respect. The relevant paragraphs 153 & 154 are reproduced herein below:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra*(') where the following observations were made:

'Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.'

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and 164 (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

30. The aforesaid cardinal principles with regard to the completion of chain of circumstantial evidence for holding the appellants guilty could not be established at all by the prosecution in the present case. With such broken chain of

circumstantial evidence, at many places, it would neither be safe nor prudent to hold the appellants guilty.

31. Apart from the above, it is extremely difficult for us to come to the conclusion if Exh. PG can fall in the category of dying declaration at all or can be said to be legally admissible. Even though we have categorically, minutely and with microscopic eyes gone through the said document number of times, but it does not inspire confidence, more so, the manner in which it has been written. We have already mentioned hereinabove that after having consumed excessive liquor, it would not have been possible for any one, much less for Vijay, to have written the said dying declaration with so much of precision or with steady hand. In our considered opinion, dying declaration should be such,which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts. It should not be the result of tutoring. But dying declaration in the present case does not fulfill these conditions.

32. In HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition, at page 936, under title "Alcohols", deals with handwriting after consumption of liquor. While coming to the general behaviour after excessive drinking, apart from other things, it has specifically been noted: "Character of hand-writing: There is often difficulty with letters, N, M and W."

33. In the same book, it is further described that blood reaches all the organs, mainly the brain and interferes with normal brain functions like judgment and coordination of muscular movements. The blood alcohol level influences the behaviour of the person. The amount of alcohol present in the stomach and intestine has no effect but only indicates the ingestion.

34. Obviously, it would go to show and we also come to

the conclusion that after going through the handwriting, as has been found by us in the allegeddying declaration Ext. PG, it would have been extremely difficult for him to write it as he could not have been in a mentally fit condition to have written the same.

35. Unfortunately, this aspect of the matter has neither been considered by the learned Trial Judge nor has been adverted to by the Division Bench of the High court and yet the appellants have been found guilty for commission of the aforesaid offence.

36. In our considered opinion, the said judgment and order of conviction passed by the Trial Court and upheld by the High Court, cannot be sustained in law. They are accordingly set aside and quashed. As a necessary consequence thereof, the appellants would be set at liberty forthwith, if not required in connection with any other criminal case.

Both the appeals are allowed accordingly.

D.G. Appeals allowed.

M/S. BHANWARLAL DUGAR & ORS.
v.
BRIDHICHAND PANNALAL & ORS.
(Civil Appeal No. 4889 of 2010)

JULY 5, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Code of Civil Procedure, 1908:

s.96 – Appeal from original decree – Scope of – HELD: A regular first appeal is a rehearing of the suit and the appellate court is bound to appreciate the evidence on record and arrive at its own conclusion – In the instant case, the appellate court miserably failed to exercise its appellate jurisdiction as it copied verbatim the judgment of trial court without any independent application of mind and appreciation of evidence – Rent Control and Eviction.

s.115 – Revisional jurisdiction of High Court – HELD: High Court cannot re-appreciate the evidence and set aside concurrent findings of fact recorded by courts below, by taking a different view of the evidence – It is open to High Court to remit the matter if it finds that the courts below did not consider the material evidence on record – In the instant case, though the High Court rightly held that the appellate court failed to consider the material evidence on record, but it erred it undertaking that responsibility upon itself – Order of High Court set aside – Matter remitted to appellate court for hearing and disposal of the appeal afresh – Rent Control and Eviction.

The instant appeal was filed by the plaintiffs-landlords against the judgment of the High Court passed in a revision petition reversing the concurrent findings of fact recorded by the trial court as affirmed by the appellate court that the tenant-respondent was a wilful defaulter,

liable to be evicted and that the landlord-appellants *bona fide* required the premises for their own business.

Allowing the appeal, the Court

HELD: 1.1. The plaintiffs-appellants in their plaint in clear and categorical terms have pleaded that the schedule premises is *bona fide* required by them for their own use as they and their sons have to do their own business from the schedule premises. The trial court upon appreciation of the evidence available on record has found that the appellants/plaintiffs do not have any other suitable place to start their own business except the suit premises which is situated on the ground floor. The appellate court without appreciating the evidence available on record merely copied verbatim the findings of the trial court. It committed the same mistake even while considering the issue relating to wilful default on the part of the defendants. [para 6-7 and 9] [407-A-B, G; 408-G]

1.2. A regular first appeal is nothing but a rehearing of the suit and the appellate court is bound to appreciate the evidence available on record and arrive at its own conclusions. Only such conclusions arrived at upon appreciation of the evidence are conclusive and not normally interfered with by the revisional court by re-appreciating the evidence. In the case on hand, the appellate court copied verbatim the judgment of the trial court without any independent application of mind and assessing the evidence. The appellate court miserably failed to exercise its appellate jurisdiction. [para 7] [407-H; 408-A-B]

2. It is settled law that the High Court cannot re-appreciate the evidence and set aside the concurrent findings of fact recorded by courts below by taking a different view of the evidence. It is always open to the High Court to remit the matter if in its opinion the courts

below did not consider the material evidence on record. In the instant case, the High Court instead of remitting the matter for consideration afresh by the appellate court, chose to undertake that responsibility upon itself, on the ground that the appellate court failed to consider the material evidence on record, which course cannot be sustained. [para 8] [408-D-F]

3. The order of the High Court is set aside. The matter is remitted to the appellate court for hearing and disposal of the appeal afresh in accordance with law and expeditiously. [para 10] [408-H; 409-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4889 of 2010.

From the Judgment & Order dated 13.8.2009 of the High Court of Gauhati in Civil Revision Petition No. 157 of 2009.

Vijay Hansaria, Aseem Mehrotra, Abhijat P. Medh for the Appellants.

P.S. Narsiman, Manish Goswami (for Map & Co.) for the Respondents.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Leave granted.

2**.** This is a landlord's appeal by Special Leave against the order of the High court reversing the concurrent decree of eviction from commercial premises at Guwahati in Assam. The Trial Court, the Appellate Court concurrently found that the respondent was a wilful defaulter and liable to be evicted. They have also found that the appellants herein required the premises for their own business purpose. The High Court in exercise of its jurisdiction under Section 115 of the Code of Civil Procedure reversed the concurrent findings of facts and

accordingly dismissed the suit for eviction filed by the appellants against the respondents.

3. The premises in question is a commercial one. There is no dispute of landlord and tenant relationship between the parties. Only two substantial issues framed by the Trial Court were: (1) whether the respondent committed any default in payment of rents since April, 1993 as pleaded by the appellants? (2) Whether the appellants required the suit premises bona fide for their own use? On both the issues the Trial Court as well as the Appellate Court concurrently held in favour of the appellants.

4. The High Court upon re-appreciation of evidence reversed the findings of the courts below.

5. In this appeal, Shri Vijay Hansaria, learned senior counsel appearing on behalf of the appellants strenuously contended that the High Court committed a manifest error in interfering with the concurrent findings of facts arrived at by the courts below by reappreciating the evidence which is impermissible in law. He also contended that the appellants clearly made out and established their case that the respondent committed default in payment of rents since April, 1993 till the date of filing of the suit. The appellants have also successfully established that the premises in question is required by them for their own business purposes. His submission was that the High Court exceeded its jurisdiction in interfering with the concurrent findings of facts. Shri P.S. Narasimha, learned senior counsel appearing on behalf of the respondent contended that the High Court on facts was justified in reversing the findings of the courts below inasmuch as the findings recorded by the courts below were perverse in nature. It was submitted that the courts below committed serious error in exercise of their jurisdiction and ignoring vital evidence and in such circumstances the High Court was well within its jurisdiction to correct the errors committed by the courts below in exercise of their jurisdiction.

***Bona fide* Requirement of the Premises:**

6. The appellants in their plaint in clear and categorical terms pleaded that the schedule premises is bona fide required by them "for their own use as they and their sons have to do their own business from the schedule premises,……." The respondent in the written statement pleaded that the schedule premises is not required bona fide by the appellants for their own use. That apart, it was further pleaded that the appellants already started new business in the year, 1997 in their own premises. "Besides this, the plaintiffs have a number of tenants under them such as Canara Bank, Madan Electricals etc. in the same building, but no case has been filed against them for vacating the premises which shows that the plaintiffs are not in need of premises for their own use and occupation……." Plaintiff No.2 examined himself as PW-1 in the present case. It is specifically stated by him that the premises is required for starting new business for own sons for which purposes they have sufficient funds and also can manage required resources from the financial institutions for starting new business. In the cross-examination it was suggested to PW-1 that he did not state in the plaint as to what type of business the plaintiffs intended to start in that premises. It was not suggested that the appellants did not possess the financial resources for commencing their own business in the suit premises. It was however, suggested that many other premises were under the occupation of the tenants which suggestion was accepted by PW-1.

7. The Trial Court upon appreciation of evidence available on record found that the appellants/plaintiffs do not have any other "suitable place to start their own business except the suit premises which is situated on the ground floor". The Appellate Court without reappreciating the evidence available on record merely copied the findings of the Trial Court in verbatim. It is needless to state that a Regular First Appeal is nothing but rehearing of the suit and the Appellate Court is bound to

appreciate the evidence available on record and arrive at its own conclusions. Only such conclusions arrived at upon appreciation of the evidence are conclusive and not normally interfered with by the revisional court by re-appreciating the evidence. In the case on hand the Appellate Court verbatim copied the judgment of the Trial Court without any independent application of mind and assessing the evidence. The Appellate Court miserably failed to exercise its appellate jurisdiction. The High Court is right in observing that the Appellate Court merely reproduced the judgment of the Trial Court without any independent application of mind.

8. But the question that arises for our consideration in the present case is whether the Revisional Court is justified in re-appreciating the evidence and substituting its own findings on the ground that the Appellate Court did not consider the evidence properly? It is settled law that the High Court cannot re-appreciate the evidence and set aside concurrent findings of facts by taking a different view of the evidence. It is always open to the High Court to remit the matter if in its opinion the courts below did not consider the material evidence on record. In the instant case the High Court instead of remitting the matter for fresh consideration by the Appellate Court on the ground that the Appellate Court failed to consider the material evidence on record had chosen to undertake that responsibility upon itself which we find it difficult to sustain.

WILFULL DEFAULT :

9. We find that the First Appellate Court committed same mistake even while considering the issue relating to wilful default alleged to have been committed by the respondent. On this issue also the Appellate Court merely re-produced verbatim judgment of the Trial Court.

10. Considering all the facts and circumstances as noticed above, we are constrained to hold that the order of the High Court cannot be sustained and as such we set aside the same

and remit the matter to the First Appellate Court (Appellate Court of the Civil Judge No. 2, Kamrup, Guwahati) for hearing the appeal afresh for its disposal in accordance with law. It is needless to observe that the Appellate Court shall re-hear the matter and decide all the issues that arise for its consideration by properly re-appreciating the evidence available on record. The appeal shall be heard and disposed of within six months from today.

11. The appeal is, accordingly, allowed without any order as to costs.

R.P. Appeal allowed.

CHUNNI LAL

v.

STATE OF U.P.

(Criminal Appeal No. 669 of 2006)

JULY 5, 2010

[DR. MUKUNDAKAM SHARMA AND H.L. DATTU, JJ.]

Penal Code, 1860:

s.302 – Accused firing at his uncle causing his death – Conviction by trial court – Affirmed by High Court – Pleas of absence of motive for the crime, evidence of interested witnesses only and delay in filing FIR and starting investigation – HELD: Are not tenable – Motive for the crime has been established because of the development of the events which entirely defeated the chances of the accused to inherit the property of his deceased uncle – The eye-witnesses being the sons of the deceased, their presence at the place of occurrence at the relevant time was usual and expected – They have given a vivid account of the incident and the manner in which it occurred – Their evidence could not be shaken by defence in cross-examination – The ocular evidence fully corroborates the medical evidence – The delay caused due to reasonable factual situation cannot destroy prosecution case nor would it create any suspicion on prosecution case – In the instant case, the entire area being dacoits infested area, the police station being far away from the place of occurrence, the Investigating Officer having been required to attend the court at the relevant time, the court being at a distance from the police station, there is well reasoned and proper explanation for the delay both in lodging the FIR and starting the investigation – Accused has been rightly convicted and sentenced to imprisonment for life u/s 302 – Criminal law – Motive – Evidence – Testimony of related witnesses – Delay in lodging FIR and starting investigation.

The appellant-accused was prosecuted for committing the murder of his uncle by gun shots. The trial court convicted and sentenced him to imprisonment for life u/s 302 IPC. The High Court affirmed the conviction and the sentence.

In the instant appeal filed by the accused, it was, *inter alia,* contended for the appellant that there was no motive for him to commit the crime; that the prosecution, in order to prove its case, examined only the interested witnesses who were closely related to the deceased and the independent witness, namely, PW-5, having turned hostile, conviction could not be recorded; and that there was delay in lodging the FIR and initiating the investigation.

Dismissing the appeal, the Court

HELD: 1. As regards the motive for the crime, in the instant case, it is established from the records that PWs 1 and 2 were born out of the relationship between the deceased and their mother who earlier was kept as a mistress or concubine by the deceased for about 25-26 years. It is also established from the evidence adduced that about three months prior to the incident the deceased performed marriage with the said lady and a document was executed in that regard on 15.2.1978 before the Marriage Officer. It is to be noted that the incident took place only a few months thereafter, that is, on 7.5.1978. In the circumstances, there was no possibility at all of the appellant inheriting the property of his uncle and, therefore, the plea taken by him that he being the nephew and as such, the natural heir of the deceased, there was no motive for him to commit the crime, is without any merit. [Para 8-9] [417-A-D; 417-F-G]

Raghubir Singh & Ors. Vs. State of Punjab **(1996) 3 SCR 389 = (1996) 9 SCC 233, relied on.**

2.1. It is no doubt true that PWs 1 and 2 are the sons of the deceased and they are brothers. They have been examined in the trial as eye-witnesses to the occurrence. Their evidence also indicates that besides them there was another independent witness, namely, the Pradhan who was also present at the place of occurrence when the incident occurred. It has also come in evidence that the said Pradhan died during the trial and before his evidence could be recorded. PWs 1 and 2 were cross-examined at length by the defence but not even a single question was put in their cross-examination that they were not present at the place of occurrence. They are natural witnesses as their presence at the place of occurrence at the relevant time was usual and expected. [para 12] [418-H; 419-A-B]

2.2. Both PWs 1 and 2 have given a vivid account of the incident and the manner in which the incident had occurred. It is proved from the records that when their father was doing the cleaning work of the mustard at about 8.00 p.m. on the fateful day, the accused came there and immediately picked up the DBBL gun belonging to the deceased, loaded both the barrels with cartridges and fired twice at their father as a consequence of which, he died. Two bullets were fired which resulted in two injuries which are established from the medical evidence available on record. The ocular evidence, therefore, fully corroborates the medical evidence. In that view of the matter it cannot be said that the evidence of PWs 1 and 2 should be discarded as they are interested witnesses, particularly, when their evidence adduced could not be shaken by the defence in the cross-examination. [para 13 and 16] [419-C-D; 420-C-D]

Jayabalan vs. U.T. of Pondicherry **(2009) 15 SCR 736= (2010) 1 SCC 199 - relied on.**

3.1. Although the incident had happened at 8.00 p.m.

on 7.5.1978, PWs 1 and 2 clearly stated that they did not dare to go out of the place of occurrence due to fear. It has also come in evidence that the entire area was dacoits infested area and police station was also about 8 km. away from the place of occurrence and, therefore, it was quite possible that PWs 1 and 2 who were the eye-witnesses and the sons of the deceased thought it fit to travel out of the place of occurrence at about 4.00 a.m. in the morning to lodge the FIR which was accordingly lodged at the police station at 6.30 a.m. [para 17] [420-H; 421-A]

3.2. Although it was stated in the evidence that the investigating officer, namely, the Sub-Inspector, was present at the police station in the morning hours when the prosecution witnesses reached the police station but it has also come in evidence that he was required to go to court which was functioning from 6 a.m. in the morning. Therefore, the constable took the statement of the informant and carried the records to the court to apprise the Investigating Officer of the case. The Investigating Officer clearly stated in his deposition that he came back from the court at about 1'0 clock. The court was located at quite a distance from the police station and after going back to the police station and doing the needful he went to the village in the evening for carrying out the investigation. It is, therefore, established that there is well reasoned and proper explanation for the delay both in lodging the FIR as also in starting the investigation. [para 18] [421-D-G]

Silak Ram & Anr. Vs. State of Karnataka **2007 (8) SCR 849 = 2007 (10) SCC 464, relied on.**

3.3. The delay which was caused due to reasonable factual situation cannot destroy the prosecution case nor create any suspicion with regard to the prosecution case. It also cannot be said under any circumstance and

particularly because of the explanation available on record that the FIR is ante-timed. [para 18] [422-D]

4. There is another very vital and important factor in the instant case, which is the fact of the accused absconding immediately after the occurrence. The fact that the accused ran away from the place of occurrence and was not traceable thereafter in the village and the fact that he surrendered only on 20.5.1978 although the incident had occurred on 7.5.1978 also clearly indicate that the appellant-accused was guilty of the offence alleged against him. He has been rightly convicted and sentenced to imprisonment for life u/s 302 IPC. [para 20-21] [423-A-B; 422-E; G-H]

Case Law Reference:

(1996) 3 SCR 389	**relied on**	**para 10**
(2009) 15 SCR 736	**relied on**	**para 16**
2007 (8) SCR 849	**relied on**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 669 of 2006.

From the Judgment & Order dated 10.2.2006 of the High Court of Judicature at Allahabad in Criminal Appeal No. 3151 of 1981.

Siddhartha Dave, Vibha Datta Makhija, Jentiben AO for the Appellant.

Ratnakar Dash, T.N. Singh, Rajeev K. Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA 1. The present appellant has preferred this appeal being aggrieved by the judgment and order dated 10.02.2006 passed by the Allahabad High Court

upholding the order of conviction and sentence passed by the Second Additional Sessions Judge, Banda against the appellant under Section 302 of the Indian Penal Code [for short 'IPC'] and sentencing him to life imprisonment.

2. The aforesaid Sessions Trial case was registered for an offence punishable under Section 302 IPC for allegedly committing murder by the present appellant Chunni Lal of his uncle Heera Lal at about 8.00 p.m. on 07.05.1978 in village Baramafi, Police Station Pahari, District Banda.

3. The First Information Report [for short 'FIR'] was lodged by Juggi Lal [PW-1] who is allegedly an eyewitness to the occurrence and the same was lodged at 08.05.1978 at 6.30 a.m. The deceased Heera Lal was the uncle of the accused Chunni Lal inasmuch as both Ramdeo and Heera Lal were sons of Ram Ratan. Heera Lal was unmarried but was keeping one Kainya alias Chandrakaliya as his mistress or concubine for the last about 25-26 years preceding the incident. She was earlier married to one Jagannath Kalar but sometime prior to the incident Heera Lal performed marriage with her and a document in that regard was executed on 15.02.1978 before the Marriage Officer. In view of the aforesaid position the appellant Chunni Lal who was hoping to succeed to the estate of the deceased Heera Lal thought that his hopes of succeeding to this estate would be lost and, therefore, it is alleged that the accused had committed the aforesaid offence by going to the agricultural field of deceased Heera Lal when deceased was processing the harvest of mustard crop in his field. It is alleged that after going there the accused fired two rounds of bullets from the DBBL gun of the deceased in the presence of Juggi Lal [PW-1] and Ram Sakh [PW-2]. The incident happened at 8.00 p.m. on 07.05.1978 and the FIR was lodged on 08.05.1978 at 6.30 a.m. The investigating officer who is the Sub-Inspector of the Police Station went to the village at 7.15 p.m. for investigation. During the course of investigation he took a DBBL gun and other material exhibits into his custody and

recorded the statements of the witnesses and thereafter submitted a chargesheet against the appellant herein.

4. During the trial seven witnesses were examined on behalf of the prosecution whereas none was examined on behalf of the defence. The appellant was also examined under Section 313 of the Code of Criminal Procedure and thereafter the Second Additional Sessions Judge, Banda, who was the trial Judge, passed a judgment and order of conviction against the appellant finding him guilty of committing an offence under Section 302 IPC. By a separate order dated 21.12.1981 the learned trial Court sentenced the appellant to life imprisonment.

5. Being aggrieved by the said judgment and order the appellant filed an appeal before the Allahabad High Court which was heard by a Division Bench of the High Court. The Division Bench of the High Court by its judgment and order dated 10.02.2006 upheld the order of conviction and sentence and dismissed the appeal filed by the appellant. Appellant therefore filed the present appeal on which we have heard the learned counsel appearing for the parties.

6. The learned counsel appearing for the appellant took up several pleas during the course of his arguments in support of his stand that the appellant is innocent. We propose to deal with each of the submissions made by the counsel appearing for the appellant.

7. The first submission which was made by the counsel appearing for the appellant was with regard to the motive for the crime alleged against the appellant. The appellant contended through his counsel that there was absolutely no motive for the appellant to commit the crime as he was a natural heir being the nephew of the deceased as both PWs 1 & 2 are illegitimate sons of the deceased and therefore there was a motive for the PWs 1 & 2 to implicate the accused in the offence.

8. In the instant case it is established from the records that PWs 1 & 2 were born out of the relationship between the deceased and their mother Chandrakaliya who earlier was kept as a mistress or concubine by the deceased Heera Lal for about 25-26 years. PW-1 at the time of deposition was 20 years of age whereas PW-2 was aged about 25 years. It is established from the aforesaid fact that both of them were born out of the relationship between the deceased Heera Lal and Chandrakaliya as their relationship started about 25-26 years preceding the incident. It is also established from the evidence adduced that about three months prior to the incident Heera Lal performed marriage with the said lady and a document was executed in that regard on 15.02.1978 before the Marriage Officer. It is to be noted that incident took place occurred only a few months thereafter that is on 07.05.1978. On having found that his chance of inheriting the estate of the deceased was practically lost due to the aforesaid marriage, the accused might have thought of taking revenge on his uncle for depriving him of his right to inherit his estate and therefore immediately went to the place of occurrence on the night of 07.05.1978 picked up the DBBL gun, loaded the same and fired upon the deceased twice.

9. This, in our estimation is the reason and motive for the crime and not the one which was advanced by the counsel appearing for the appellant, for by the time the incident had taken place, the deceased had legalized his relationship and married said Chandrakaliya thereby giving legal status to PWs 1 & 2 as his sons. In that situation there was no possibility at all of the appellant inheriting the property of his uncle and therefore the plea taken by the appellant regarding motive appears to be without any merit. Rather on the other hand, we find a clear motive on the part of the appellant- accused for committing the murder of his uncle.

10. In this regard we wish to refer to the decision of this Court in the case of *Raghubir Singh & Others v. State of Punjab* reported in [1996] 9 SCC 233 which is as follows: -

> **"7.** …….. The motives may be minor but nonetheless they did provide an occasion for attack on the deceased by the appellants. That apart, even in the absence of motive, the guilt of the culprits can be established in a given case if the other evidence on the record is trustworthy and the absence of proof of motive has never been considered as fatal to the prosecution case where the ocular evidence is found reliable……. "

11. The same is also corroborated by the fact that after the death of the deceased the family of the accused including the accused himself took several steps to get the land of the deceased transferred and mutated in their names instead of PWs 1 & 2 and their brothers. Even in the cross-examination of the prosecution witnesses examined in the present criminal case of murder, an effort was being made to dislodge the claim of PWs 1 & 2 to inherit the property of the deceased. Both PWs 1 & 2 have been extensively cross-examined in that regard but their evidence in support of their claim of inheritance could not be shaken. The submission of the appellant therefore that there was no motive to kill his uncle cannot be accepted in view of the aforesaid extensively discussed clear facts and circumstance of the case.

12. The second submission which was advanced by the counsel appearing for the appellant was that the prosecution had examined only the interested witnesses who were closely related to the deceased. It was contended by the appellant that the only independent witness who was examined was PW 5, and PW5 having turned hostile, the conviction and sentence passed against the appellant is required to be set aside and quashed. It is no doubt true that PWs 1 & 2 are the sons of the deceased and they are brothers. They have been examined in the trial as the eye-witnesses to the occurrence. The evidence adduced by PWs 1 & 2 also indicate that besides them there was another witness namely Jagdeo Pradhan who was also

present at the place of occurrence when the incident had occurred. It has also come in evidence that said Jagdeo Pradhan who otherwise would have been an independent witness died during the trial and before his evidence could be recorded. Both PWs 1 & 2 were cross-examined at length by the defence but not even a single question was put in such cross-examination that said PWs 1 & 2 were not present at the place of occurrence. They are natural witnesses as their presence at the place of occurrence at the relevant time was usual and expected.

13. Both PWs 1 & 2 have given a vivid account of the incident and the manner in which the incident had occurred. It is proved from the records that when there father was doing the cleaning work of the mustard at about 8.00 p.m. on the fateful day, accused Chunni Lal came there and immediately picked up the DBBL gun belonging to the deceased, loaded both the barrels with cartridge and fired twice at Heera Lal, as a consequence of which, Heera Lal died. PW-2 has also given a vivid description of the incident including the fact that when he chased Chunni Lal and caught his leg after 6-7 feet he even managed to snatch the gun from the hand of the accused. It is also disclosed from evidence recorded that despite falling down the accused stood up immediately and ran away with the belt of cartridges towards the South. There was another independent witness Sri Keshan [PW-5] who was present at the time of the occurrence. He, however, turned hostile in the trial during his examination-in-chief.

14. Having considered the evidence of PWs 1 & 2 who were the eye-witnesses to the occurrence we are satisfied that they were present at the place of occurrence in a usual and natural manner when the incident had taken place and they had actually seen the occurrence. The incident had happened at 8.00 p.m. in the night in the field of the deceased which was not only an agricultural field but also a dacoit infested area and therefore it is reasonable to assume that even the deceased

kept a gun with him with a belt of bullets in open for security reasons. The accused knew that a gun is always kept in the field and at the place of work, for he used to visit them at the field occasionally and even at night. That was also the reason why he did not carry any weapon with him, so as to avoid a suspicion in the mind of the deceased.

15. The accused used the weapon of the deceased himself for firing upon him. Two bullets were fired which resulted in two injuries which are established from the medical evidence available on record. The ocular evidence, therefore, fully corroborates the medical evidence. In that view of the matter it cannot be said that the evidence of PWs 1 & 2 should be discarded as they are interested witnesses particularly when their evidence adduced could not be shaken by the defence in the cross-examination.

16. In *Jayabalan Vs. U.T. of Pondicherry* reported in 2010 (1) SCC 199, this Court while dealing with the evidence of the interested witnesses held as under:-

> "……..We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

17. Another submission which was made by the counsel appearing for the appellant was that there was a delay in both lodging the FIR as also in initiating the investigation by the police. It was submitted that although the incident had taken

place on 07.05.1978 at about 8.00 p.m., the FIR was lodged on 08.05.1978 at 6.30 a.m. only whereas the investigation was started by the police only in the evening.

18. On proper appreciation of the evidence we find that although the incident had happened at 8.00 p.m. on 07.05.1978 PWs 1 & 2 have clearly stated that they did not dare to go out of the place of occurrence due to fear. It has also come in evidence that the entire area was dacoit infested area and police station was also about eight kilometers away from the place of occurrence and therefore it was quite possible that PWs 1 & 2 who were the eye-witnesses and the sons of the deceased thought it fit to travel out of the place of occurrence at about 4.00 a.m. in the morning to lodge the FIR which was accordingly lodged at the police station at 6.30 a.m. Although it was stated in the evidence that the investigating officer namely the Sub-Inspector was present at the police station in the morning hours when the informant reached the police station but it has also come in evidence that he was required to go to the Court which was functioning from 6 a.m. in the morning. Therefore the constable took the statement of the informant and carried the records to the Court to apprise about the case to the Sub-Inspector, the Investigating Officer. The Investigating Officer had clearly stated in his deposition that he came back from the Court at about 1'o clock. The Court was located at quite a distance from the police station and after going back to the police station and after doing the needful he went to the village in the evening for carrying out his investigation. It is, therefore, established that there is well reasoned and proper explanation for the delay both in the lodging of the FIR as also in starting of the investigation by the Investigating Officer. In this regard we would like to refer to a decision of this Court in the case of *Silak Ram & Another v. State of Karnataka* reported in [2007] 10 SCC 464 relevant portion of which is as follows: -

> **"**12. ……..Delay in lodging FIR by itself would not be sufficient to discard the prosecution version unless it is unexplained and such delay coupled with the likelihood of concoction of evidence. There is no hard-and-fast rule that delay in filing FIR in each and every case is fatal and on account of such delay the prosecution version should be discarded. The factum of delay requires the court to scrutinise the evidence adduced with greater degree of care and caution. In this case the eyewitnesses have given a vivid description of the events. The evidence of PW 11 as noted above, is cogent and consistent and the version given by this witness fits with medical evidence. ……."

The aforesaid delay which was caused due to reasonable factual situation cannot destroy the prosecution case nor creates any suspicion with regard to the prosecution case. It also cannot be said under any circumstance and particularly because of the aforesaid explanation available on record that the FIR is ante-timed as submitted by the counsel appearing for the appellant.

19. There is another very vital and important factor in this case, which is the fact of the accused absconding immediately after the occurrence. PWs 1 & 2 stated that immediately after the accused opened fire on the deceased through the gun and after PW-2 was able to snatch away the rifle from the accused the accused got up and ran away from the place of occurrence and thereafter he was not available either at the place of occurrence or in the village. It is established from the evidence of the Investigating Officer that on 20.05.1978 he received an information that the accused surrendered in the Court of Chief Judicial Magistrate. The said information received by him was noted in the case diary. The fact that the accused ran away from the place of occurrence and was not traceable thereafter in the village and the fact that he surrendered only on 20.05.1978 although the incident had occurred on 07.05.1978 clearly indicate that the appellant was guilty of the offence alleged against him.

20. All the aforesaid discussions and facts, therefore, lead to one and the only conclusion that the appellant is guilty of the offence alleged against him.

21. In our considered opinion, the accused has been rightly convicted of the offence under Section 302 IPC. This appeal, therefore, has no merit and is dismissed accordingly.

R.P. Appeal dismissed.

VINOD SETH
v.
DEVINDER BAJAJ AND ANR.
(Civil Appeal No. 4891 of 2010)

JULY 05, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Transfer of Property Act, 1882: s.52 – Suit for specific performance of oral collaboration agreement for development of residential suit premises – No application by plaintiff for interim relief – High Court directing plaintiff to furnish an undertaking to pay Rs.25 lakhs to defendants in the event of losing case observing that prima facie case not in favour of plaintiff and due to heavy dockets in courts early disposal of suit was not possible – Propriety of – Held: There is no provision in the Code or any substantive law which enable the Court to issue a direction to a plaintiff in a suit to file an undertaking that in the event of not succeeding in the suit, he would pay damages to the defendant – Such power cannot be traced even in s.151 – It is an order in terrorem – Order punishing a litigant on the ground that the court is not able to decide the case expeditiously is unwarranted, and beyond its power – In the facts and circumstances, suit property exempted from the operation of s.52 and defendants granted liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit subject to their furnishing security of Rs.3 lakhs – Doctrine of lis pendens – Specific Relief Act, 1963 – s.14(1)(b) and (d) – Code of Civil Procedure, 1908 – ss.35, 35A, 151, Order 25 r.1 – Damages – Undertaking – Judgment/Order – Order in terrorem.

Costs: Absence of effective provisions for costs – Need for reform – The provision for costs as envisaged in ss.35, 35A, 35B have either become infructuous on account of inflation or are seldom invoked – Lack of appropriate

provisions relating to costs result in increase in malicious, vexatious and frivolous suits – Urgent need for the Legislature and the law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in ss.35, 35A – Code of Civil Procedure, 1908 – ss.35, 35A, 35B – Legislation – Suggestion for.

Doctrines/ Principles: Doctrine of lis pendens – Applicability of.

The plaintiff-appellant claimed to be a builder-cum-real estate dealer. The defendants-respondents were the owners in possession of the suit premises. According to the plaintiff, an oral agreement for commercial collaboration for development of residential suit premises was purportedly entered between him and the defendants. In terms of the agreement, defendants were required to convert the suit premises from leasehold to freehold and then hand over vacant physical possession to the plaintiff. Thereafter plaintiff was to demolish the said property and reconstruct three storeyed building. The plaintiff was to keep the ground floor with himself and handover first and second floors to the defendants and also pay to them a sum of Rs.3.71 lacs. Pursuant to the said terms of the agreement, a sum of Rs.51000 was paid by the plaintiff to the first defendant who gave a receipt. The plaintiff alleged that the defendants failed to comply with the agreement and subsequently he also came to know that the property stood in the name of the second defendant and not the first defendant. The plaintiff issued a notice dated 9.3.2007 calling upon the defendants to comply with the legal formalities to facilitate the collaboration agreement. Alleging that defendants failed to comply, the appellant filed a suit on 30.6.2007 for specific performance. The defendants denied the claim in toto. When the case came up for framing issues, a Single Judge of the High Court passed an interim order

that the plaintiff instituted the suit without moving any application for interim relief and the suit being in respect to an immovable property, even in the absence of any interim order restraining the defendants from dealing with the property, would adversely affect the right of defendants owing to the pendency of the said suit. It further held that the likelihood of the plaintiff succeeding in the suit was remote as such agreements are not concluded and enforceable till detailed writing is executed. In the circumstances, the Single Judge directed the plaintiff to file an affidavit/undertaking that in the event plaintiff did not succeed in the suit, he would pay a sum of Rs. 25 lacs by way of damages to the defendants. The said amount was arrived at because of the averments in the plaint that the plaintiff was to spend Rs. 20 lacs in development of the property and in lieu thereof was to become the owner of the ground floor of the newly constructed property. Plaintiff filed an intra-court appeal. The Division Bench dismissed the appeal holding that the course adopted by the Single Judge was not without sanction of law and there was merit in the said approach looking to the ground realities and heavy dockets in the Courts. Aggrieved plaintiff filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1. It is doubtful whether the collaboration agreement, as alleged by the plaintiff-appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not a usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order

XXI Rule 32(5) CPC. The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents were limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has to perform several obligations when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant was dependant upon his personal qualifications and volition. If the court should decree the suit and direct specific performance of the "collaboration agreement" by respondents, it was not practical or possible for the court to ensure that the appellant would perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. The alleged agreement being vague and incomplete, required consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court could not supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced.

Further, as the appellant had not made an alternative prayer for compensation for breach, there was also a bar in regard to award of any compensation under section 21 of the Specific Relief Act. [Para 8.1] [446-F-H; 447-A-H; 448-A-B]

Abdul Gafur v. State of Uttarakhand **2008 (10) SCC 97, referred to.**

1.2. The appellant claimed to be a builder and real estate dealer. If the appellant entered into a collaboration agreement orally and could secure a receipt in writing for Rs.51,000/-, nothing prevented him from reducing the said terms of the alleged collaboration agreement in the form of an agreement or Memorandum of Understanding and have it signed by the owners of the property. No reason was forthcoming as to why that was not done. [Para 8.2] [448-B-C]

1.3. The property stood in the name of second defendant, but she did not sign the receipt. There was nothing to show that the second defendant participated in the alleged negotiations or authorized her husband-the first defendant to enter into any collaboration agreement in respect of the suit property. The receipt was not signed by the first defendant as Attorney Holder or as the authorized representative of the owner of the property. From the plaint averments it is evident that plaintiff did not even know who the owner was, at the time of the alleged negotiations and erroneously assumed that first defendant was the owner. The execution of a receipt for Rs.51,000/- by the first defendant even if proved, may at best make out a tentative token payment pending negotiations and finalization of the terms of an agreement for development of the property. The agreement is alleged to have been entered on 10.6.2004. But the plaintiff issued the first notice calling upon defendants to perform, only on

9.3.2007 and filed the suit on 30.6.2007. There was no correspondence or demand for performance, in writing, prior to 9.3.2007, even though the alleged agreement was a commercial transaction. [Paras 8.3, 8.4] [448-D-H]

2. Having regard to the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882, the pendency of the suit by the plaintiff would affect the valuable right of the second defendant to deal with the property in the manner she deemed fit, and restricted her freedom to sell the property and secure a fair market price from a buyer of her choice. When a suit for specific performance is filed alleging an oral agreement without seeking any interim relief, the defendant would not even have an opportunity to seek a prima facie finding on the validity of the claim. Filing such a suit is an ingenious way of creating a cloud over the title to the suit property. Such a suit is likely to be pending for a decade or more. Even if a defendant-owner asserts that his property is not subject to any agreement and the said assertion is ultimately found to be true, his freedom to deal with the property as he likes or to realize its true market value by sale or transfer is adversely affected during the pendency of the suit. The ground reality is that no third party would deal with a property in regard to which a suit for specific performance is pending. This enables an unscrupulous plaintiff to cajole and persuade a defendant to sell/give the property on plaintiff's terms, or force the defendant to agree for some kind of settlement. It was these circumstances which persuaded the High Court to find some way to do justice, leading to the impugned direction. [Para 9] [449-A-F]

3. Order XXV Rule 1 CPC provides that at any stage of a suit, the court may either on its own motion or on the application of defendant, order the plaintiff for reasons to be recorded, to give security for the payment of all

costs incurred or likely to be incurred by the defendant. But the Code, nowhere authorizes or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to defendant, when the plaintiff's suit is still pending, without any application by defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract between the parties which requires the appellant to furnish such undertaking. None of the provisions of either TP Act or Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws, a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. [Paras 11.2, 12] [451-C-H; 452-A]

4.1. As the provisions of the Code are not exhaustive, section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognize rights, or to create liabilities and

obligations not contemplated by any law. [Para 13] [452-B-E]

Padam Sen v. State of Uttar Pradesh **AIR 1961 SC 218;** *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* **AIR 1962 SC 527;** *Ram Chand and Sons Sugar Mills Pvt. Ltd.v. Kanhayalal Bhargav* **AIR 1966 SC 1899;** *Nainsingh v. Koonwarjee* **AIR 1970 SC 997, relied on.**

4.2. A suit or proceeding initiated in accordance with law, cannot be considered as an abuse of the process of court, only on the ground that such suit or proceeding is likely to cause hardship or is likely to be rejected ultimately. As there are specific provisions in the Code, relating to costs, security for costs and damages, the court cannot invoke Section 151 on the ground that the same is necessary for ends of justice. Therefore, a court trying a civil suit, cannot, in exercise of inherent power under section 151 CPC, make an interim order directing the plaintiff to file an undertaking that he will pay a sum directed by the court to the defendant as damages in case he fails in the suit. [Para 13.4] [454-B-D]

5.1. The direction to the plaintiff to furnish an undertaking to pay Rs.25 lakhs to defendants in the event of losing the case, is an order *in terrorem.* It is made not because the plaintiff committed any default, nor because he tried to delay the proceedings, nor because he filed any frivolous applications, but because the court is unable to find the time to decide the case in view of the huge pendency. Such an order, punishing a litigant for approaching the court, on the ground that the court is not able to decide the case expeditiously, is unwarranted, unauthorized and beyond the power and jurisdiction of the court in a civil suit governed by the Code. Such orders are likely to be branded as judicial highhandedness, or worse, judicial vigilantism. [Para 14] [454-E-G]

5.2. Though the land-grabbers, speculators, false claimants and adventurers in real estate are to be discouraged from pressurizing hapless and innocent property owners to part with their property against their will, by filing suits which are vexatious, false or frivolous, but the method adopted by the High Court is wholly outside law and cannot be approved. In a suit governed by the Code, no court can, merely because it considers it just and equitable, issue directions which are contrary to or not authorized by law. The High Court can certainly innovate, to discipline those whom it considers to be adventurers in litigation, but it has to do so within the four corners of law. [Para 15] [454-H; 455-A-D]

Benjamin N. Cardozo in The Nature of the Judicial Process (Yale University Press **1921 Edition Page 114), referred to.**

6. The instant case reminds of the adage: "Hard cases make bad law". The High Court should have resisted from laying down a 'bad law', which would be treated as a precedent and would result in similar directions by courts, wherever they feel that suits are not likely to succeed. It would encourage, in fact even force, the losing party to file an appeal or further appeal against the final decision in the suit. This was because no plaintiff would like to undertake to pay a large sum as damages, nor would a defendant like to miss a chance to receive a large sum as damages. Such orders would also tempt and instigate both the parties to make attempts to succeed in the suit by hook or crook, by adopting means fair or foul. If litigants are to be subjected to such directions *in terrorem*, the litigant public will be dissuaded from approaching courts, even in regard to *bona fide* claims. Such orders may lead to gradual loss of faith in the judiciary and force litigants to think of extra-judicial remedies by seeking the help of underworld elements or

police to settle/enforce their claims thereby leading to break-down of rule of law. No order or direction of the High Court, even if it is intended to deter vexatious and frivolous litigation, should lead to obstruction of access to courts. [Para 16] [455-F-H; 456-A-F]

Northern Securities Co. v. United States **193 (1903) US 197;** *Bellamy v. Sabine* **1857 (1) De G & J 566, referred to.**

Black's Law Dictionary, **referred to.**

7. It is well settled that the doctrine of *lis pendens* does not annul the conveyance by a party to the suit, but only render it subservient to the rights of the other parties to the litigation. The principle underlying section 52 of TP Act is based on justice and equity. The operation of the bar under section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any party to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, this was a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants would have the liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit. It is admitted by appellant-plaintiff that under the collaboration agreement, he was required to invest Rs. 20 lakhs in all, made up of Rs.16,29,000/- for construction and Rs.3,71,000/- as cash consideration and that in lieu of it he will be entitled to ground floor of the new building to be constructed by him at his own cost. Treating it as a business venture, a reasonable profit from such a venture can be taken as 15% of the investment

proposed, which works out to Rs.3 lakhs. Therefore it would be sufficient to direct the respondents to furnish security for a sum of Rs. 3 lakhs to the satisfaction of the court (Single Judge) as a condition for permitting the defendants to deal with the property during the pendency of the suit, under Section 52 of the TP Act. [Paras 20, 21] [458-E-H; 459-A-B]

Need for reform

8.1. High Court made the impugned order probably because it felt that in the absence of stringent and effective provision for costs, on the dismissal of the suit, it would not be able to compensate the defendants for the losses/hardship suffered by them, by imposing costs. If there was an effective provision for levy of realistic costs against the losing party, with reference to the conduct of such party, the High Court, in all probability would not have ventured upon the procedure it adopted. This draws attention to the absence of an effective provision for costs which has led to mushrooming of vexatious, frivolous and speculative civil litigation. [Para 22] [459-F-H; 460-A]

Salem Advocate Bar Association v. Union of India **2005 (6) SCC 344, relied on.**

Manindra Chandra Nandi v. Aswini Kumar Acharaya **ILR (1921) 48 Cal. 427, approved**

8.2. The provision for costs is necessary to achieve the following goals : (a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence; (b) Costs should ensure that the provisions of the Code, Evidence Act and other

laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court; (c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs; (d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial; (e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or *bonafide* claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts. [Para 23] [461-E-H; 462-A-D]

8.3. At present these goals are sought to be achieved mainly by sections 35, 35A and 35B read with the relevant civil rules of practice relating to taxing of costs. Section 35 CPC vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules, including the rules in force in Delhi provide that each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs. In Delhi, the advocate's fee in regard to

suits the value of which exceeds Rs.5 lakhs is : Rs.14,500/- plus 1% of the amount in excess of Rs.5 lakhs subject to a ceiling of Rs. 50,000/-. The prevalent view among litigants and members of the bar is that the costs provided for in the Code and awarded by courts neither compensate nor indemnify the litigant fully in regard to the expenses incurred by him. [Para 24] [462-E-H; 463-A]

8.4. The provision relating to compensatory costs (Section 35A CPC) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs.3,000/-. This requires a realistic revision. Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay. [Para 26] [463-G-H; 464-A]

8.5. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 CPC ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A CPC. The order of the Division Bench and Single Judge directing the plaintiff-appellant to file an affidavit undertaking to pay Rs. 25 lakhs to defendants-respondents in the event of failure in the suit is set aside. Instead, the defendants-respondents are permitted under section 52 of TP Act, to deal with or dispose of the suit property in the manner they deem fit, inspite of the pendency of the suit by the

plaintiff, subject to their furnishing security to an extent of Rs. Three lakhs to the satisfaction of the Single Judge. [Paras 27, 28] [464-B-E]

Case law reference:

2008 (10) SCC 97	**referred to**	**Para 5**
AIR 1961 SC 218	**relied on**	**Para 13.1**
AIR 1962 SC 527	**relied on**	**Para 13.2**
AIR 1966 SC 1899	**relied on**	**Para 13.3**
AIR 1970 SC 997	**relied on**	**Para 13.3**
193 (1903) US 197	**referred to**	**Para 16**
1857 (1) De G & J 566	**referred to**	**Para 20**
ILR (1921) 48 Cal. 427	**approved**	**Para 23**
2005 (6) SCC 344	**relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4891 of 2010.

From the Judgment & Order dated 27.1.2009 of the High Court of Delhi at New Delhi in FAO (OS) No. 19 of 2009.

Dr. Kailash Chand for the Appellant.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. Heard. The validity of a novel and innovative direction by the High Court, purportedly issued to discourage frivolous and speculative litigation is under challenge in this appeal. To understand the issue, it is necessary to set out the facts and also extract relevant portions of the plaint and the impugned orders of the High Court.

2. The appellant claims to be a builder-cum-real estate dealer. He filed a suit for specific performance of an oral

agreement for "commercial collaboration for business benefits" allegedly entered by the respondents as the owners in possession of premises No.A-1/365, Paschim Vihar, New Delhi, with him. He alleged in the plaint, that the following terms and conditions were orally agreed between the parties:

"(a) The defendants will apply to the DDA for conversion of the above property from leasehold to freehold and within 2-3 months the defendants will handover vacant physical possession of the above property to the plaintiff.

(b) The plaintiff will reconstruct the above property from his own money/funds with three storeys i.e. ground floor, first floor and second floor.

(c) Out of the said reconstructed three storeyed building, the plaintiff shall be entitled to own and possess the ground floor; and the first and second floors will be owned and possessed by the defendants.

(d) Besides bearing the expenses of construction and furnishing etc. of the proposed three storeyed building, the plaintiff shall also pay a sum of Rs. 3,71,000/- to the defendants at the time of handing over possession of the above house for reconstruction.

(e) Out of the agreed consideration of Rs.3,71,000/-, a sum of Rs.51,000/- was paid to the defendants in cash and the remaining consideration of Rs.3,20,000/- was to be paid to the defendants at the time of handing over possession of the above house for reconstruction. In token of the same a Receipt for Rs.51,000/- was duly executed by defendant No.1.

(f) On getting conversion of the above property from leasehold to freehold, the above agreement/proposed collaboration of the property bearing No. A-1/365, Paschim Vihar, New Delhi and the above terms and conditions were to be reduced into writing vide an appropriate

Memorandum Of Understanding to be duly executed by the parties i.e. the builder and the owners of the above property."

The appellant further alleged that in pursuance of the above, he paid a sum of Rs.51,000/- to first respondent in the presence of second respondent and two witnesses (Sanjay Kumar Puri and M.R.Arora) and that the first respondent executed the following receipt acknowledging the payment:

"RECEIPT/PART PAYMENT

Received a sum of Rs.51,000/- (Fifty one thousand only)

By Cash/Cheque Cash

From Sh. Vinod Seth S/o Sh. Sohan Seth R/o M-231 First Floor,

Guru Harikishan Nagar

Against Collaboration of Property No. A-1/365 Paschim Vihar

Signature (Devinder Bajaj)/10-6-04

3. The appellant alleged that the respondents failed to comply with the agreement and lingered over the matter on one pretext or the other; that the appellant came to know subsequently that the property stood in the name of the second respondent and not the first respondent; and that the appellant therefore issued a notice dated 9.3.2007 calling upon the respondents to comply with the legal formalities to facilitate the collaboration agreement. Alleging that respondents failed to comply, the appellant filed a suit on 30.6.2007 for specific performance. We extract below the relevant portion of the prayer:

"……to pass a decree of specific performance of

Collaboration Agreement entered in between the parties on 10-6-2004, as per its terms and conditions in favour of plaintiff and against defendants specifying that :

(a) the defendants to apply immediately with the DDA for conversion of the above property from leasehold to freehold and immediately after such conversion, the defendants will handover vacant physical possession of the suit property i.e. House No.A-1/365 Paschim Vihar Delhi to the plaintiff.

(b) that the defendants to immediately apply by submitting building plan as per Annexure P-3 with the Authorities for sanction of the building plan.

(c) the plaintiff will reconstruct the above property as three storeyed building as per site/building plan from his own money/funds within one year of handing over of possession by the defendants to the plaintiff and sanctioning of the building plan of the suit property.

(d) out of the said reconstructed three storeyed building the plaintiff shall be entitled to own and possess its ground floor only, and the first and second floors will be owned and possessed by the defendants.

(e) besides to bear the expenses of construction etc. of the proposed 3 storeyed complete building, the plaintiff shall also pay a sum of Rs.3,20,000/- to the defendants at the time of handing over possession of the above house for reconstruction.

(f) the defendants will not transfer the title or possession of the suit property till execution of the collaboration Agreement but after its execution, the defendants would be within their full rights to enjoy lawfully the title and possession of the first floor and second floor of the building.

(g) the plaintiff will be fully entitled for the full title and possession of the ground floor of the building and the defendants would be left with no right, title or interest in the property of the ground floor of the building, however, he would not be entitled for any exclusive rights in the property of ground floor till the first and second floor of the building are duly constructed, as per the specifications and quality as that of the ground floor, and handed over to the defendants.

4. The respondents contested the said suit and filed a written statement denying the claim in toto. When the case came up for framing issues, a learned Single Judge of the High Court on perusal of the pleadings passed an interim order dated 2.12.2008, relevant portion of which is extracted below :

"The agreement of such a nature, in common parlance known as collaboration agreement, requires detailed terms and conditions to be settled between the parties as to the quality of construction, time period, alternate accommodation, sharing of the expenses and space in the newly constructed building, etc. and *ordinarily specific performance of such agreements is difficult for the Court to supervise. In the present case all the terms of the agreement will have to be established by evidence, there being no document recording the same.*

The plaintiff instituted the suit without any application for interim relief and notice was issued of the suit by the Joint Registrar and the suit has come up before the Court for the first time.

The suit being with respect to an immovable property, even in the absence of any interim order restraining the defendants from dealing with the property, *attracts Section 52 of the Transfer of Property Act and the pendency of the suit itself has a tendency of interference with the*

defendants' dealing with their own property and if at all the defendants are compelled to deal with the same, the defendants are likely to realize much less than the market value of the property, owing to the pendency of the said suit.

Prima facie, the likelihood of the plaintiff succeeding in the suit appears to be remote. Such agreements are not concluded and enforceable till detailed writing as aforesaid is executed. Even if the averment of the plaintiff of having paid Rs. 51,000/- to the defendants is established, the same would still not establish a concluded enforceable agreement. The suit cannot be dismissed at the threshold. The counsel for the plaintiff has also contended that in law it is permissible to have such an oral agreement. However, the defendants are likely to suffer considerably merely owing to the pendency of the present suit. *While nearly nothing of the plaintiff is at stake in pursuing the present suit, the defendants as aforesaid will be losers even if ultimately succeed. Courts cannot be silent spectators to the parties being put on such unequal footing.* The remedy of defendants suing the plaintiffs for damages caused to them, after succeeding in the present suit is not efficacious. *Affluent speculators in immovable properties cannot be permitted to misuse the process of the court to compel owners to transact with them only.* **In the circumstances, it is deemed expedient to direct the plaintiff to file an affidavit/undertaking to this Court to, in the event of not succeeding in the suit pay a sum of Rs. 25 lacs by way of damages to the defendants.** If the plaintiff is reasonably confident of the genuineness of his case, the plaintiff ought not to suffer any harm by giving such undertaking. The said amount has been arrived at because of the averments in the plaint that the plaintiff was to spend Rs. 20 lacs in development of the property and in lieu thereof was to become the owner of the ground floor of the newly constructed property.

The plaintiff to file the affidavit in terms of above within four weeks from today. List on 27th January, 2009 for framing of issues."

(emphasis supplied)

5. The appellant filed an intra-court appeal contending that every person has an inherent right to bring a suit of civil nature and there was no provision in law which enabled the Trial Court to impose such a condition on a plaintiff requiring an undertaking to pay Rs.25 lakhs by way of damages to defendants in the event of failing in the suit. He relied upon the following observations of this Court in *Abdul Gafur v. State of Uttarakhand* [2008 (10) SCC 97] :

"Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute." (vide *Abdul Gafur v. State of Uttarakhand* [2008 (10) SCC 97]. In *Ganga Bai v. Vijay Kumar* [1974 (2) SCC 393] this Court had observed as under: "…… There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit, for its maintainability requires no authority of law and it is enough that no statute bars the suit."

6. The Division Bench dismissed the appeal by the appellant, holding that the order of the learned Single Judge did not in any way contravene the said decision, on the following reasoning:

"We see no contradiction in the aforesaid judgment and the impugned order. The learned Single Judge has not dismissed the suit. We also note the observations of the Supreme Court that even a frivolous suit can be bought before the court "at one's peril". All that the learned Single Judge has done at the stage of framing of issues, having prima facie found not much merit in the case of the appellant, considered it appropriate to impose certain terms and conditions.

We may notice that the provisions of Order 39 of the said Code deals with temporary injunctions and interlocutory orders. Order 39 Rule 2(2) authorizes the court to grant injunction on such terms as deems proper including giving of security. Thus, when the prayer for interim relief has to be granted, provision has been specifically made authorizing the court to make orders for keeping accounts, giving security or otherwise as the court thinks fit.

The appellant has conveniently not filed an interim application to avoid the rigour of such an order. Normally in a suit for specific performance and that too dealing with an immovable property, a party would seek interim protection. The appellant has not done so. It is an ingenious method of keeping a suit alive without claiming interlocutory relief and creating a cloud over a property in view of the provisions of Section 52 of Transfer of Property Act.

We do think that the courts cannot look helplessly at such tactics and ignore the problem of huge docket, which arises on account of meritless claims being filed. The heavy docket does not permit early disposal of suits and

thus parties may take advantage of keeping frivolous claims alive. We also cannot ignore the ground realities of the market which would persuade third parties to eschew dealing with such a property over which there is a cloud during the pendency of the suit. It is this cloud of which the appellant can take advantage of to extract some money in case the relief is frivolous.

We also find that the appellant really cannot have any grievance since a condition has not been imposed to deposit any amount which would make the appellant be out of pocket. The condition is of a much lesser level of only an undertaking to compensate the respondent in case of failure in the suit and as the learned Single Judge has rightly observed that a party coming to court should reasonably be confident of the genuineness of its case. The figure of Rs. 20 lakhs is based on the claim of the appellant as noticed by learned Single Judge. We may also add that Order XXV Rule 1 of the CPC gives power to the Court including suo moto power for the plaintiff to give security for payment of all costs incurred and likely to be incurred by the defendant. However, reasons for such an order are to be recorded. The costs include not only what is spent in the litigation but also the effect of the continuation of the suit on the plaintiff and, thus, as per the impugned order, for reasons recorded, the learned Single Judge has passed the order.

We find that the course adopted by the learned Single Judge is not without sanction of law and there is merit in this approach looking to the ground realities mentioned aforesaid."

(emphasis supplied)

7. The appellant has challenged the said decision in this appeal. This Court directed notice on 2.4.2009 on the special leave petition with the following observations :

"Though the order appears to be a just order, as it involves a serious question of law, we direct issuance of notice returnable in four weeks.

We however make it clear that there will be no order of stay in regard to the decision of the learned Single Judge affirmed by the division bench and if the petitioner fails to give an undertaking as ordered, he will not have the benefit of section 52 of Transfer of Property Act."

The respondents have remained *ex parte*. On the submissions of the appellant, the following question arises for our consideration :

(i) Whether a court has the power to pass an order directing a plaintiff in a suit for specific performance (or any other suit), to file an undertaking that in the event of not succeeding in the suit, he shall pay Rs.25 lakhs (or any other sum) by way of damages to the defendant?

8. We are broadly in agreement with the High Court that on the material presently on record, the likelihood of appellant succeeding in the suit or securing any interim relief against the defendants is remote. We may briefly set out the reasons therefor.

(8.1) It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure ('Code' for short). The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential

property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant is dependant upon his personal qualifications and volition. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 3 above) and direct specific performance of the "collaboration agreement" by respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant? The alleged agreement being vague and incomplete, require consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration

agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under section 21 of the Specific Relief Act.

(8.2) The appellant claims to be a builder and real estate dealer. If the appellant entered into a collaboration agreement orally with numerous details as set out in the plaint (extracted in Para (2) above) and could secure a receipt in writing for Rs.51,000/-, nothing prevented him from reducing the said terms of the alleged collaboration agreement in the form of an agreement or Memorandum of Understanding and have it signed by the owners of the property. No reason is forthcoming as to why that was not done.

8.3. The property stands in the name of second respondent (Defendant No.2), but she did not sign the receipt. There is nothing to show that the second respondent participated in the alleged negotiations or authorized her husband-the first respondent to enter into any collaboration agreement in respect of the suit property. The receipt is not signed by the first respondent as Attorney Holder or as the authorized representative of the owner of the property. From the plaint averments it is evident that appellant did not even know who the owner was, at the time of the alleged negotiations and erroneously assumed that first respondent was the owner. The execution of a receipt for Rs.51,000/- by the first respondent even if proved, may at best make out a tentative token payment pending negotiations and finalization of the terms of an agreement for development of the property.

(8.4) The agreement is alleged to have been entered on 10.6.2004. But the plaintiff issued the first notice calling upon defendants to perform, only on 9.3.2007 and filed the suit on 30.6.2007. There was no correspondence or demand for performance, in writing, prior to 9.3.2007, even though the alleged agreement was a commercial transaction.

9. We also agree with the High Court that having regard to the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882 ('TP Act' for short), the pendency of the suit by the appellant shackled the suit property, affected the valuable right of the second defendant to deal with the property in the manner she deems fit, and restricted her freedom to sell the property and secure a fair market price from a buyer of her choice. When a suit for specific performance is filed alleging an oral agreement without seeking any interim relief, the defendant will not even have an opportunity to seek a prima facie finding on the validity of the claim. Filing such a suit is an ingenious way of creating a cloud over the title to the suit property. Such a suit, filed in the Delhi High Court, is likely to be pending for a decade or more. Even if a defendant-owner asserts that his property is not subject to any agreement and the said assertion is ultimately found to be true, his freedom to deal with the property as he likes or to realize its true market value by sale or transfer is adversely affected during the pendency of the suit. The ground reality is that no third party would deal with a property in regard to which a suit for specific performance is pending. This enables an unscrupulous plaintiff to cajole and persuade a defendant to sell/give the property on plaintiff's terms, or force the defendant to agree for some kind of settlement. It is these circumstances which persuaded the High Court to find some way to do justice, leading to the impugned direction. Having broadly agreed with the High Court in regard to the factual position and the adverse consequences of the suit, the question that remains is whether in such a situation, the High Court could have issued the impugned interim direction.

10. Every person has a right to approach a court of law if he has a grievance for which law provides a remedy. Certain safeguards are built into the Code to prevent and discourage frivolous, speculative and vexatious suits. Section 35 of the Code provides for levy of costs. Section 35A of the Code provides for levy of compensatory costs in respect of any false

or vexatious claim. Order 7 Rule 11 of the Code provides for rejection of plaint, if the plaint does not disclose a cause of action or is barred by any law. Order 14 Rule 2 of the Code enables the court to dispose of a suit by hearing any issue of law relating to jurisdiction or bar created by any law, as a preliminary issue. Even if a case has to be decided on all issues, the court has the inherent power to expedite the trial/ hearing in appropriate cases, if it is of the view that either party is abusing the process of court or that the suit is vexatious. The court can secure the evidence (examination-in-chief) of witnesses by way of affidavits and where necessary, appoint a commissioner for recording the cross examination so that it can dispose of the suit expeditiously. The court can punish an erring plaintiff adopting delaying tactics, by levying costs under Section 35B or taking action under Order 17 Rules 2 and 3 of the Code. Apart from recourse to these provisions in the Code, an aggrieved defendant can also sue the plaintiff for damages, if the suit is found to be based on a forged or false document, or if the suit was vexatious or frivolous.

11. There are also two other significant provisions in the Code having a bearing on the issue. We may refer to them :

(11.1) Section 95 provides that where in any suit in which an arrest or attachment has been affected or a temporary injunction granted, the suit of the plaintiff ultimately fails and it appears to the court that there was no reasonable or probable ground for instituting the suit, and the court may upon an application by the defendant, award against the plaintiff, such amount not exceeding Rs.50,000/- as it deems a reasonable compensation to the defendant for the expense or injury caused to him. It further provides that an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction. In other words, if a suit is field without sufficient grounds and in such a suit the plaintiff obtains an interim order of arrest, attachment or temporary injunction, the court can grant compensation up to Rs. 50,000

on application by the defendant. Three things are implicit from this provision. The first is, if no interim order (of arrest, attachment or injunction) is obtained by the plaintiff, the court cannot grant any compensation to defendant. The second is that the compensation awardable by the court cannot exceed Rs.50,000/. The third is that if a plaintiff does not secure an interim order of arrest, attachment or temporary injunction but merely files a suit on insufficient or false grounds the remedy of the defendant, if the defendant wants any compensation (other than costs and exemplary costs under Section 35 and 35A of the Code), he has to file a separate suit.

(11.2) Order XXV Rule 1 of Code provides that at any stage of a suit, the court may either on its own motion or on the application of any defendant order the plaintiff for reasons to be recorded, to give security for the payment of all costs incurred or likely to be incurred by the defendant.

12. But the Code, nowhere authorizes or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to defendant, when the plaintiff's suit is still pending, without any application by defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract between the parties which requires the appellant to furnish such undertaking. None of the provisions of either TP Act or Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. In short, law does not contemplate a plaintiff indemnifying a defendant

for all or any losses sustained by the defendant on account of the litigation, by giving an undertaking at the time of filing a suit or before trial, to pay damages to the defendants in the event of not succeeding in the case.

13. We will next examine whether the power to make such an order can be traced to Section 151 of the Code, which reads: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." As the provisions of the Code are not exhaustive, section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognize rights, or to create liabilities and obligations not contemplated by any law.

(13.1.) Considering the scope of Section 151, in *Padam Sen v. State of Uttar Pradesh* (AIR 1961 SC 218), this Court observed:

> "The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that *the court is free to exercise them for the purposes mentioned in S.151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."*

xxx xxx xxx

The inherent powers saved by S.151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. *These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party."*

(emphasis supplied)

(13.2) In *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* – AIR 1962 SC 527, this court held :

"…..that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S.151 itself. But those powers are not to be exercised when their exercised may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature."

(13.3) In *Ram Chand and Sons Sugar Mills Pvt. Ltd.v. Kanhayalal Bhargav* - AIR 1966 SC 1899 this court reiterated that the inherent power of the court is in addition to and complementary to the powers expressly conferred under the Code but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. Section 151 however is not intended to create a new procedure or any new right or obligation. In *Nainsingh v. Koonwarjee* – AIR 1970 SC 997, this Court observed:

"Under the inherent power of Courts recognized by Section 151 CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the

necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code…."

(13.4) A suit or proceeding initiated in accordance with law, cannot be considered as an abuse of the process of court, only on the ground that such suit or proceeding is likely to cause hardship or is likely to be rejected ultimately. As there are specific provisions in the Code, relating to costs, security for costs and damages, the court cannot invoke Section 151 on the ground that the same is necessary for ends of justice. Therefore, we are of the view that a court trying a civil suit, cannot, in exercise of inherent power under section 151 of the Code, make an interim order directing the plaintiff to file an undertaking that he will pay a sum directed by the court to the defendant as damages in case he fails in the suit.

14. The direction to the plaintiff to furnish an undertaking to pay Rs.25 lakhs to defendants in the event of losing the case, is an order *in terrorem.* It is made not because the plaintiff committed any default, nor because he tried to delay the proceedings, nor because he filed any frivolous applications, but because the court is *unable to find the time to decide the case* in view of the huge pendency. (The division bench has supported the order of the learned Single Judge on the ground that 'the heavy docket does not permit early disposal of suits and thus parties may take advantage of keeping frivolous claims alive'). Such an order, punishing a litigant for approaching the court, on the ground that the court *is not able to decide the case expeditiously,* is unwarranted, unauthorized and beyond the power and jurisdiction of the court in a civil suit governed by the Code. Such orders are likely to be branded as judicial highhandedness, or worse, judicial vigilantism.

15. We appreciate the anxiety shown by the High Court to discourage land-grabbers, speculators, false claimants and

adventurers in real estate from pressurizing hapless and innocent property owners to part with their property against their will, by filing suits which are vexatious, false or frivolous. But we cannot approve the method adopted by the High Court which is wholly outside law. In a suit governed by the Code, no court can, merely because it considers it just and equitable, issue directions which are contrary to or not authorized by law. Courts will do well to keep in mind the warning given by Benjamin N. Cardozo in *The Nature of the Judicial Process* : (Yale University Press -1921 Edition Page 114) :

> "The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life".

The High Court can certainly innovate, to discipline those whom it considers to be adventurers in litigation, but it has to do so within the four corners of law.

16. This case reminds us of the adage: "Hard cases make bad law". Black's Law Dictionary defines a 'hard case' thus : "A law suit involving equities that tempt a judge to stretch or even disregard a principle of law at issue — hence the expression "Hard cases make bad law". Justice Holmes explained and extended the adage thus : (See his dissenting opinion in *Northern Securities Co. v. United States* 193 (1903) US 197) :

> "Great cases, like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

This is certainly a hard case. The High Court should have resisted from laying down a 'bad law', which will be treated as a precedent and will result in similar directions by courts, wherever they feel that suits are not likely to succeed. It would encourage, in fact even force, the losing party to file an appeal or further appeal against the final decision in the suit. This is because no plaintiff would like to undertake to pay a large sum as damages, nor would a defendant like to miss a chance to receive a large sum as damages. Such orders would also tempt and instigate both the parties to make attempts to succeed in the suit by hook or crook, by adopting means fair or foul. If litigants are to be subjected to such directions *in terrorem*, the litigant public will be dissuaded from approaching courts, even in regard to bona fide claims. Such orders may lead to gradual loss of faith in the judiciary and force litigants to think of extra-judicial remedies by seeking the help of underworld elements or police to settle/enforce their claims thereby leading to break-down of rule of law. No order or direction of the High Court, even if it is intended to deter vexatious and frivolous litigation, should lead to obstruction of access to courts.

17. We may also examine the matter from another angle. Can the court insist upon the plaintiff to give an undertaking to pay compensation to defendant on the event of dismissal of the suit, irrespective of the reasons for the dismissal of the suit? If the plaintiff furnishes such an undertaking and proceeds with the suit and is able to establish the oral agreement as pleaded by him, but the court dismisses the suit either because it holds that the prayer is barred under section 14(1)(b) and (d) of the Specific Relief Act, or because it decides not to exercise

discretion to grant specific performance under section 20(2) of the Specific Relief Act, should the plaintiff be made liable to pay Rs.25 lakhs as compensation to the defendants?

18. The attempt of the Division Bench to support the order of the learned Single Judge with reference to Order XXV Rule 1 of the Code is clearly erroneous. The said provision, as noticed above, only enables the court to require the plaintiff to furnish security for payment of costs incurred or likely to be incurred by the defendant.

19. If the High Court felt that the prayer in the suit was vexatious or not maintainable, it could have considered whether it could reject the suit under Order 7 Rule 11 of the Code holding that the plaint did not disclose the cause of action for grant of the relief sought or that the prayer was barred by section 14(1)(b) and (d) of the Specific Relief Act. Alternatively, the court could have framed issues and heard the issue relating to maintainability as a preliminary issue and dismiss the suit if it was of the view that it had no jurisdiction to grant specific performance as sought, in view of the bar contained in section 14(1)(b) and (d) of the Specific Relief Act. If it was of the prima facie view that the suit was a vexatious one, it could have expedited the trial and dismissed the suit by awarding appropriate costs under section 35 of the Code and compensatory costs under section 35A of the Code. Be that as it may.

20. Having found that the direction of the High Court is unsustainable, let us next examine whether we can give any relief to defendants within the four corners of law. The reason for the High Court directing the plaintiff to furnish an undertaking to pay damages in the event of failure in the suit, is that Section 52 of the Transfer of Property Act would apply to the suit property and the pendency of the suit interfered with the defendant's right to enjoy or deal with the property. Section 52 of TP Act provides that during the pendency in any court of any suit in which any right to immovable property is directly and

specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose. The said section incorporates the well-known principle of *lis pendens* which was enunciated in *Bellamy v. Sabine* [1857 (1) De G & J 566] :

> "It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

It is well-settled that the doctrine of *lis pendens* does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.

21. The principle underlying section 52 of TP Act is based on justice and equity. The operation of the bar under section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any

part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit. The appellant-plaintiff has alleged that he is a builder and real estate dealer. It is admitted by him that he has entered into the transaction as a commercial collaboration agreement for business benefits. The appellant has further stated in the plaint, that under the collaboration agreement, he is required to invest Rs. 20 lakhs in all, made up of Rs.16,29,000/- for construction and Rs.3,71,000/- as cash consideration and that in lieu of it he will be entitled to ground floor of the new building to be constructed by him at his own cost. Treating it as a business venture, a reasonable profit from such a venture can be taken as 15% of the investment proposed, which works out to Rs.3 lakhs. Therefore it would be sufficient to direct the respondents to furnish security for a sum of Rs. 3 lakhs to the satisfaction of the court (learned Single Judge) as a condition for permitting the defendants to deal with the property during the pendency of the suit, under Section 52 of the TP Act.

The need for reform :

22. Before concluding, it is necessary to notice the reason why the High Court was trying to find some way to protect the interests of defendants, when it felt that they were being harassed by plaintiff. It made the impugned order because it felt that in the absence of stringent and effective provision for costs, on the dismissal of the suit, it would not be able to compensate the defendants for the losses/hardship suffered by them, by imposing costs. If there was an effective provision for levy of realistic costs against the losing party, with reference to the conduct of such party, the High Court, in all probability would not have ventured upon the procedure it adopted. This

draws attention to the absence of an effective provision for costs which has led to mushrooming of vexatious, frivolous and speculative civil litigation.

23. The principle underlying levy of costs was explained in *Manindra Chandra Nandi v. Aswini Kumar Acharaya* – ILR (1921) 48 Cal. 427 thus:

> "We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. * * * * The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."

In *Salem Advocate Bar Association v. Union of India* [2005 (6) SCC 344] this after noticing that the award of costs is in the discretion of the court and that there is no upper limit in respect of the costs awardable under Section 35 of the Code, observed thus:

> "Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either

the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35 (2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

23. The provision for costs is intended to achieve the following goals :

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the

successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

24. At present these goals are sought to be achieved mainly by sections 35,35A and 35B read with the relevant civil rules of practice relating to taxing of costs. Section 35 of the Code vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules, including the rules in force in Delhi provide each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs. We are informed that in Delhi, the advocate's fee in regard to suits the value of which exceeds Rs.5 lakhs is : Rs.14,500/- plus 1% of the amount in excess of Rs.5 lakhs subject to a ceiling of Rs. 50,000/-. The prevalent view among litigants and members of

the bar is that the costs provided for in the Code and awarded by courts neither compensate nor indemnify the litigant fully in regard to the expenses incurred by him.

25. The English civil procedure rules provide that a court in deciding what order, if any, to make in exercising its discretion about costs should have regard to the following circumstances: (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment made into court or admissible offer to settle made by a party which is drawn to the courts attention. 'Conduct of the parties' that should be taken note by the court includes : (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. Similar provisions, with appropriate modifications may enable proper and more realistic costs being awarded. As Section 35 of the Code does not impose any ceiling the desired object can be achieved by the following : (i) courts levying costs, following the result, in all cases (non-levy of costs should be supported by reasons); and (ii) appropriate amendment to Civil Rules of Practice relating to taxation of costs, to make it more realistic in commercial litigation.

26. The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs.3,000/-. This requires a realistic revision keeping in view, the observations in *Salem Advocates Bar Association (supra*). Section 35B providing for costs for

causing delay is seldom invoked. It should be regularly employed, to reduce delay.

27. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code.

Conclusion

26. In the result, we allow this appeal in part, set aside the order of the Division Bench and Learned Single Judge directing the plaintiff-appellant to file an affidavit undertaking to pay Rs. 25 lakhs to defendants-respondents in the event of failure in the suit. Instead, we permit the defendants-respondents under section 52 of TP Act, to deal with or dispose of the suit property in the manner they deem fit, in spite of the pendency of the suit by the plaintiff, subject to their furnishing security to an extent of Rs. Three lakhs to the satisfaction of the learned Single Judge.

D.G. Appeal partly allowed.

INDU BHUSHAN DWIVEDI
v.
STATE OF JHARKHAND AND ANR.
(Civil Appeal No. 4888 of 2010)

JULY 05, 2010

[G.S. SINGHVI AND C.K. PRASAD, JJ.]

Service Law – Misconduct – Charges of insubordination and indiscipline against appellant-Judicial Magistrate – Proved in disciplinary inquiry – High Court recommended dismissal of appellant, after taking into consideration his past adverse record, but without informing him that the same were being relied upon for deciding the quantum of punishment – Dismissal challenged as being vitiated due to violation of the rules of natural justice – Also, quantum of punishment challenged as being totally disproportionate to the charges found proved against the appellant – Held: Since the un-communicated adverse remarks contained in the Annual Confidential Reports of the appellant became foundation of the decision taken by the High Court to recommend his dismissal from service and he was not noticed about the proposed consideration of those remarks, it must be held that the appellant was seriously prejudiced –Also, the charges proved were not that serious which warranted imposition of the extreme penalty of dismissal from service – High Court directed to consider the issue of quantum of punishment afresh and make fresh recommendation to State Government after giving an opportunity to the appellant to make appropriate representation – Natural justice – Rule of audi alteram partem – Violation of.

The appellant was a Sub-Divisional Judicial Magistrate. Regular departmental Inquiry was held against him on three charges, viz. 1) that after having consumed liquor, he had misbehaved and manhandled

an accused and a constable; 2) that he had left the headquarters without seeking permission from the Registrar General of the High Court in violation of the direction contained in an order given by it and 3) that he had used derogatory words *qua* the communication sent by the High Court.

The first charge was not found to be proved. The other two charges were however found proved by the Inquiry Officer. Thereafter, the High Court recommended the dismissal of appellant from service. The recommendation was accepted by the State Government.

Appellant filed writ petition before the Division Bench of the High Court, contending that the dismissal order was vitiated due to violation of the rules of natural justice because while recommending his dismissal from service, the High Court had considered un-communicated adverse remarks recorded in the Annual Confidential Reports of the appellant without informing him that the same were being relied upon for deciding the quantum of punishment. Another ground taken by the appellant was that the punishment of dismissal from service was totally disproportionate to the charges found proved against him. The Division Bench of the High Court set aside the punishment of dismissal but imposed upon the appellant the punishment of compulsory retirement.

Before this Court, the appellant urged that the action taken against him was not only against the basics of natural justice but was wholly arbitrary, unreasonable and unjustified. The appellant submitted that even if the findings recorded by the Inquiry Officer in respect of two charges are held to be correct, there was no justification to impose the punishment of dismissal ignoring that in his long service career he was not found guilty of any other act of insubordination or indiscipline. The appellant argued that when charge no.1, which was extremely

serious in nature was not found proved, the High Court could not have imposed extreme penalty of dismissal from service by simply relying upon un-communicated adverse remarks recorded in his Annual Confidential Reports.

The appellant contended that the Division Bench of the High Court should have set aside the order which was subject matter of challenge in the writ petition and directed the respondents to pass fresh orders after communicating adverse remarks to the appellant and giving him an opportunity to explain his position.

Allowing the appeal, the Court

HELD: 1. One of the basic canons of justice is that no one can be condemned unheard and no order prejudicially affecting any person can be passed by a public authority without affording him reasonable opportunity to defend himself or represent his cause. As a general rule, an authority entrusted with the task of deciding lis between the parties or empowered to make an order which prejudicially affects the rights of any individual or visits him with civil consequences is duty bound to act in consonance with the basic rules of natural justice including the one that material sought to be used against the concerned person must be disclosed to him and he should be given an opportunity to explain his position. This unwritten right of hearing is fundamental to a just decision, which forms an integral part of the concept of rule of law. This right has its roots in the notion of fair procedure. It draws the attention of the authority concerned to the imperative necessity of not overlooking the cause which may be shown by the other side before coming to its decision. When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the

employee aware of the specific imputations of misconduct but also disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the ground of the violation of the rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty bound to act in consonance with the rules of natural justice. [Para 18] [488-C-H; 489-A-B]

1.2. However, every violation of the rules of natural justice may not be sufficient for invalidating the action taken by the competent authority/employer and the Court may refuse to interfere if it is convinced that such violation has not caused prejudice to the affected person/ employee. [Para 18] [489-B-C]

1.3. While recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary/competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment. [Para 20] [491-D-E]

State of Mysore v. K. Manche Gowda **AIR 1964 SC 506 and** *Managing Director, Uttar Pradesh Warehousing Corporation and another v. Vijay Narayan Bajpayee* **(1980) 3 SCC 459, relied on.**

2.1. In the present case, it is not in dispute that adverse remarks recorded in the Annual Confidential Reports of the appellant for the years 1988-1989, 1989-1990, 1990-1991 and 1996-1997 were not communicated

to him. It can reasonably be presumed that if the adverse remarks were communicated to him, the appellant would have made representation for expunging the same. However, as the adverse remarks were not communicated to him, the appellant could not avail that opportunity. He did not even know what were the adverse remarks and who had recorded the same. This Court cannot speculate about the appellant's fate if the High Court had informed him that there were adverse remarks in his Annual Confidential Reports which were being relied upon for the purpose of determining the quantum of punishment and that he can submit his representation against the same. If the appellant was made aware that the adverse remarks relate to his work, conduct or behaviour, he may have represented and successfully demonstrated that the remarks were recorded by the concerned officer without looking into the quality and quantity of the work done by him and that there was no complaint from any quarter regarding his conduct and behaviour. He could have also shown that in the past no such adverse remark had been entered in his Annual Confidential Report. If the remarks contained adverse reflection on his integrity, the appellant could have represented that the same were unfounded or were made due to bias or prejudice. He may have shown that his integrity was beyond doubt and he had discharged his duties sincerely and to the satisfaction of his superiors. However, the fact of the matter is that the adverse remarks were not communicated to him and on that account he could not represent against the same. [Para 22] [491-H; 492-A-F]

2.2. In the show cause notice issued to the appellant, it was not disclosed that the High Court had considered the un-communicated adverse remarks recorded in his Annual Confidential Reports for the purpose of forming an opinion that he should be dismissed from service. If

the appellant had been told about this and given an opportunity to have his say against the un-communicated adverse remarks, he could have offered appropriate explanation and tried to convince the concerned authority that the remarks were either unfounded or were totally unjustified. He would have surely pleaded that after 1996-1997 no adverse comments were made about his work, conduct, behaviour and integrity and he had earned good reports (even the Division Bench of the High Court had noted that his confidential report for the year 2002-2003 was good on all counts). It is thus clear that the appellant was seriously prejudiced on account of non-disclosure of the fact that while recommending his dismissal from service, the High Court had taken into consideration un-communicated adverse remarks recorded in his four Annual Confidential Reports. [Para 23] [492-G-H; 493-A-C]

2.3. There cannot be two views that being a member of the subordinate judiciary, the appellant was bound to comply with the direction given by the High Court to stay at the headquarters but singular violation of such directive or use of intemperate language in representation were not that serious which warranted imposition of the extreme penalty of dismissal from service. The adverse remarks recorded in the Annual Confidential Reports of the appellant seems to have weighed heavily with the High Court while recommending his dismissal from service. [Para 24] [493-F-G]

2.4. Since the un-communicated adverse remarks contained in the Annual Confidential Reports of the appellant became foundation of the decision taken by the High Court to recommend his dismissal from service and he was not noticed about the proposed consideration of those remarks, it must be held that the appellant was seriously prejudiced. [Para 25] [493-H; 494-A-B]

2.5. A reading of the representation made by the appellant makes it clear that he had only mentioned that there was no report against his integrity and honesty and he was never found guilty of any act of insubordination or indiscipline in his service career. This assertion, cannot by any stretch of imagination be construed as a request by the appellant for consideration of his past record, as held by the Division Bench of the High Court. The finding recorded by the Division Bench of the High Court that the appellant's cause was not prejudiced on account of consideration of the past adverse record is clearly erroneous and unsustainable. [Para 26] [494-C-E]

State of U.P. v. Harish Chandra Singh **AIR 1969 SC 1020, distinguished.**

Om Kumar v. Union of India **(2001) 2 SCC 386;** *Mahindra and Mahindra Ltd. v. N.B. Jarawade* **(2005) 3 SCC 134 and** *Hombe Gowda Educational Trust v. State of Karnataka* **(2006) 1 SCC 430, referred to.**

3. The impugned order of the Division Bench of the High Court is set aside. The High Court shall now consider the issue of quantum of punishment afresh and make fresh recommendation to the State Government. If the High Court still feels that the adverse remarks in the Annual Confidential Reports of the appellant for the year 1988-1989, 1989-1990, 1990-1991 and 1996-1997 should be considered, then such report(s) shall be communicated to him and he should be given an opportunity to make appropriate representation. While making fresh recommendation for imposing the particular punishment, the High Court is expected to take into consideration the good as well as adverse record of the appellant. The State Government shall pass appropriate order after receipt of fresh recommendation from the High Court. [Para 28] [494-G-H; 495-A-C]

Case Law Reference:

AIR 1964 SC 506	**relied on**	**Para 13**
AIR 1969 SC 1020	**distinguished**	**Para 13**
(2001) 2 SCC 386	**referred to**	**Para 14**
(2005) 3 SCC 134	**referred to**	**Para 14**
(2006) 1 SCC 430	**referred to**	**Para 14**
(1980) 3 SCC 459	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4888 of 2010.

From the Judgment & Order dated 29.3.2007 of the High Court of Jurisdiction at Jharkhand in Writ Petition (service) No. 2671 of 2006.

Raja Venkatappa Naik, Dr. Sudhakar Chowdhary, N.N. Jha, S.K. Tandon, Rameshwar Prasad Goyal for the Appellant.

Manish Kumar Saran, Krishnanand Pandeya for the Respondents.

The Judgment of the Court was delivered by

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

2. This is an appeal for setting aside order dated 29.3.2007 passed by the Division Bench of Jharkhand High Court in Writ Petition No.2671 of 2006 whereby it set aside the dismissal of the appellant from service but imposed the punishment of compulsory retirement.

3. The appellant joined service as Munsif in 1982. He was promoted as Sub-Divisional Judicial Magistrate in 1996. While he was posted as Sub-Divisional Judicial Magistrate at Chaibasa, a news item appeared in 'Dainik Jagran' dated

2.7.2003 suggesting that the appellant had misbehaved and manhandled an accused, named, Anup Kumar and Constable Sheo Pujan Baitha. On the next day, i.e. 3.7.2003, the appellant made a representation to District and Sessions Judge, West Singhbhum at Chaibasa with the request that an inquiry be got conducted into the matter and appropriate action against the person who got published the misleading news.

4. The High Court of Jharkhand took cognizance of the newspaper report adversely commenting upon the conduct of the appellant and passed an order dated 5.7.2003 whereby he was placed under suspension and his headquarter was fixed at Chaibasa with a direction that he shall not leave the headquarter without obtaining prior permission from the Registrar General of the High Court.

5. In the meanwhile, the appellant appears to have submitted an application to the District Judge on 4.7.2003 for permission to go to Ranchi for his treatment and also avail holiday on 6.7.2003. After receiving the order of suspension, the appellant submitted an application to the Registrar General of the High Court stating therein that as per the advise of the doctor, he has to take complete rest for one month and, therefore, he is unable to return to Chaibasa. The appellant also indicated that he would join the headquarters after recovery from illness. This prayer of the appellant was rejected by the High Court and he was informed through the District Judge to comply with the direction contained in order dated 5.7.2003. The appellant responded to this communication by sending letter dated 19.7.2003 to the District Judge wherein he mentioned that he had to proceed on leave because he was suffering from acute and uncontrolled loose motions and he had left the headquarters after handing over charge and after seeking permission from the District Judge. He then reiterated his inability to return to the headquarter and described the direction contained in the letter of the High Court as merciless which could not be complied with at the cost of one's life. He also

claimed that being a suspended employee, he cannot be compelled to stay at the headquarters.

6. After five months of his suspension, a regular departmental inquiry was initiated against the appellant on the following charges:

"Charge No.1

You, Shri Indu Bhushan Dwivedi while functioning as SDJM, West Singhbhum at Chaibasa was found in intoxicated condition on 1st July 2002 (a holiday) in your residential office when an accused Anup Kumar of a case no. C/7-60/2001 of the Court of Shri D. Mahapata, Judicial Magistrate, Ist Class, Chaibasa was produced before you in your residential office for remand by the Head Constable Shri Sheo Pujan Baitha in presence of Office Clerk Shri Baidyanath Ballav Kath of the Court of Shri D. Mahapatra.

At the time of production of the said accused Anup Kumar, you misbehaved and manhandled the accused Anup Kumar as well as constable Shri Sheo Pujan Baitha.

The aforesaid action on your part not only reflects on your reputation, dereliction of duty but also shows the recklessness and misconduct in the discharge of duties.

The aforesaid action on your part is also unbecoming of a Judicial Officer.

Charge No.2

You, Shri Indu Bhushan Dwivedi, SDJM, Chaibasa was placed under suspension by Hon'ble High Court's order contained in letter No. 05/Apptt. dt. 5.7.2003 fixing your headquarter at Chaibasa. It was served on you on 5th July, 2003 by the District & Sessions Judge, West Singhbhum at Chaibasa. On 4th July, 2003, you submitted

representation applications before the District & Sessions Judge, West Singhbhum at Chaibasa to leave the headquarter on following Sunday i.e. 6th of July, 2003 (for one day) to proceed to Ranchi which was allowed by the District & Sessions Judge, West Singhbhum, Chaibasa.

Though during the period of suspension you are not supposed to attend duty or sign any Attendance Register but you are supposed to remain in the Headquarters and cannot leave the Headquarters without any permission of the competent authority, but you remained absent from headquarter from 6.7.2003 after making over charge to SDJM, Porahat on 5.7.2003 and you remained out of headquarter without any information till 10.9.2003.

The aforesaid action on your part and violation of Court's order amounts insubordination and misconduct.

Charge No.3.

You, Shri Indu Bhushan Dwivedi, SDJM, Chaibasa (under suspension) when asked by the District & Sessions Judge, West Singhbhum at Chaibasa as to why you have not returned to headquarter by letter No.2501/G dated 10th of July, 2003 and to report you submitted reply and used derogatory words against the Court by your letter No. 5(P) of 2003 dt. 19th July, 2003 using expression "Merciless Direction of the Hon'ble Court".

The aforesaid remarks by you reflects on your conduct amounting to insubordination, indiscipline and unbecoming a Judicial Officer.

Shri Dwivedi has been charged of misconduct recklessness in discharge of his duties along with insubordination and for committing the acts most unbecoming of a responsible Judicial Officer, on the basis of the above mentioned allegation."

7. The appellant submitted reply and denied all the charges. After considering the reply, the High Court appointed District & Sessions Judge, East Singhbhum, Jamshedpur to conduct regular inquiry. The presenting officer examined 5 witnesses and produced 11 documents to substantiate the charges leveled against the appellant, who examined 2 witnesses and produced 17 documents.

8. For the sake of his convenience, the Inquiry Officer formulated the following points:

(i) Whether Shri Dwivedi was in an intoxicated condition on 1st July, 2003 in the residential Office when accused Anup Kumar was produced before him for remand?

(ii) Whether Shri Dwivedi had misbehaved as also manhandled the accused Anup Kumar and Constable Sheo Pujan Baitha?

(iii) Whether Shri Dwivedi had left his headquarter without prior permission from the competent authority and without any sufficient cause?

(iv) Whether Shri Dwivedi had used derogatory language/word against the Hon'ble Court by his Letter No.5(p) 2003 dated 19.7.2003? and

(v) Whether Shri Dwivedi had acted in a way which shows recklessness and misconduct in discharge of his duties along with insubordination and indiscipline which is unbecoming of a responsible Judicial Officer?

After analyzing the evidence produced before him, the Inquiry Officer submitted report dated 4.6.2005 with the conclusion that charges No.2 and 3 have been proved against the appellant but charge No.1 has not been proved. While dealing with point Nos.1 and 2 which related to charge No.1,

the Inquiry Officer referred to the statements of Pravakar Singh (A.W.1), the Registrar, Civil Courts, Chaibasa, Baidyanath Ballav Kant (A.W.2), Havildar Sheo Pujan Baitha (A.W.3), the accused Anup Kumar (A.W.5) and recorded the following conclusions:

> "11. From perusal of the record, it appears that there is some force in the contention of the delinquent because A.W.2 Baidyanath Ballav Kant has specifically stated that on the date of occurrence, the delinquent had performed 'Puja' and several persons were present there and after 'Puja' Prasad was also given to him and two other persons and this fact has been supported by A.W.1 Prabhakar Singh. A.W.2 has further stated that the delinquent was not in an intoxicated condition when the accused was produced for remand. The said Havildar, A.W.3, has also nowhere stated in his evidence that the delinquent was in an intoxicated state.
>
> 12. On careful examination of the evidence oral and documentary, adduced by the parties and in view of the aforesaid discussions, I am of the view that the Charge No.1 that the delinquent was in an intoxicated condition when the accused was produced before him for remand, could not be proved by cogent evidence and similarly, this has also not been proved that the delinquent had assaulted the accused Anup Kumar and the Havildar Sheo Pujan Baitha. So, the Point No.4(i) and (ii) are decided in favour of the delinquent."

9. The Inquiry Officer then dealt with other three points and held that the delinquent (appellant herein) appears to have managed the medical prescription from the doctors to justify non-compliance of the direction given by the High Court not to leave the headquarter without obtaining permission from the Registrar General and concluded that his action amounted to insubordination and indisciplined behaviour unbecoming of a responsible judicial officer.

10. The High Court accepted the inquiry report and directed that show cause notice be issued to the appellant for imposition of a major penalty. Accordingly, the Registrar General of the High Court issued Memo dated 30.6.2005 to the appellant enclosing therewith a copy of the inquiry report and called upon him to show cause as to why a major penalty such as dismissal from service may not be inflicted upon him. In his reply dated 22.7.2005, the appellant challenged the findings recorded by the Inquiry Officer in respect of charges No.2 and 3 by contending that the same were based on erroneous appreciation of evidence and that there was no valid ground to discard the testimony of the doctor and prescriptions given by him. The appellant then pleaded that he neither had the intention nor he could have dared to disobey the direction given by the High Court. He submitted that non-compliance of the direction given by the High Court to stay at the headquarters during the period of suspension was due to his illness and pleaded that he may be pardoned for using the expression 'merciless direction' for the communication sent by the High Court. He again tendered an unqualified apology for what he termed as wrong choice of the words. Simultaneously, he claimed that there was no adverse report regarding his integrity, honesty and sincerity and he was never found guilty of any act of insubordination or indiscipline and pointed out that in the latest report, the District Judge had commended his work. This is evinced from para 17 of the appellant's representation, which reads thus:

> "17. Sir, most humbly and respectfully I submit that in the entire period of my service there is no report against my integrity honesty and sincerity. I was never found guilty of any act of insubordination or indiscipline ever before in this entire period of service also that recently proceeding this suspension my District Judges in their annual report have commended my work."

11. After considering the reply of the appellant, the High Court recommended his dismissal from service. The State

Government accepted the recommendation of the High Court and passed order dated 22.2.2006 whereby the appellant was dismissed from service.

12. The appellant challenged the aforementioned order by contending that the same is vitiated due to violation of the rules of natural justice because while recommending his dismissal from service, the High Court had considered un-communicated adverse remarks recorded in the Annual Confidential Report without informing him that the same were being relied upon for deciding the quantum of punishment. Another ground taken by the appellant was that the punishment of dismissal from service was totally disproportionate to the charges found proved against him.

13. The Division Bench of the High Court first considered the question whether the past adverse record could be considered for imposing the punishment of dismissal, referred to the judgment of the Constitution Bench in *State of Mysore v. K. Manche Gowda* AIR 1964 SC 506 as also the judgment in *State of U.P. v. Harish Chandra Singh* AIR 1969 SC 1020 and held that when the High Court proposed the punishment of dismissal from service and the appellant himself made a request in paragraph 17 of his reply that his past record may be considered, no prejudice can be said to have been caused to him on account of consideration of the adverse reports. Paragraphs 21 and 22 of the impugned order which contain the reasoning of the High Court on this issue are extracted below:

> "21. Thus, the ratio decided in the above case is where the past records is considered for awarding lesser punishment, no notice about the proposal that the past records will be considered is necessary. In this case, the stand taken by the 2nd respondent, namely, the High Court, the past records were taken into consideration in addition to the charges proved only to consider if any lesser punishment than the dismissal could be inflicted, as

> desired by the petitioner. In case, the past records were not considered by the disciplinary authority, then the then the petitioner may raise a grievance non-consideration of his past records white awarding punishment in spite of his request. Under those circumstances, the past records as admitted in the counter affidavit filed by the respondent No. 2 have been considered.
>
> 22. As indicated above, when specially the petitioner has made a request in his reply to consider his past records, while awarding punishment as his past records are good, the disciplinary authority was constrained to go into the past record. But, according to the counter by the respondent No.2, the past records did not support the claim of the petitioner that his past records were good. On the contrary, his past records contained various details about his bad records in so many words as mentioned in the counter. There is no question of consideration of past records for giving higher punishment than the disciplinary authority felt while issuing 2nd show cause notice that the maximum punishment alone, would commensurate the proved charges. In the aforesaid circumstance, there is no requirement to mention in the show cause notice regarding to mention in the show cause notice regarding his past records. As stated by the counsel for the respondent No.2, the past records were considered at the instance of the petitioner and also with a view to consider if any lesser punishment than the dismissal could be inflicted upon the petitioner. As such the first contention would fail."

14. The Division Bench then considered the appellant's plea that the punishment of dismissal was unduly harsh and disproportionate to the misconduct found proved against him, referred to the judgments in *Om Kumar v. Union of India* (2001) 2 SCC 386, *Mahindra and Mahindra Ltd. v. N.B. Jarawade* (2005) 3 SCC 134, *Hombe Gowda Educational Trust v. State of Karnataka* (2006) 1 SCC 430, and held:

"Even at the threshold, it should be stated that, the disciplinary proceedings were initiated and suspension order was passed mainly on the basis of the report of an officer in the Civil Court complaining that the delinquent-petitioner, in an intoxicated condition, assaulted the accused who was produced before him for remand as well as the constable, who produced before the delinquent. This is truly a very serious charge. If this charge is proved, it would have been a very serious misconduct on the part of the judicial officer, which would entail him to maximum punishment. But, in this case, the inquiry officer has not only observed the charge is not proved, but also indicated that the delinquent had been falsely implicated at the instance of the police personnel of the local police station with whom relationship of delinquent was not cordial. It is true that merely, because the first charge had been held to be false, we cannot hold the other charges do not need any serious consideration. Other charges also are serious, but it shall be remembered that they are not so serious as that of the first charge. As indicated above, the petitioner, himself, requested the disciplinary authority to take into consideration the past record. There is no dispute in the fact that the past records were taken into consideration where it was recorded as his conduct was not good in respect of some period. But the show cause reply sent by the delinquent, dated, 22.07.2005, would indicate that he has specifically asked the authority to take into consideration all the entire period of service. He further referred in his show cause that his District Judge, Chaibasa has commended his work in his annual report. Admittedly, there is no reference about this in the counter filed by the respondent No. 2. On the other hand, the counsel for the 2nd respondent would submit that his entire past records are not good.

In view of this, it would be better to look into the relevant entries in his A.C.R. This Court called for the A.C.R. and

perused the same. The relevant entry in A.C.R. in respect of 1988-89, 1989-90, 1991-92, 1996-97 would show various adverse remarks, as referred to in the counter. However, in the counter, there is no mention about the entries made during the year 2002-2003. As per the entry, the District Judge, Chaibasa certified him as a good officer which is as follows:

Year	2002-2003
Name of Judgeship	Chaibasa
Reporting Officer /Hon'ble Judge	Mr. B.N. Pandey
Knowledge	Good
Promptness in disposal	Yes
Quality of Judgment	Good
Supervision of Business	NA
Efficiency	Yes
Reputation	Yes
Attitude towards Colleagues	Good behaviour
Relation with Bar & Public	Good behaviour
Net Result	Good Officer

There is no reason as to why the respondent No. 2 has not chosen to refer to these entries in relation to his good behaviour. The respondent No. 2 only was particular about giving reference about the earlier years in which some adverse remarks had been passed against him, but in the later year, as indicated above, he got an entry from the District Judge in his A.C.R. that his knowledge and behaviour is good and he was certified as good officer.

Thus, it is clear while imposing punishment, this aspect has not been taken into consideration despite the request made by the delinquent to take into consideration the recent entry made by District Judge, Chaibasa commending his work.

Admittedly, the suspension order was issued on 05.07.2003. His suspension was not revoked during the pendency of the inquiry. The inquiry commenced and the charges have been framed only on 16.12.2003. The inquiry officer was appointed only on 28.05.2004. Thereafter inquiry held. The inquiry report was submitted on 04.06.2005. Show cause notice was issued on 30.06.2005. Show cause reply was sent on 22.07.2005. Ultimately, dismissal order was passed only on 26.02.2006. Thus, he was facing inquiry from 2003 to 2006. Admittedly, during the said period his suspension was not revoked and he was continued to be under suspension. Thus, he was facing inquiry for two years and seven months approximately and during that long period, he was constrained to stay at Chaibasa at Headquarters as per the direction of this Court. So, this aspect of the long delay as well as the good conduct certificate obtained by the delinquent in the recent past from the District Judge would be the relevant aspect which ought to have been taken into consideration by the disciplinary authority, while imposing punishment. Admittedly, both these aspects have not been considered."

15. In the end, the Division Bench concluded that the punishment of dismissal imposed on the appellant is not sustainable but declined to set aside the same on the ground that substantial time has lapsed since the initiation of the inquiry and proceeded to impose punishment of compulsory retirement upon the appellant. This is evinced from paragraphs 34 and 35 of the impugned order, which are extracted below:

"34. At this stage, we may refer to the powers of this Court as indicated by the Supreme Court for reviewing the

punishment imposed upon the delinquent by the disciplinary authority. Let us refer to the relevant portion of judgment of the Supreme Court in (2001) 2 SCC 386 [Om Kumar versus Union of India]

14. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in extreme and rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, can the court substitute its own view as to the quantum of punishment.

35. In the light of the above rule, we are vested with the power to review the punishment. As we are of the view that the Wednesbury principles have been violated in this case, we are constrained to review the quantum punishment. As Supreme Court would observe, this Court would normally remit the matter to the disciplinary authority to take a fresh decision as to the quantum of punishment. However, this Court is no inclined to do the same, as in this case there has been a long delay in the time taken by the disciplinary proceedings as well as in the time taken in this Court. The proceedings were started in the year 2003. We are in 2007. Therefore, instead of remitting the matter, we ourselves inclined to review the punishment. In our view, instead of dismissing the petitioner from service, it would be appropriate to impose the punishment of compulsory retirement, which would meet the ends of justice."

16. Shri Raja Venkatappa Naik, learned counsel for the appellant reiterated both the grounds taken before the High Court and urged that the impugned order as also the one passed by the State Government are liable to be set aside because the action taken against the appellant is not only against the basics of natural justice but is wholly arbitrary,

unreasonable and unjustified. Learned counsel emphasized that none of the four Annual Confidential Reports mentioned in paragraph 30 of the impugned order were communicated to the appellant so as to enable him to represent against the adverse remarks recorded therein and argued that the same could not have been considered for the purpose of imposing the punishment of dismissal without giving him opportunity to offer his explanation. Learned counsel submitted that even if the findings recorded by the Inquiry Officer in respect of charges No.1 and 2 are held to be correct, there was no justification to impose the punishment of dismissal ignoring that in his long service career of 24 years the appellant was not found guilty of any other act of insubordination or indiscipline. Learned counsel argued that when charge No.1, which was extremely serious in nature was not found proved, the High Court could not have imposed extreme penalty of dismissal from service by simply relying upon un-communicated adverse remarks recorded in his Annual Confidential Reports. Learned counsel criticized the imposition of the punishment of compulsory retirement by the Division Bench of the High Court by arguing that once the Division Bench came to the conclusion that punishment of dismissal is vitiated due to non consideration of the relevant material i.e., the latest Annual Confidential Report in which the immediate superior of the appellant had commended his work and conduct, then it should have set aside the order which was subject matter of challenge in the writ petition and directed the respondents to pass fresh orders after communicating adverse remarks to the appellant and giving him an opportunity to explain his position.

17. We shall first deal with the question whether consideration of the past adverse record of the appellant by the High Court had the effect of vitiating the ultimate order passed by the State Government. An exactly similar question was considered and answered in affirmative by the Constitution Bench in *State of Mysore v. K. Manche Gowda* (supra). The facts of that case were that while the respondent was holding

the post of an Assistant to the Additional Development Commissioner, Planning, Bangalore, the Government of Mysore appointed Shri G.V.K. Rao (Additional Development Commissioner) to conduct a departmental enquiry against him in respect of the false claims for allowances and fabrication of vouchers. The Enquiry Officer framed four charges against the respondent. After holding an enquiry in accordance with relevant rules, the Enquiry Officer submitted report with the recommendation that the respondent might be reduced in rank. However, the government issued a notice to the respondent requiring him to show cause as to why he may not be dismissed from service. After considering his reply, the Government dismissed the respondent from service. The respondent challenged his dismissal by filing writ petition under Article 226 of the Constitution of India. The High Court quashed the order of dismissal on several grounds including the one that the respondent had not been foretold about the proposed consideration of his past adverse record. This Court approved the view taken by the High Court and observed:

> "Under Art.311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges leveled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in State of Assam v. Bimal Kumar Pandit, Civil Appeal No.832 of 1962 D/- 12-2-1963 : (AIR 1963 SC 1612). *If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is*

excessive. If the proposed punishment was mainly based upon the previous record of a government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the government servant. It would be no answer to suggest that every government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. *If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry.* He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of

"reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the government servant at the second stage reasonable opportunity to show-cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation."

(emphasis supplied)

18. The proposition laid down in the above noted judgment represents one of the basic canons of justice that no one can be condemned unheard and no order prejudicially affecting any person can be passed by a public authority without affording him reasonable opportunity to defend himself or represent his cause. As a general rule, an authority entrusted with the task of deciding lis between the parties or empowered to make an order which prejudicially affects the rights of any individual or visits him with civil consequences is duty bound to act in consonance with the basic rules of natural justice including the one that material sought to be used against the concerned person must be disclosed to him and he should be given an opportunity to explain his position. This unwritten right of hearing is fundamental to a just decision, which forms an integral part of the concept of rule of law. This right has its roots in the notion of fair procedure. It draws the attention of the authority concerned to the imperative necessity of not overlooking the cause which may be shown by the other side before coming to its decision. When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the employee aware of the specific imputations of misconduct but also disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the

ground of the violation of the rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty bound to act in consonance with the rules of natural justice – *Managing Director, Uttar Pradesh Warehousing Corporation and another v. Vijay Narayan Bajpayee* (1980) 3 SCC 459. However, every violation of the rules of natural justice may not be sufficient for invalidating the action taken by the competent authority/employer and the Court may refuse to interfere if it is convinced that such violation has not caused prejudice to the affected person/employee.

19. In *Harish Chandra Singh's* case (supra), a three-Judge Bench of this Court considered a somewhat similar question in the backdrop of the fact that even though in the show cause notice, the competent authority had proposed dismissal of the respondent, after considering his reply, a lesser punishment i.e. removal from service was imposed upon him. The respondent in that case had joined Police Department in 1947. He was dismissed from service on 21.6.1951 but was reinstated in January, 1952. He was finally removed from service in 1956. In the year 1951 itself, punishment of reduction to the lowest scale of the post for a period of three years was imposed on the respondent. In 1955, his pay was reduced for a period of two years. In the course of service, the respondent had earned fifteen rewards and commendations. In the departmental inquiry which led to his removal from service in 1956, the respondent was found guilty of three charges of gross negligence in the performance of his duty of investigating the cases registered under various sections of the Indian Penal Code. The trial Court dismissed the suit filed by the respondent. On appeal, Additional District Judge, Varanasi decreed the same. The High Court confirmed the appellate judgment and dismissed the second appeal preferred by the State by observing that the respondent had not been given opportunity to explain the past punishments which were considered by the Deputy Inspector General of Police in arriving at his decision to remove the

respondent from service. While considering the question whether it was necessary for the concerned authority to give notice to the respondent as a condition precedent for consideration of his past punishments, this Court referred to the factual matrix of the case and held that when the final punishment was lesser than the proposed punishment, consideration of the past adverse record was inconsequential. The Court referred to the arguments urged on behalf of the State and observed:

> "The learned counsel for the State contends that on the facts of this case it is clear that the plaintiff had notice that his record would be taken into consideration because the Superintendent of Police had mentioned it towards the end of his order, a copy of which was supplied to the plaintiff. In the alternative he contends that if the record is taken into consideration for the purpose of imposing a lesser punishment and not for the purpose of increasing the quantum or nature of punishment, then it is not necessary that it should be stated in the show-cause notice that his past record would be taken into consideration.
>
> It seems to us that the learned counsel is right on both the points. The concluding para of the report of the Superintendent of Police, which we have set out above, clearly gave an indication to the plaintiff that his record would be considered by the Deputy Inspector General of Police and we are unable to appreciate what more notice was required. There is also force in the second point urged by the learned counsel. In *State of Mysore v. K. Manche Gowda* (1964) 4 SCR 540 the facts were that the Government servant was misled by the show-cause notice issued by the Government, and but for the previous record of the Government servant the Government might not have imposed the penalty of dismissal on him. This is borne out by the following observations of Subba Rao, J., as he then was:

"In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service."

20. An analysis of the two judgments shows that while recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary/competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment.

21. In the light of the above, we shall now consider whether the High Court could have while recommending the appellant's dismissal from service taken into consideration un-communicated adverse Annual Confidential Reports and whether the Division Bench of the High Court was right in distinguishing the judgment of the Constitution Bench in *Manche Gowda's* case on the ground that appellant had himself made a request for consideration of the past record.

22. It is not in dispute that adverse remarks recorded in the Annual Confidential Reports of the appellant for the years 1988-1989, 1989-1990, 1990-1991 and 1996-1997 were not

communicated to him. It can reasonably be presumed that if the adverse remarks were communicated to him, the appellant would have made representation for expunging the same. However, as the adverse remarks were not communicated to him, the appellant could not avail that opportunity. He did not even know what were the adverse remarks and who had recorded the same. This Court cannot speculate about the appellant's fate if the High Court had informed him that there were adverse remarks in his Annual Confidential Reports which were being relied upon for the purpose of determining the quantum of punishment and that he can submit his representation against the same. If the appellant was made aware that the adverse remarks relate to his work, conduct or behaviour, he may have represented and successfully demonstrated that the remarks were recorded by the concerned officer without looking into the quality and quantity of the work done by him and that there was no complaint from any quarter regarding his conduct and behaviour. He could have also shown that in the past no such adverse remark had been entered in his Annual Confidential Report. If the remarks contained adverse reflection on his integrity, the appellant could have represented that the same were unfounded or were made due to bias or prejudice. He may have shown that his integrity was beyond doubt and he had discharged his duties sincerely and to the satisfaction of his superiors. However, the fact of the matter is that the adverse remarks were not communicated to him and on that account he could not represent against the same.

23. The ratio of *Manche Gowda's* case is that the past adverse record of the delinquent employee cannot be considered at the stage of imposing punishment unless he is put to notice and given an opportunity to explain his position. In the show cause notice issued to the appellant, it was not disclosed that the High Court had considered the un-communicated adverse remarks recorded in his Annual Confidential Reports for the purpose of forming an opinion that

he should be dismissed from service. If the appellant had been told about this and given an opportunity to have his say against the un-communicated adverse remarks, he could have offered appropriate explanation and tried to convince the concerned authority that the remarks were either unfounded or were totally unjustified. He would have surely pleaded that after 1996-1997 no adverse comments were made about his work, conduct, behaviour and integrity and he had earned good reports (even the Division Bench of the High Court had noted that his confidential report for the year 2002-2003 was good on all counts). It is thus clear that the appellant was seriously prejudiced on account of non-disclosure of the fact that while recommending his dismissal from service, the High Court had taken into consideration un-communicated adverse remarks recorded in his four Annual Confidential Reports.

24. The inquiry was held against the appellant on three charges, the most serious of which was that after having consumed liquor, he had misbehaved and manhandled an accused and a constable. That charge was not found proved. The other two charges were that he had left headquarter without seeking permission from the Registrar General of the High Court in violation of the direction contained in order dated 5.7.2003 and that he had used derogatory words (merciless direction) qua the communication sent by the High Court. There cannot be two views that being a member of the subordinate judiciary, the appellant was bound to comply with the direction given by the High Court to stay at the headquarters but singular violation of such directive or use of intemperate language in representation dated 19.7.2003 were not that serious which warranted imposition of the extreme penalty of dismissal from service. In our view, the adverse remarks recorded in the Annual Confidential Reports of the appellant seems to have weighed heavily with the High Court while recommending his dismissal from service.

25. Since the un-communicated adverse remarks

contained in the Annual Confidential Reports of the appellant became foundation of the decision taken by the High Court to recommend his dismissal from service and he was not noticed about the proposed consideration of those remarks, it must be held that the appellant was seriously prejudiced. We have mentioned all this only to reinforce the ratio of the judgment in *Manche Gowda's* case that consideration of the past adverse record without giving an opportunity to the delinquent to explain the same can cause serious prejudice to him.

26. The Division Bench of the High Court clearly misread the representation made by the appellant and distinguished the judgment of the Constitution Bench in *Manche Gowda's* case without any tangible reason. A reading of paragraph 17 of the representation made by the appellant makes it clear that he had only mentioned that there was no report against his integrity and honesty and he was never found guilty of any act of insubordination or indiscipline in his service career. This assertion, cannot by any stretch of imagination be construed as a request by the appellant for consideration of his past record. Thus, the finding recorded by the Division Bench of the High Court that the appellant's cause was not prejudiced on account of consideration of the past adverse record is clearly erroneous and unsustainable.

27. The judgment in *Harish Chandra Singh's* case is clearly distinguishable. At the cost of repetition, we consider it necessary to observe that the three-Judge Bench had not applied the ratio of *Manche Gowda's* case because on facts it was found that the past record had been considered by the disciplinary authority only for the purpose of imposing a lesser punishment on the respondent.

28. For the reasons stated above, the appeal is allowed. The impugned order of the Division Bench of the High Court is set aside. The High Court of Jharkhand shall now consider the issue of quantum of punishment afresh and make fresh recommendation to the State Government within a period of

four months from the date of receipt/production of copy of this order. If the High Court still feels that the adverse remarks in the Annual Confidential Reports of the appellant for the year 1988-1989, 1989-1990, 1990-1991 and 1996-1997 should be considered, then such report(s) shall be communicated to him and he should be given an opportunity to make appropriate representation. While making fresh recommendation for imposing the particular punishment, the High Court is expected to take into consideration the good as well as adverse record of the appellant. The State Government shall pass appropriate order within three months from the date of receipt of fresh recommendation from the High Court. The parties are left to bear their own cost.

B.B.B. Appeal allowed.

STATE OF WEST BENGAL AND ORS.
v.
S.K. NURUL AMIN
(Civil Appeal No. 1961 of 2006)

JULY 05, 2010

[R.V. RAVEENDRAN AND P. SATHASIVAM, JJ.]

Motor Vehicles Act, 1988 – s.72(1) – Interpretation of – Grant of stage carriage permit – Power of State Transport Authority to grant stage carriage permits with modification by curtailing a part of the routes applied for – Held: The State Transport Authority is not bound to grant a stage carriage permit as sought – It can refuse to grant such permit or grant permit with such modifications as deemed fit by it – Curtailment of a route would be a modification as contemplated under s.72(1) – State Transport Authority is not prohibited from curtailment in regard to portion of the route applied for, for any valid reason – So long as the reason for the modification is not found to be arbitrary or unreasonable, the order of the Authority cannot be interfered with – The only restriction on the power of the Authority is that it cannot grant a permit for a route not specified in the application.

Respondent made two applications to the State Transport Authority, West Bengal for grant of permanent stage carriage permit. The first application was for a permit for the route Dhulian Bazar to Kolkata (via Raghunathganj and Barasat) and the second application was for a permit for the route Raghunathganj to Kolkata (via Barasat).

The State Transport Authority, West Bengal offered permits for the routes Dhulian Bazar to Barasat and Raghunathganj to Barasat respectively, by curtailing/

excluding the last portion of the two applied routes from Barasat to Kolkata (26 kms.).

By the impugned judgment, the High Court held that when permits were sought for the routes - Dhulian Bazar to Kolkata and Raghunathganj to Kolkata, the State Transport Authority could not have offered permits by curtailing the routes, thereby changing one of the termini from Kolkata to Barasat, and that the orders of the State Transport Authority violated Section 72(1) of the Motor Vehicles Act, 1988.

In appeal to this Court, the question which arose for consideration was whether the State Transport Authority had the power to grant stage carriage permits with modification by curtailing a part of the routes applied and hence, in the instant case, the Authority was justified in curtailing the route and granting the permits only up to Barasat thereby deleting the last leg of the route from Barasat to Kolkata.

Allowing the appeals, the Court

HELD:1. Section 72 of the Motor Vehicles Act, 1988 deals with grant of stage carriage permits. A careful reading of sub-section (1) of section 72 of the Act makes it clear that the State Transport Authority, West Bengal is not bound to grant a stage carriage permit as sought. The Authority could either grant the stage carriage permit in accordance with the application or refuse to grant such stage carriage permit or grant the stage carriage permit with such modifications as it deemed fit. The only restriction on the power of the Authority is that it could not grant a permit for a route not specified in the application. [Paras 5,6] [501-E-H; 502-A-B]

2. In this case, what the Authority has done is to grant the permanent stage carriage permits in regard to

the routes for which the applications were made, but with a modification, by curtailing the routes for which the permits were applied, only up to Barasat. The Authority in effect therefore refused to grant the permit for the last leg (Barasat to Kolkata) of the two routes applied. Though the communications from the Authority to the respondent did not contain the reason for curtailing the routes, it is stated that the resolutions of Authority (which led to the issue of the impugned communications) assigned the reason for curtailment. The reason was that in view of the heavy traffic congestion and vehicular pollution in Kolkata, there was restriction of entry of new passenger vehicles into Kolkata and, therefore, the permits were granted only up to Barasat. [Para 7] [502-C-E]

3. The High Court proceeded on the basis that when one of the termini is altered by the Authority, then the permit is not granted in respect of the route applied, and it would amount to granting a permit in respect of a route not specified in the application. The interpretation by the High Court is without basis. What is prohibited by the proviso to sub-section (1) of section 72 is granting of a permit in respect of any route or area not specified in the application. The said proviso does not prohibit curtailment in regard to portion of the route applied for, for any valid reason. In fact sub-section (1) specifically authorizes the Authority to grant the stage carriage permit with such modifications as it deems fit. Curtailment of a route would be a modification as contemplated under sub-section (1) of Section 72. [Para 8] [502-E-H; 503-A-B]

4. In this case, the route applied for was Dhulian Bazar to Kolkata, via Raghunathganj and Barasat in one case and Raghunathganj to Kolkata via Barasat in the other case. Permits were granted from Dhulian Bazar to Barasat and Raghunathganj to Barasat, excluding the

portion from Barasat to Kolkata. Such curtailment was a modification which was permitted and authorized by section 72(1) of the Act. The High Court was not therefore justified in holding that the grant of a permit for a route with any curtailment would be a violation of Section 72(1) of the Act. [Para 9] [503-C-D]

5. As regards the question as to whether the Authority was justified in curtailing the route and granting the permits only up to Barasat thereby deleting the last leg of the route from Barasat to Kolkata, though no reason was given in the communications of the Authority about the grant of permits, the resolutions of the Authority gave the reason that the curtailment was necessitated due to the need to restrict entry of new passenger transport vehicles into Kolkata on account of heavy traffic congestion and increasing vehicular pollution. [Para 10] [503-E-F]

6. The Authority has the power to grant a stage carriage permit in accordance with the application or with such modifications as it deems fit. So long as the reason for the modification is not found to be arbitrary or unreasonable, the question of interfering with the order of the Authority does not arise. The grant of some permits to others for routes touching Kolkata during the pendency of these matters, would not affect the validity of the orders of the Authority, nor be a ground for interfering with the orders of the Authority, as appellants have explained the reason why in some cases, during the pendency of the matter it had to issue permits. [Para 14] [505-D-F]

7.The orders of the High Court are set aside, the orders of the Authority are restored and the curtailment of the routes is upheld. [Para 15] [505-C-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1961 of 2006.

From the Judgment & Order dated 27.4.2001 of the High Court at Calcutta in M.A.T. No. 1100 of 2001.

WITH

C.A. No. 1962 of 2006.

Altaf Ahmad, Tara Chandra Sharma, Neelam Sharma for the Appellants.

Bijan Kumar Ghosh, Satish Vig (NP) for the Respondent.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. These two appeals arising from order dated 27.4.2001 in MAT No.1100 of 2001 and order dated 2.4.2001 in MAT No.586 of 2001 passed by the Calcutta High Court, raise a common question relating to interpretation of sub-section (1) of section 72 of Motor Vehicles Act, 1988 ('Act' for short).

2. The respondent made two applications to the State Transport Authority, West Bengal ('Authority' for short) for grant of permanent stage carriage permit, the first on 7.11.1997 for a permit for the route Dhulian Bazar to Kolkata (via Raghunathganj and Barasat), and the second on 30.11.1998 for a permit for the route Raghunathganj to Kolkata (via Barasat). As the said applications were not disposed of, the respondent approached the High Court by filing separate writ petitions and the said petitions were disposed of with a direction to the Authority to consider and dispose of the pending applications of the respondent. Thereafter, the Authority, by communications dated 18.12.2000 and 3.11.2000, offered permits for the routes Dhulian Bazar to Barasat and Reghunathganj to Barasat respectively, by curtailing/excluding the last portion of the two applied routes from Barasat to Kolkata (26 kms.).

3. Feeling aggrieved, the respondent filed two writ

petitions which were disposed of by a learned Single Judge by orders dated 5.3.2001 and 13.2.2001 respectively. The orders directed the Authority to consider the applications of the respondent afresh as the communications of the Authority did not give reasons as to why the permits were not granted up to Kolkata. The Authority was also directed to pass reasoned orders after giving an opportunity of hearing to the respondent.

4. The orders of the learned Single Judge were challenged by the respondent by filing intra-court appeals before a Division Bench. The Division Bench allowed the appeals by the impugned orders dated 27.4.2001 and 2.4.2001. The Division Bench noted that the routes, for which the permits were sought, were not notified ones. The Division Bench held that when permits were sought for the routes – Dhulian Bazar to Kolkata and Raghunathganj to Kolkata, the Authority could not have offered permits by curtailing the routes, thereby changing one of the termini from Kolkata to Barasat. The division bench held that the orders of the Authority violated Section 72(1) of the Act. The said orders are challenged in these appeals by special leave.

5. Section 72 of the Act deals with grant of stage carriage permits. Sub-section (1) thereof which is relevant, is extracted below :

> *"72. Grant of stage carriage permit.*—(1) Subject to the provisions of section 72, a Regional Transport Authority may, on an application made to it under section 70, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit;
>
> Provided that no such permit shall be granted in respect of any route or area not specified in the application."

6. A careful reading of sub-section (1) of section 72 makes it clear that the Authority is not bound to grant a stage carriage

permit as sought. The Authority could either grant the stage carriage permit in accordance with the application or refuse to grant such stage carriage permit or grant the stage carriage permit with such modifications as it deemed fit. The only restriction on the power of the Authority is that it could not grant a permit for a route not specified in the application.

7. In this case, what the Authority has done is to grant the permanent stage carriage permits in regard to the routes for which the applications were made, but with a modification, by curtailing the routes for which the permits were applied, only up to Barasat. The Authority in effect therefore refused to grant the permit for the last leg (Barasat to Kolkata) of the two routes applied. Though the communications from the Authority to the respondent did not contain the reason for curtailing the routes, it is stated that the resolutions of Authority (which led to the issue of the impugned communications) assigned the reason for curtailment. The reason was that in view of the heavy traffic congestion and vehicular pollution in Kolkata, there was restriction of entry of new passenger vehicles into Kolkata and, therefore, the permits were granted only up to Barasat.

8. The Division Bench proceeded on the basis that when one of the termini is altered by the Authority, then the permit is not granted in respect of the route applied, and it would amount to granting a permit in respect of a route not specified in the application. On a careful consideration, we are of the view that the interpretation by the High Court is without basis. What is prohibited by the proviso to sub-section (1) of section 72 is granting of a permit in respect of any route or area not specified in the application. The said proviso does not prohibit curtailment in regard to portion of the route applied for, for any valid reason. In fact sub-section (1) specifically authorizes the Authority to grant the stage carriage permit with such modifications as it deems fit. Curtailment of a route would be a modification as contemplated under sub-section (1). We may clarify this by an illustration where the application is made for grant of a permit

in regard to a route A to D through points B and C. If the grant is made for the route A to C through B, excluding the last portion C to D, it will be a modification which is contemplated and provided for under sub-section (1) of Section 72 of the Act. On the other hand, if the grant is made in regard to route E to F or in regard to route A to E, the grant will be in regard to a route not specified in the application and consequently the permit will be violative of the proviso to sub-section (1) of Section 72 of the Act.

9. In this case, the route applied for was Dhulian Bazar to Kolkata, via Raghunathganj and Barasat in one case and Raghunathganj to Kolkata via Barasat in the other case. Permits were granted from Dhulian Bazar to Barasat and Raghunathganj to Barasat, excluding the portion from Barasat to Kolkata. Such curtailment was a modification which was permitted and authorized by section 72(1) of the Act. The Division Bench of the High Court was not therefore justified in holding that the grant of a permit for a route with any curtailment would be a violation of Section 72(1) of the Act.

10. The next question is whether the Authority was justified in curtailing the route and granting the permits only up to Barasat thereby deleting the last leg of the route from Barasat to Kolkata. Though no reason was given in the communications of the Authority about the grant of permits, the resolutions of the Authority gave the reason that the curtailment was necessitated due to the need to restrict entry of new passenger transport vehicles into Kolkata on account of heavy traffic congestion and increasing vehicular pollution.

11. The respondent contended that the said reason was not a valid reason, as during the pendency of these matters, long after the curtailment of routes in his case, several permanent stage carriage permits were granted on various inter-regional routes, all up to Kolkata, without any curtailment.

12. The appellant-State responded by contending that in

view of the traffic congestion and automobile pollution in Kolkata reaching alarming proportions, entry of vehicles in Kolkata was being restricted in a phased manner as a matter of policy; that the State Government constituted a technical committee on 2.1.2004 as per directions of the Division Bench of the High Court dated 21.11.2003 in *M/s. Sankar Automobiles v. State of West Bengal* – CA No. 568/2002/ APOT No. 83 of 2002) to examine inter alia the road space, availability of halting space, terminus and related matters; that in accordance with the recommendation of a Technical Committee, the State Government issued a notification dated 2.8.2004 (gazetted on 6.8.2004) directing the Authority and all Regional Transport Authorities in the State as follows:

> (1) No new bus route be formulated and permits be issued which may pass through the Central Business District viz. Esplanade and Band Stand in Kolkata and Howrah station and approach areas of Howrah Bridge till further orders;
>
> (2) No new permit for Stage Carriage shall be issued which may originate/terminate in Esplanade and Band Stand in Kolkata and Howrah Station;
>
> (3) No new bus route shall also be created/formulated in Kolkata and Howrah without creating appropriate parking place having requisite amenities for both the passengers as well as the transport workers.

The appellants submitted that the validity of the said notification was upheld by the Division Bench of the High Court by order dated 27.9.2005 in FMA No.604 of 2004 (*Sujata Ganguly v. State of West Bengal*). The State Government admitted that it had granted some permits up to Kolkata during the pendency of these matters, but that was in pursuance of specific directions of the High Court in some writ petitions and before issue of the notification dated 2.8.2004. The appellants have furnished the particulars of the orders of the High Court which directed

grant of permit up to Kolkata. It was submitted that as the issue of notification (which was ultimately issued on 2.8.2004) was under process, and as these matters were still pending, the appellants complied with the orders of the High Court in those cases.

13. The respondent replied by contending that the prohibition under a notification dated 2.8.2004 would not apply to him as his applications were of the years 1997 and 1998 and the grant of permit for curtailed routes were by orders passed in 2000 long prior to the said notification and therefore, the said notification was not relevant.

14. The notification dated 2.8.2004 was pressed into service by the State Government only to counter the argument that some permits for routes up to Kolkata were granted during the pendency of these matters. The question for decision in these appeals is whether the Authority had the power to grant stage carriage permits with modification by curtailing a part of the routes applied. We have already held that the Authority has the power to grant a stage carriage permit in accordance with the application or with such modifications as it deems fit. So long as the reason for the modification is not found to be arbitrary or unreasonable, the question of interfering with the order of the Authority does not arise. The grant of some permits to others for routes touching Kolkata during the pendency of these matters, would not affect the validity of the orders of the Authority, nor be a ground for interfering with the orders of the Authority, as appellants have explained the reason why in some cases, during the pendency of the matter it had to issue permits.

15. In view of the subsequent events, the question of directing the Authority to consider the applications of respondent afresh does not arise. These appeals are allowed, the orders of the High Court are set aside, the orders of the Authority are restored and the curtailment of routes is upheld.

B.B.B. Appeals allowed.

UNION OF INDIA & ORS.

v.

RAM PRAKASH

(Civil Appeal No. 4887 of 2010)

JULY 5, 2010

[DR. MUKUNDAKAM SHARMA AND DR. B.S. CHAUHAN, JJ.]

Service Law:

Armed Forces – Air Force Service – Disability pension – Employee released from service on the opinion of the Release Medical Board that he suffered from 90% disabilities which were neither attributable to nor aggravated by Air Force Service – HELD: Keeping in view the Pension Regulations and the Entitlement Rules it was unjustified for the single Judge of the High Court to set aside the concurrent opinions of the Appellate Board and the Release Medical Board – Further, in view of s.100 CPC, the High Court should not have set aside the concurrent findings of the trial court and the first appellate court, merely on the presumption that the plaintiff was undergoing arduous nature of job as he was in the Air Force Service – The findings given by the High Court were presumptive in nature and based on surmises and conjectures – Air Force Pension Regulations – Regulation 153 – Appendix II – Entitlement Rules – Code of Civil Procedure, 1908 – s.100.

The respondent, after having rendered 15 years of service in the Indian Air Force, was discharged in terms of the opinion of the Release Medical Board which found him suffering from rational detachment and Immature Cataract of both the eyes. The Board assessed the composite disability at 90% and opined that the disabilities suffered by the respondent were neither

attributable to nor aggravated by the Air Force service, but were constitutional in nature. The claim of the respondent for disability pension having not been accepted by the authorities concerned, he filed a suit which was dismissed. His appeal having been dismissed by the first appellate court, he filed the second appeal, which was allowed by the High Court.

In the instant appeal filed by the employers, it was contended for the appellants that the High Court was not justified in interfering with the concurrent findings of fact of the two courts below; and that the medical report having a primacy, should have been given primary consideration and due weightage and the High Court was not justified in substituting the findings and opinion of the Medical Board by its own opinion.

Allowing the appeal, the Court

HELD: 1.1. In view of Regulation 153 of the Air Force Pension Regulations, unless and until it is proved and established that an individual has become disabled to the extent of more than 20% during his service career and released from service due to such disability which is attributable to or aggravated by Air Force service, he is not entitled to receive the disability pension. The Rules in Appendix II to the Regulations are also clear on the issue that such entitlement should be considered and decided giving emphasis and primacy to the opinion of the Medical Board constituted for the purpose. [para 19] [515-H; 516-A-B]

1.2. In the report of the Release Medical Board, it is stated that though the diseases from which the respondent was suffering did not exist before his entering the service, but the same were neither attributable to nor aggravated by service during peace or under field service conditions. The Medical Board has given a specific and

definite opinion that the said diseases were in no manner connected with service. The Appellate Medical Board upheld the opinion of the Medical Board. [para 18-19] [515-A-E]

2.1. The scope and limit of interfering with the finding of fact in a case u/s 100 CPC has been reiterated by this Court time and again. Besides, the consistent view of this Court is that the opinion of the Medical Board would be given a primacy and a court should be slow in interfering with and substituting its own opinion with that of the Medical Board. [para 20-21] [516-C; 517-D-E]

Secretary, Ministry of Defence and Ors. Vs. A.V. Damodaran (D) through LRs. and Ors. **2009 (13) SCR 416 = 2009 (9) SCC 140,** *Union of India & Ors. Vs. Keshar Singh* **2007 (5) SCR 408 = 2007 (12) SCC 67;** *Controller of Defence Accounts (Pension) and Others Vs. S. Balachandran Nair* **2005 (4) Suppl. SCR 431 = 2005 (13) SCC 128;** *Union of India and Ors. Vs. Dhir Singh China (Colonel) Retd.* **2003 (1) SCR 779 = 2003 (2) SCC 382 and** Union of India and Anr. Vs. Baljit Singh **1996 (7) Suppl. SCR 626 = 1996 (11) SCC 315, relied on.**

Sheel Chand v. Prakash Chand **1998 (1) Suppl. SCR 297 = (1998) 6 SCC 683, referred to.**

2.2. The Pension Regulations when read with the Entitlement Rules, make it clear that the determination of 'attributable' or 'aggravation' is as per the Entitlement Rules. As the Medial Board has given a categorical opinion that the ailment of the respondent was constitutional and the same is not attributable to or aggravated by Air Force Service, it was unjustified for the Single Judge of the High Court to set aside the concurrent opinions of the Appellate Board and the Release Medical Board and also the findings recorded by the trial court and the appellate court merely because the Single Judge felt that there could be a presumption that

the respondent was undergoing arduous nature of job as he was appointed as an Air Force personnel. The findings recorded by the Single Judge of the High Court were presumptive in nature and based on surmises and conjectures. There is no factual foundation for arriving at such a decision. The High Court totally ignored the applicability of the Regulations to the case of the respondent. The judgment and order of the High Court is set aside. [para19,22 and 23] [515-F-H; 517-F-H; 518-A-B]

Case Law Reference:

1998 (1) Suppl. SCR 297	**referred to**	**para 20**
2009 (13) SCR 416	**relied on**	**para 21**
2007 (5) SCR 408	**relied on**	**para 21**
2005 (4) Suppl. SCR 431	**relied on**	**para 21**
2003 (1) SCR 779	**relied on**	**para 21**
1996 (7) Suppl. SCR 626	**relied on**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil appeal No. 4887 of 2010.

From the Judgment & Order dated 4.07.2005 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 3795 of 1998.

D.K. Thakur, Rohini Mukherjee, Kunal Bahri (for Anil Katiyar) for the Appellants.

S.C. Paul, Rahul Kumar, Roopa Paul, Sarojbala (for Satyendra Kumar) for the Respondent.

The Judgment of the Court was delivered by

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

2. The present appeal is directed against the judgment and

order dated 4.7.2005 passed by the learned Single Judge of the Punjab and Haryana High Court whereby the learned Single Judge has allowed the Second Appeal filed by the respondent and thereby setting aside the findings recorded by the Civil Judge (Junior Division) in his judgment and decree dated 27.9.1996 dismissing the suit of the respondent/plaintiff for the grant of disability pension and also the judgment and decree dated 27.8.1998 passed by the Additional District Judge, Jalandhar whereby the appeal filed by the respondent was dismissed.

3. The respondent was enrolled in the Indian Air Force in the month of May, 1970. After he rendered service for 15 years in the Air Force, the Respondent was unwell and consequently he was examined by a Medical Board which was constituted to consider the case of the respondent. After such medical examination, the Release Medical Board found that the respondent suffered from Retinal detachment to the extent of 60% and that the degree of disablement was permanent. He was also found to be suffering from Immature Cataract of both the eyes and his disablement was assessed at 40% by the Release Medical Board.

4. The Release Medical Board assessed the composite disability at 90% and gave an opinion that the said disability suffered by the respondent during his service was neither attributable to nor aggravated by Air Force Service and that the diseases were constitutional in nature.

5. The respondent on being discharged from service in terms of the opinion of the Release Medical Board claimed for payment of disability pension. The Appellate authority, however, informed the respondent that disability for which the respondent was released from service were constitutional in nature. The authorities namely Chief Controller of Defence Accounts (Pension) and the appellate medical authority examined the case of the respondent and thereafter both the authorities held

that the disability suffered by the respondent was not due to injury suffered during the course of duty or because of nature of duties performed by the respondent. The appellate authority also gave an opinion that the disease of the respondent was neither attributable to nor aggravated by Air Force service.

6. Being aggrieved by the aforesaid order, the respondent herein filed a suit claiming payment of disability pension on the ground that at the time of his entry to the Air Force service, no such disease was recorded in his records and therefore, onset of the aforesaid disease during the course of service should be considered as attributable to service, particularly due to the adverse service conditions which caused the disease.

7. The aforesaid suit was contested by the appellant herein by filing a detailed written statement. On the basis of the pleadings of the parties, several issues were framed and the parties led their evidence in support of their cases, and finally by judgment and decree dated 27.9.1996, the learned Trial Court dismissed the suit.

8. Being aggrieved by the aforesaid judgment and decree, the respondent filed an appeal before the first appellate court which was heard and was dismissed.

9. The respondent being aggrieved by the aforesaid concurrent findings of fact arrived at by the two courts below filed a second appeal in the Punjab and Haryana High Court which, however, after hearing the parties was allowed by the learned Single Judge, on account of which the present appeal was filed by the appellant herein. The appeal was listed before us and the counsel appearing for the parties were heard at length.

10. The counsel appearing for the appellants submitted before us that the High Court was not justified in interfering with the concurrent findings of fact of two courts below and therefore, the said judgment is required to be set aside and quashed. It

was also submitted that the medical report having a primacy, should have been given due weightage and primary consideration and the learned Single Judge was not justified in substituting the said findings and opinion of the Medical Board by substituting its own opinion.

11. The aforesaid submissions of the counsel appearing for the appellant were refuted by the counsel appearing for the respondent who submitted that the High Court was justified in holding that since at the time of his entry in the Air Force on 1.5.1970, no such disease was found despite a thorough medical check up, it must be held that the adverse service conditions of the Respondent was the cause for onset of the diseases in question.

12. In the light of the aforesaid submissions of the counsel appearing for the parties, the question that falls for our consideration is whether or not the disability suffered by the respondent court be attributed to the service conditions of the Air Force service.

13. The Pension Regulations was enacted for the Air Force, the provisions of which are made applicable to the personnel of the Air Force and all claims of pension are to be regulated by the provisions made in the Regulations at the time of individual's retirement or release or discharge as the case may be.

14. Section III of the said Air Force Pension Regulations deals with the Disability Pensioner Awards. Regulation 37 provides the manner and method of entertaining the claim of disability pension and also the circumstances under which such pension becomes admissible.

Regulation 37 reads as follows:-

"37(a) An officer who is retired from air force service on account of a disability which is attributable to or aggravated by such service and is assessed at 20 per cent

or over may, on retirement, be awarded a disability pension consisting of a service element and a disability element in accordance with the regulations in this section.

(b) The question whether a disability is attributable to or aggravated by air force service shall be determined under the regulations in Appendix II."

15. Section IV of the said Pension Regulations deals with the primary conditions for the grant of disability pension. In Regulation 153, it is stated thus;

"153. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by air force service and is assessed at 20 per cent or over.

154. The question whether a disability is attributable to or aggravated by air force service shall be determined under the regulations in Appendix II."

16. In the light of the aforesaid provisions, what is laid down in Appendix 2 becomes relevant. The said Appendix 2 deals with the Entitlement Rules. It is provided therein that the aforesaid Entitlement Rules would apply in cases where the disablement or death, on which the claim to casualty pensioner award is based. Rule 1, 2, 3 and 4 read as follows:-

"1. With effect from 1st April, 1948, in supersession of all previous orders on the subject, the entitlement to disability and family pension, children's allowance and death gratuities will be governed by the following rules. Invaliding from service at the time of his release under the Release Regulations is in a lower medical category than that in which he was recruited will be treated as invalided from service. Airmen who are placed permanently in a medical category other than 'A' and are discharged because no

alternative employment suitable to their low medical category can be provided as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalided out of service.

2. Disablement or death shall be accepted as due to air force service provided it is certified that :-

(a) the disablement is due to a wound, injury or disease which –

(i) is attributable to air force service ; or

(ii) existed before or arose during air force service and has been and remains aggravated thereby ;

(b) the death was due to or hastened by –

(i) a wound, injury or disease which was attributable to air force service;

(ii) the aggravation by air force service of a wound, injury or disease which existed before or arose during air force service.

3. There must be a casual connection between disablement and air force service for attributability or aggravation to be conceded"

17. There is no dispute with regard to the fact that when the respondent was initially appointed as an Air Force Personnel in the Indian Air Force, there was a medical examination held in which he was found to be fit to be appointed to the Air Force. After he had rendered service in the Air Force for about 15 years, the respondent was examined by the Release Medical Board and he was diagnosed as a case of retinal detachment and immature cataract of both the eyes.

18. A Medical Board assessed composite disability at

90%, and in view of the opinion of the said Release Medical Board and as recommended by them, the respondent was released from service. The aforesaid Regulations which are referred to and extracted hereinbefore give primacy to the Report of the Medical Board. The Report of the Medical Board is annexed with the records. Part 3 of the said Report deals with the opinion of the Medical Board. In the said opinion of the Medical Board, it is stated that the aforesaid disabilities did not exist before entering the service. The Medical Board has further given an opinion that the aforesaid diseases from which the respondent was suffering were not attributable to service during peace or under field service conditions nor aggravated thereby. The Medical Board has given a specific and definite opinion that the said diseases were in no manner connected with service.

19. The respondent filed an appeal as against the aforesaid opinion of the Medical Board and his case was considered by the Appellate Medical Board who upheld the aforesaid opinion of the Medical Board and held that the diseases from which the respondent was suffering at the time of his release from Air Force Service, were neither attributable to service nor aggravated thereby. Despite the aforesaid opinion of the Medical Board, the learned Single Judge took pains to re-appreciate the records, and on such appreciation held that there could be presumption drawn that the respondent was subjected to perform arduous nature of duties during his span of service with the Indian Air Force inasmuch as it is general knowledge that a person in defence services is always required to perform arduous nature of duties. The aforesaid findings recorded by the Trial Court and Single Judge was presumptive in nature and are based on surmises and conjectures and there is no factual foundation for arriving at such a decision. The learned Single Judge totally ignored the applicability of the aforesaid Regulations to the case of the Respondent. Unless and until it is proved and established that an individual has become disabled to the extent of more than

20% during his service career and released from service due to such disability which is attributable to or aggravated by air force service, he is not entitled to receive such disability pension. Rules are also clear on the issue that such entitlement should be considered and decided giving emphasis and primacy on the opinion of the Medical Board constituted for the purpose.

20. The scope and limit of interfering with the finding of fact in a case under Section 100 of the Code of Civil Procedure has been reiterated by this Court time and again. Instead of going into the ratio of all the aforesaid decisions, we may summarise the legal principles enunciated by this Court in the decision of *Sheel Chand v. Prakash Chand* reported in (1998) 6 SCC 683. In this case, this Court while dealing with question of existence of a substantial question of law, held as follows:-

> "7. …… The existence of a "substantial question of law" is the sine qua non for the exercise of jurisdiction by the High Court under the amended provisions of Section 100 CPC. It appears that the learned Single Judge overlooked the change brought about to Section 100 CPC by the amendment made in 1976. The High Court unjustifiably interfered with pure questions of fact while exercising jurisdiction under Section 100 CPC. It was not proper for the learned Single Judge to have reversed the concurrent findings of fact while exercising jurisdiction under Section 100 CPC. That apart, we find that the learned Single Judge did not even notice, let alone answer the question of law which had been formulated by it at the time of admission of the second appeal. There is no reference to the question of law in the impugned order and it appears that the High Court thought that it was dealing with a first appeal and not a second appeal under Section 100 CPC. The findings of fact recorded by the two courts below were based on proper appreciation of evidence and the material on the record. There was no perversity, illegality or irregularity in

those findings. None has been brought to our notice by the learned counsel for the respondent either. The findings, therefore, did not require to be upset in a second appeal under Section 100 CPC. The judgment of the learned Single Judge, under the circumstances, cannot be sustained……."

21. Several decisions of this Court like *Secretary, Ministry of Defence and Ors. Vs. A.V. Damodaran (D) through LRs. and Ors.* reported in 2009 (9) SCC 140, *Union of India & Ors. Vs. Keshar Singh* reported in 2007 (12) SCC 675, *Controller of Defence Accounts (Pension) and Others Vs. S. Balachandran Nair* reported in 2005 (13) SCC 128, *Union of India and Ors. Vs. Dhir Singh China (Colonel) Retd.* reported in 2003 (2) SCC 382 and *Union of India and Anr. Vs. Baljit Singh* reported in 1996 (11) SCC 315, this Court had the occasion to deal with a similar issue and in all the aforesaid decisions, it was held that the Medical Board consists of an expert body and that its opinion is entitled to be given due weight and value. The consistent view of this Court is that such opinion of the Medical Board would be given a primacy and a Court should be slow in interfering with and substituting its own opinion with the opinion of the Medical Board.

22. The Medical Board has given a categorical opinion that the diseases for which the respondent has been released from service were neither attributable to nor aggravated by Air Force service. The aforesaid Pension Regulations when read with the Entitlement Rules, make it clear that the determination of attributable or aggravation is as per the Entitlement Rules. As the Medial Board has given a categorical opinion that the ailment of the respondent was constitutional and the same is not attributable to or aggravated by Air Force Service, it was unjustified for the learned Single Judge to set aside the aforesaid concurrent opinions of the appellate Board and Released Medical Board and also the findings recorded by the trial court and also by the First Appellate Court merely because

the learned Single Judge felt that there could be a presumption that the respondent was undergoing arduous nature of job as he was appointed as a Air Force personnel.

23. We, therefore, set aside the judgment and order of the learned Single Judge, and allow the appeal filed by the appellant. As a result of this order, the suit filed by the respondent should be held to be dismissed.

R.P. Appeal allowed

AVINASH GAIKWAD & ORS.
v.
STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 4890 of 2010)

JULY 5, 2010

[R.V. RAVEENDRAN AND P. SATHASIVAM, JJ.]

Urban Development:

Development Control Regulations for Greater Mumbai, 1991—Regulation 33(7) read with Appendix III, regulation 35(2)(k) and regulation 38(22)—Reconstruction or redevelopment of property by developer under Urban Renewal Scheme—Area of tenements to be constructed and delivered to previous occupants—Tenements of minimum carpet area of 225 sq.ft. with a balcony in addition, of a minimum area of 22.5 sq.ft (10% tenement area)—Claim of—Held: Not justified—Regulation 33(7) r/w Appendix III, No Obejection Certificate issued by State Building Repair and Reconstruction Board, agreement between State Housing and Area Development Authority and developer, and the approved Scheme clearly specifies that minimum carpet area of 225 sq.ft. was to be given to occupants—It did not contemplate delivery of any balconyin addition to the 225 sq.ft. carpet area—Also regulation 35(2)(k) r/w regulation 38(22) cannot be construed as casting liability upon developer reconstructing/developing a property under Urban Renewal Scheme to construct balcony measuring 10% of tenement area.

The State of Maharashtra acquired certain properties-312 residential tenements and 23 non-residential tenements. It delivered the possession of the properties to the Maharashtra Housing and Area Development Authority (MHADA) for re-development under the Urban

Renewal Scheme. MHADA did not have adequate funds for constructing tenements and proposed to execute the project through a developer. The Supreme Court approved the Scheme. The private developer was issued No Objection Certificate dated 23.05.2003 for redevelopment of the said property in pursuance of Regulation 33(9) r/w Regulation 33(7) of the Development Control Regulation for Greater Mumbai, 1991. MHADA entered into an agreement dated 30.6.2003 with the developer. The developer re-developer the property. The appellants-previous occupants of the property challenged the area of the tenements to be constructed and delivered to them. They contended during their arguments that the area of each tenement to be constructed and delivered to the previous occupants should have, in addition to a carpet area of 225 sq. ft. in respect of the tenement, a balcony measuring 10% of the tenement area. The High Court rejected the same as the Scheme was under DC Regulations and it did not require contstruction of a balcony in addition to the tenement measuring 225 sq. ft. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1 The No Objection Certificate dated 23.5.2003 issued by Mumbai Building Repair and Reconstruction Board and the Agreement dated 30.6.2003 between Maharashtra Housing and Area Development Authority and the developer, require the developer to deliver to each occupant of the old building, a tenement with a carpet area equal to area occupied by him for residential purpose subject to minimum carpet area of 225 sq. ft. They do not require delivery of any additional balcony area. [Para 9] [528-D]

1.2 When the agreement between MHADA and developer did not require construction of a balcony and

when the appellant had not even alleged in the petition that balcony was required to be contructed, it cannot be understood that how the appellants could raise a contention during arguments before the High Court that they were entitled to a balcony in the tenement whose measurement should be of 10% of the area of the tenement. The inspection report showed that the extent of tenement was not less than 225 sq. ft. and the appellants had agreed to take the tenements subject to the result of the case. [Para 12] [532-G-H; 533-A]

1.3 Regulation 38(22) of the Development Control Regulations for Greater Mumbai, 1991 relates to "Balconies" and provides that in any residential zone, balconies may be permitted free of Floor Space Index at reach floor (excluding ground and terrace floors) of an area not more than 10% of the area of the floor from which such balcony projects. Regulation 35 deals with FSI computation and Note (ii) thereof relates to exclusion from FSI computation. One of the items to be excluded from the FSI computation vide entry (k) is the area of balconies which are provided under Regulation 38(22). The effect of Regulation 35 (2)(k) read with Regulation 38(22) is that a balcony is contsructed as per Regulation 38(22) it will be excluded for the purpose of calculating FSI. These Regulations cannot be construed as casting a liability upon the developer reconstructing/developing a property under the Urban Renewal Scheme to construct a balcony (wose extent is 10% of the area of the tenement) when constructing and delivering tenements to the previous occupants of the demolished building. The area to be given to such occupants is clearly specified in Regulation 33(7) read with Appendix III (Clause 2), the NOC and the agreement. An old occupant is entitled to a tenement only under Regulation 33(7) and not Regulation 33(9). Regulation 33(9) was invoked only to get additional FSI of 1.5 by MHADA. [Para 13] [533-B-G]

1.4 Under the Scheme approved by this Court, MHADA which did not have adequate funds for constructing tenements, proposed to execute the project through a developer. The arrangement as per the Scheme was that the benefit of Regulation 33(9) was to be taken only for utilizing the higher FSI floor and the development by the developer will be governed by DC Regulation 33(7) read with Appendix III. Appendix III requires that each occupant to be rehabilitated should be given a minimum carpet area of 225 sq. ft. As per the Scheme approved, the contractor had to construct 335 tenements for the rehabilitation of the existing occupants free of cost and each tenements was to be of an area of 225 sq.ft. The Scheme did not contemplate construction and delivery of any balcony in addition to the 225 sq.ft. carpet area. In so far as the area to the delivered to the previous occupants, the extent is clear, that is 225sq.ft. without any balcony. Further, the assumption of the appellants that if the matter had been governed by Regulation 33(9), the tenement measurement would have been 225 sq.ft. plus a balcony of a minimum measurement of 10% of the 225 sq.ft., is baseless as Regulation 33(9) does not require it. [Para 13] [533-H; 534-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4890 of 2010.

From the Judgment & Order dated 05.05.2005 of the High Court of Judicature at Bombay in Writ Petition No. 649 of 2005.

R.F. Nariman, Sanjay Parikh, A.M. Singh, Mamta Saxena, Gaurav Tyagi, Anitha Shenoy, Pallav Shishodia, H.D. Thanvi, D.N. Mishra, Joaguih Reis, Shridhar Y. Chitale, Raj Mhatre, Abhijat P. Medh, Dattatray Vyas, Manish Sharma, Chirag M. Shroff, Chinmoy Khaladkar, Sanjay Kharde, Asha G. Nair, Ravindra Keshavrao Adsure for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. Heard the parties.

2. The appellants challenge the order dated 5.5.2005 by which W.P.No.649/2005 filed by them was dismissed by the Bombay High Court.

3. A property known as Pimpalwadi at CS No.370 Tatya Gharpure Marg, Girgaon Division, Mumbai, originally belonged to Sir Harkishandas Trust. The said property consisting of several Chawls, Godowns and Sheds was acquired by the State of Maharashtra under section 41 of the Maharashtra Housing & Area Development Act, 1976 in the year 1988. Thereafter, the State Government delivered possession of the said property to the Maharashtra Housing & Area Development Authority ('MHADA' for short) on 31.1.1989 for redevelopment under Urban Renewal Scheme. However, due to certain protracted litigation between the owners of the property and Pimpalwadi Bhadekaru Sangh formed by the occupants of the said property, MHADA could not take up the reconstruction. At that stage, the said Pimpalwadi Bhadekaru Sangh, gave a proposal to MHADA to permit development of the property through M/s. Shreepati Towers - a private developer (an AOP of respondents 5 to 12 described also as "R.R. Chaturvedi & Others of M/s. Shreepati Group"). The said property had 312 residential tenements and 23 non-residential tenements. MHADA considered the proposal and granted a no objection certificate dated 27.2.2001 for redevelopment of the said property in favour of the developer, under Regulation No. 33(7) of Development Control Regulations for Greater Mumbai, 1991 (for short 'DC Regulations').

4. The said NOC was challenged by some occupants/ tenants by filing WP No.1299/2001 in the Bombay High Court. The said petition was allowed by order dated 30.4.2002 and the NOC dated 27.2.2001 granted by MHADA to the developer was set aside with a direction to MHADA to itself develop the property. The said decision was challenged by MHADA in C.A.

Nos.2046-47/2003 before this Court. The developers and some tenants also filed appeals. In those appeals, this Court by interim order dated 23.9.2002 called upon the State Government and MHADA to state whether the State Government would direct MHADA to take up and proceed with the construction. In pursuance of it, the State Government and MHADA held deliberations and MHADA prepared a scheme in consonance with the guidelines issued under the Urban Renewal Scheme by the Government read with DC Regulation 33(9). Thereafter, the State Government filed an affidavit dated 15.2.2003 wherein they set out the terms of a scheme as follows :

> "Under the scheme, the property can be developed by MHADA utilizing up to 4 FSI. The contractor/developer involved in the scheme shall construct 335 tenements for the existing tenements free of cost to MHADA. He shall get some areas for free sale which will be equivalent to 2.5 FSI minus the FSI required for construction of tenements for the tenants. He shall also construct additional tenements free of cost for MHADA to accommodate tenants in the Master List using part of the balance 1.5 FSI out the total 4 FSI available under the scheme. The said scheme can be implemented by MHADA involving contractor/developer who has consent of atleast 70% of the occupants of the property in question.
>
> In nutshell since MHADA does not have adequate funds to construct the houses for tenants, Government proposes after due consultations with MHADA, to execute the project through developer, who within 2.5 F.S.I. will construct free flats for 335 tenants. Remaining FSI out of 2.5 can be utilized by developer for his free sale flats.
>
> MHADA gets 4.00 F.S.I. Therefore, within remaining 1.5 F.S.I, it is proposed to construct 134 in the same premises, flats for those who are in the transit camp for which separate negotiations will be made with the developer.

In view of the resources crunch faced both by Government and MHADA, they both after discussion with each other have together decided the above course of action, for which Government requests the approval of the Supreme Court.

x x x x x

If the above scheme is approved by the Hon'ble Supreme Court, State Government shall issue appropriate guidelines for the purpose of the implementation of the reconstruction scheme by availing FSI in accordance with the provisions of DC Regulations 33(9) of the DC Regulation 1991. The guidelines shall prescribe transparent purpose of the implementation of the reconstruction scheme by availing FSI in accordance with the provisions of DC Regulations 33(9) of the DC Regulation 1991. The guidelines shall prescribe transparent procedure such as explaining the plans of the new building, municipal & other taxes likely to be incurred by the occupants, formation and registration of the Co-operative Housing Society, area to be utilized for the purpose of rehabilitation and free sale etc. as directed by the Hon. High Court in its judgment MHADA would be directed to complete the reconstruction scheme within the four corners of the administrative guidelines issued by the Government."

This Court considered the said scheme and by order dated 7.3.2003, recorded the acceptance thereto by MHADA and others also, barring some tenants, and accepted the said Scheme and disposed of the matter in terms of it.

5. In pursuance of the order of this Court, the State Government issued guidelines on 24.3.2003. The Mumbai Building Repair & Reconstruction Board ('MBRRB' for short, the third respondent herein), issued an NOC dated 23.5.2003 to the Developer for redevelopment of the said property jointly

by MHADA and the developer in pursuance of DC Regulation 33(9) read with Regulation 33(7). Thereafter, MHADA entered into an agreement dated 30.6.2003 with the developers (respondents 5 to 12) in regard to the development of the said property. In pursuance of it, the developer, after securing possession, has re-developed the property.

6. During the course of the execution of the development project, five tenants filed Writ Petition Nos.108/2003 and 3096/2003 challenging the subsequent NOC dated 23.5.2003 issued by third respondent in accordance with the order of this Court, approving the Scheme. The Bombay High Court by its judgment dated 16.2.2004 dismissed the said petitions and in the course of the said judgment, observed as under :-

"The NOC dated 23.5.2003 granted by MHADA pursuant to the directions given by the Supreme Court is now sought to be challenged primarily on the ground that the DC Regulation 33(7) has no application to the said property as DC Regulation 33(7) is applicable to cessed properties whereas the said property is acquired property, and therefore the state has committed an error in applying DC Regulation 33(7) and the NOC is invalid.....DC Regulation 33(9) is applicable to properties acquired by the State/MHADA whereas DC Regulation 33(7) apply to cessed properties. However, there is nothing in the provisions of DC Regulations 33(9) and 33(7) cannot be invoked simultaneously so that MHADA can get additional tenements in order to house dishoused persons as per the Master List. In fact both provisions were incorporated in the scheme submitted before the Supreme Court. The scheme approved by the Supreme Court specifically contemplate that the land, though vested in MHADA/State would be developed through the builder by invoking the provisions of DC Regulation 33(9) read with D C Regulation 33(7) of the D C Regulations."

7. Thereafter, the present appellants along with two others

(all previous occupants of the property) filed Writ Petition No.649/2005 seeking the following, among others, reliefs : (a) declaration that the re-development of Pimpalwadi property was not being done in accordance with law and the DC Regulations, and for a direction to respondents to carry out the re-development by removing the defects pointed out in the writ petition; (b) a direction to the developers to demolish the rehabilitation tenements constructed so far as they were not conforming to the DC Regulations; (c) for a direction to MHADA and MBRRB to construct the rehabilitation tenements at their own cost as per DC Regulations. However, when the said petition came up for hearing before the High Court, only two contentions were urged, presumably because the other contentions were covered by the decision of this Court and subsequent High Court order dated 16.2.2004. The first contention was that the area of each tenement to be constructed and delivered to the previous occupants should have, in addition to a carpet area of 225 sq. ft. in respect of the tenement, a balcony measuring 10% of the tenement area. The second contention was that the height of the tenements (height between roof and floor) should not be less than 2.9 M, instead of 2.7 M adopted by the developer. The High Court by its order dated 5.5.2005 disposed of the said writ petition. It held that the first contention could not be accepted as the Scheme was under DC Regulations and it did not require construction of a balcony in addition to the tenement measuring 225 sq. ft. In regard to the second contention, the High Court recorded the submission of the developer that the height of the units will be increased to 2.9 M in the buildings which were yet to be constructed.

8. The said judgment is challenged in this appeal by special leave by the appellants who were occupants. In the special leave petition, several contentions have been raised. When it was pointed out by the court that only two contentions were urged before the High Court (out of which one was conceded by the developer before the High Court, leaving one issue for decision), the learned counsel for the appellants

submitted that the appellants were pressing only one contention regarding the area of the tenements to be delivered to the previous occupants. It was contended that they should be delivered tenements of minimum carpet area of 225 sq.ft. as permanent alternative accommodation with a balcony in addition, which is of a minimum area of 22.5 sq.ft. (10% of the tenement area). Thus, the only question that arises for our consideration is whether the developer is bound to construct and deliver to the previous occupants, tenements with a balcony measuring a balcony area of a minimum area of 22.5 sq.ft. in addition to the minimum carpet area of 225 sq.ft.

9. The NOC dated 23.5.2003 issued by MBRRB and the Agreement dated 30.6.2003 between MHADA and the developer, require the developer to deliver to each occupant of the old building, a tenement with a carpet area equal to area occupied by him for residential purpose subject to minimum carpet area of 225 sq.ft. They do not require delivery of any additional balcony area. We extract below Clause (3) of the operative portion of the agreement dated 30.6.2003 :

> "The second party shall out of the 2.5 FSI, construct and hand over to the first party, 312 tenements for the residential tenants and 23 tenements for the non residential tenants of the said property and free sale tenements for the second party as per provisions under Appendix III of DCR 33(7)."

10. Not finding any support from the agreement dated 30.6.2003, the appellants attempted to seek support for their claim for balcony (with an area of 10% of the area of the tenement) with reference to DC Regulation No. 33(9) read with Regulation 35(2)(k) and Regulation 38(22). It is submitted that the development being a reconstruction under the Urban Renewal Scheme, it was governed by DC Regulation 33(9); that in regard to the developments of cessed buildings under DC Regulation 33(7) and development of slums under DC Regulation 33(10), the area of 225 sq.ft. would include the area

of balcony also, having regard to Clause(2) of Appendix III and Clause 1.2 of Appendix IV; that in regard to the development under DC Regulation 33(9) under the Urban Development Scheme, the balcony of an area of 10% of the tenement area) has to be provided in addition to the area of the tenement.

11. To find out whether there is any merit in the contention, we may now refer to the relevant Regulations:

> *"33(7) Reconstruction or redevelopment of cessed buildings in the Island City by Cooperative Housing Societies or of old buildings belonging to the Corporation or of old buildings belonging to the Police Department :-* For reconstruction/redevelopment to be under taken by Cooperative Housing Societies of existing tenants or by Co-op. Housing Societies of landlords and/or occupiers of a cessed buildings of 'A' category in Island City, which attracts the provisions of MHADA Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation and Department of Police, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra, constructed prior to 1940, the Floor Space Index shall be 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more.
>
> *33(9) Repairs and reconstruction of cessed buildings and Urban Renewal Scheme:-* For repairs & reconstruction of cessed buildings and Urban Renewal Scheme undertaken by the Maharashtra Housing and Area Development Authority or the Mumbai Housing and area Development Board or Corporation in the Island City, the FSI shall be 4.00 or the FSI required for rehabilitation of existing tenants / occupiers, whichever is more.
>
> *33(10) Rehabilitation of slum dwellers through owners/ developers/co-operative housing societies:-* For redevelopment of restructuring of censused slums or such

> slums whose structures and inhabitants whose names appear in the Legislative Assembly voters' list of 1985 by the owners/developers of the land on which such slums are located or by Cooperative Housing Societies of such slum dwellers a total floor space index of upto 2.5 may be granted in accordance with schemes to be approved by special permission of the Commissioner in each case. Each scheme shall provide inter-alia the size of tenements to be provided to the slum dwellers, the cost at which they are to be provided on the plot and additional tenements which the owner/developer can provide to accommodate/ rehabilitate *slum* dwellers/project affected persons from other areas etc. in accordance with the guidelines laid down in the Regulations in Appendix IV."
>
> *35. Floor Space Index Computation -*
>
> (1) *Floor Space Index/Built-up calculations* - The total area of a plot shall be reckoned in floor space index/built-up area calculations applicable only to new development to be undertaken hereafter as under: xxx xxx xxx
>
> (2) *Exclusion from FSI computation* - The following shall not be counted towards FSI:- xxx xxx xxx (k) Area of balconies as provided in sub-regulation (22) of Regulation 38.
>
> xxx xxx xxx

Sub-regulation (22) of Regulation 38 referred to in Regulation 35(2) is extracted below:

> *38(22) — Balcony* – In any residential zone (R-1) and residential zone with shop line (R-2), or in a purely residential building in any other zone, balconies may be permitted free of FSI at each floor, excluding the ground and terrace floors, of an area not more than 10 per cent of the area of the floor from which such balcony projects

subject to the following conditions:

x x x"

The relevant portions of Appendix III and Appendix IV which are referred in Regulation 33(7) and 33(10) are as under:

APPENDIX III

Regulation for the reconstruction or redevelopment of cessed buildings in the Island City by the Landlord and/or Co-operative Housing Societies.

[D.C. Regulation No. 33(7)]

1. (a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 per cent of the occupiers of the old building.

(b) All the occupants of the old building shall be re-accommodated in the redeveloped building.

2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.90 sq.mt. (225 sq.ft.) and/or maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHAD Act, 1976. In case of non-residential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

x x x x x

APPENDIX IV

[Regulation No.33(10)]

1. Applicability of the provisions of this Appendix : The following provisions will apply for redevelopment/ construction of accommodation for hutment/pavement-

dwellers through owners/developers/co-operative housing societies of hutment/pavementdwellers/public authorities such as MHADA, MIDC, MMRDA etc./Non-Governmental Organisations anywhere within the limits of Brihan Mumbai.

…….

1. *Right of the hutment dwellers:*

1.1. Hutment-dwellers, in the slum or on the pavement, eligible in accordance with the provisions of Development Control Regulation 33(10) shall, in exchange for their structure, be given free of cost a residential tenement having a carpet area of 20.90 sq. m. (225 sq.ft.) including balcony, bath and water closet, but excluding common areas.

1.2. Even those structures having residential areas more than 20.90 sq.m will be eligible only for 20.90 sq.m of carpet area. Carpet area shall mean exclusive of all areas under walls including partition walls if any in the tenement. Only 20.90 sq.mt. carpet area shall be given and if proposal contains more area, it shall not be taken up for consideration.

x x x x x"

12. The grievance of the appellants in the writ petition was that tenements constructed were of an area less than the required carpet area of 225 sq.ft, and that was a violation of the DC Regulations. The writ petition did not raise any contention about any requirement of providing a balcony of 10% of the area of the tenement. When the agreement between MHADA and developer did not require construction of a balcony and when the appellants had not even alleged in the petition that balcony was required to be constructed, we fail to understand that how the appellants could raise a contention during arguments before the High Court that they were entitled to a balcony in the tenement whose measurement should be

of 10% of the area of the tenement. It is not disputed that the inspection report showed that the extent of tenement was not less than 225 sq.ft. and the appellants had agreed to take the tenements subject to the result of the case.

13. Let us consider whether Regulation 35(2)(k) and 38(22) are of any assistance to appellants. Regulation 38(22) relates to 'Balconies' and provides that in any residential zone, balconies may be permitted free of FSI at each floor (excluding ground and terrace floors) of an area not more than 10% of the area of the floor from which such balcony projects. Regulation 35 deals with Floor Space Index computation and Note (ii) thereof relates to exclusion from FSI computation. One of the items to be excluded from the FSI computation vide entry (k) is the area of balconies which are provided under Regulation 38(22). The effect of Regulation 35 (2)(k) read with Regulation 38(22) is that if a balcony is constructed as per Regulation 38(22) it will be excluded for the purpose of calculating FSI. These Regulations by no stretch of imagination can be construed as casting a liability upon the developer reconstructing/developing a property under the Urban Renewal Scheme to construct a balcony (whose extent is 10% of the area of the tenement) when constructing and delivering tenements to the previous occupants of the demolished building. The area to be given to such occupants is clearly specified in Regulation 33(7) read with Appendix III (Clause 2), the NOC and the agreement. An old occupant is entitled to a tenement only under Regulation 33(7) and not Regulation 33(9). Regulation 33(9) was invoked only to get additional FSI of 1.5 by MHADA. We may at this juncture note that the question whether Regulation 33(9) will apply as contended by the appellant or Regulation 33(7) read with Regulation 33(9) will apply, as contended by the respondents, is academic and not relevant for the purpose of ascertaining whether the appellants as old occupants are entitled to any additional balcony area.

13. Under the Scheme approved by this Court, MHADA

which did not have adequate funds for constructing tenements, proposed to execute the project through a developer. The arrangement as per the Scheme was that the benefit of Regulation 33(9) was to be taken only for utilizing the higher FSI floor and the development by the developer will be governed by DC Regulation 33(7) read with Appendix III. Appendix III requires that each occupant to be rehabilitated should be given a minimum carpet area of 225 sq.ft. As per the Scheme approved, the contractor had to construct 335 tenements for the rehabilitation of the existing occupants free of cost and each tenement was to be of an area of 225 sq.ft. The Scheme did not contemplate construction and delivery of any balcony in addition to the 225 sq.ft. carpet area. In so far as the area to be delivered to the previous occupants, the extent is clear, that is 225 sq.ft. without any balcony. Further, the assumption of the appellants that if the matter had been governed by Regulation 33(9), the tenement measurement would have been 225 sq.ft. plus a balcony of a minimum measurement of 10% of the 225 sq.ft., is baseless as Regulation 33(9) does not require it. Be that as it may.

14. We therefore find no merit in this appeal and the same is dismissed.

N.J. Appeal dismissed.

RASID JAVED & ORS. ETC. ETC.
v.
STATE OF U.P. & ANR. ETC. ETC.
(Civil Appeal No. 5951 of 2002)

JULY 5, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Motor Vehicle Act, 1988:

s. 102(1) – Cancellation or modification of scheme – Inter-state route – Saharanpur-Delhi route and other routes – 1993 Scheme whereby the entire Saharanpur-Delhi route became fully nationalized for exclusive operation by State Transport Undertakings – Proposal to modify the 1993 Scheme by State Government – Issuance of Notification dated 16.04.1999 u/s. 102(1) – Objections invited and heard by Hearing Authority – Hearing Authority approving the proposed modification that private operators be allowed to ply their vehicles – However, State Government issued Notification dated 15.04.2000 u/s. 102(1) r/w s. 21 of the 1897 Act, to rescind Notification dated 16.04.1999 – Validity of – Held: Notification dated 15.04.2000 is valid and does not suffer from any legal flaw – There was no impediment for State Government in exercising its power to rescind the Notification dated 16.04.1999 since the order of Hearing Authority cannot be treated as order of State Government u/s. 102(1) – General Clauses Act, 1897 – s. 21.

s.102 – Cancellation or modification of scheme – Extent of authority to Hearing Authority – Held: Delegatee must confine his activity within four corners of powers vested in him and if he acts beyond that, his action cannot have any legal sanction unless ratified by delegator – Distinction must be maintained where hearing authority is empowered by State Government to hear objections and approve proposed

modification or modify the approved scheme and a case where it is authorized to hear objections relating to proposed modification to the approved scheme – On facts, Hearing Authority not authorized to approve the proposed modification or modify the approved scheme – Order of Hearing Authority being in excess of authority given to him, cannot be construed as final order of approval u/s. 102 (1).

Permit granted to appellant relating to Saharanpur-Delhi route – Status of appellant's permit – Held: Said permits related to routes which overlapped Delhi-Saharanpur notified route – By the 1959 Scheme and 1993 Scheme, entire Saharanpur-Delhi route became fully nationalized for exclusive operation by State Transport Undertakings and no private operator could operate on the said route – Regional Transport Authority cannot either renew permit of such private operators or give any fresh permit in respect of route which overlaps notified route – Thus, appellants' permits stood cancelled.

Motor Vehicles Act, 1939: s. 68 C and 68D – Publication of a scheme of road transport service by State Transport Undertakings – Effect of – Held: No person other than STU may operate on the notified area or notified route except as provided in the scheme itself.

General Clauses Act, 1897: s. 21 – Invocation of – Held: Authority which has power to issue notification has undoubted power to rescind or modify the notification in the like manner – On facts, there was no impediment for State Government in exercising its power u/s. 102 of the 1988 Act r/w s. 21 to rescind the Notification dated 16.04.1999 – Order of Hearing Authority was not an order of approval u/s.102(1) of the 1988 Act – Power of State Government to rescind Notification dated 16.04.1999 did not get exhausted – Motor Vehicles Act, 1988 – s. 102(1).

The inter-State route of Saharanpur-Delhi became a

notified route under the 1959 Scheme. It was provided in the Scheme that the persons other than the State Transport Undertaking (STU) would not be permitted in plying any road transport service on the said route or portion thereof except as stated therein. The private operators challenged the Scheme. The High Court directed the State Government not to enforce the 1959 Scheme against the said operators. This Court in **Jeewan Nath Wahal's* case upheld the order of High Court. Thereafter, pursuant to the decision in ***Shri Chand's* case, the UPSRTC published a draft scheme on February 13, 1986 for 39 routes: Saharanpur-Delhi and others. While the said draft scheme was pending, the Motor Vehicles Act, 1939 was repealed and the Motor Vehicles Act, 1988 came into force. Subsequently, some operators were granted permits for Saharanpur to Ghaziabad via Shahdara routes. The said grant of permits was challenged in ****Ram Krishna Verma's* case and it was held that the nationalization of Saharanpur - Delhi route by the 1959 Scheme is operative to the total exclusion of every operator except UPSRTC and 50 operators whose objections were upheld by the High Court. The permits granted to the private operators were quashed. Thereafter, the competent authority approved the 1986 draft Scheme and directed the same to be published. On May 29, 1993, the approved scheme-1993 Scheme was published in the Gazette.

In the Notification published on April 16, 1999 under section 102(1) of the Motor Vehicles Act, 1988 the State Government proposed to modify the scheme notified on May 29, 1993 by providing that permit holders shall be allowed to operate their buses along with the Uttar Pradesh State Road Transport Corporation (UPSRTC) on the said route provided they got their permits counter-signed by State of Haryana for plying their buses in that State. Objections were invited. The Hearing Authority-Z,

Special Secretary and Additional Legal Remembrancer heard the affected parties. It passed the Order dated October 11, 1999 that proposed modification be approved-private operators be allowed to ply their vehicle. However, the State Government by a Notification dated April 15, 2000 in exercise of the powers under section 102 of 1988 Act read with section 21 of General Clauses Act, 1897 rescinded the Notification dated April 16, 1999. The private operators filed writ petition questioning the Notification dated April 15, 2000 issued by the State of U.P. rescinding the earlier Notification dated April 16, 1999. The writ petitions were dismissed. Hence these appeals.

Dismissing the appeals, the Court

HELD: 1. The Notification dated April 15, 2000 is valid and does not suffer from any legal flaw. [Para 44] [568-C-D]

2. The permit granted to the appellants related to routes which overlapped the Delhi-Saharanpur notified route. [Para 28] [559-B]

<u>The effect of publication of a scheme under Section 68D:</u>

3. Chapter IV-A of the Motor Vehicles Act, 1939 makes special provisions relating to the State Transport Undertakings (STUs). Section 68-C provides for preparation and publication of scheme of road transport service by an STU. The objections to the draft scheme published under section 68-C may be filed under section 68-D. Sub-section (2) of section 68-D provides that the State Government after considering the objections and hearing the objectors and the STU may approve or modify the scheme. Sub-section (3) of section 68-D provides that the scheme as approved or modified under sub-section (2) shall be published in the Official Gazette by the State Government and the same shall then

become final and called 'approved scheme'. Once the scheme has been published under sub-section (3) of section 68-D, section 68-FF imposes restriction on grant of permits in respect of notified area or notified route. From these provisions, it is apparent that once a scheme is published under section 68-D in relation to any area or route or portion thereof, whether to the exclusion, complete or partial of other persons or otherwise, no person other than the STU may operate on the notified area or notified route except as provided in the scheme itself. [Para 30] [559-F-H; 500-A-B]

Adarsh Travels Bus Service and Anr. v. State of U.P. and Ors. **(1985) 4 SCC 557;** *Mysore State Road Transport Corporation v. Mysore State Transport Appellate Tribunal* **(1974) 2 SCC 750;** *H.C. Narayanappa and Ors.* v. *State of Mysore and Ors.* **(1960) 3 SCR 742;** *Ram Krishna Verma and Ors. v. State of U.P. and Ors.* **(1992) 2 SCC 620, relied on.**

The status of appellants' permits

4.1. The Saharanpur-Delhi route became a notified route under the 1959 Scheme. The Saharanpur-Delhi route on its nationalization stood frozen under the 1959 Scheme against everyone except 50 operators. The draft scheme published on February 13, 1986 was confined to those 50 operators alone and not to other private operators. By the 1993 Scheme, Saharanpur-Delhi route stood frozen against 50 operators as well. The effect of these two schemes (1959 Scheme and 1993 Scheme), thus, has been that the entire Saharanpur-Delhi route became fully nationalized for the exclusive operation by the STU i.e., UPSRTC and no private operator could operate on the said route. Thus, the Regional Transport Authority cannot either renew the permit of such private operators or give any fresh permit in respect of a route which overlaps the notified route, the appellants' permits stood cancelled and in any case these permits lost their

legal significance and sanctity. [Para 33] [561-A-G; 562-A]

4.2. The whole exercise undertaken by the State Government under sub-section (1) of section 102 of 1988 Act proposing to modify the 1993 Scheme relating to Saharanpur-Delhi notified route was misconceived as the permits specified in that Notification did not exist in law. The finding of the High Court that the modification proposal dated April 16, 1999 proceeded on the misconception that the appellants were holding permits on the concerned route cannot be said to be unjustified. Moreover, in the absence of any proposal to modify the 1959 Scheme, the modification proposed in the 1993 Scheme vide Notification dated April 16, 1999 was meaningless. The submission that the 1959 Scheme merged in the 1993 Scheme has no merit. The 1959 Scheme was approved under 1939 Act and even after repeal of 1939 Act by 1988 Act, the State Government was competent to prepare fresh scheme by following the procedure contemplated in sections 99 and 100 or modify that scheme under section 102 of the 1988 Act but the proposed modification published in the Notification on April 16, 1999 does not seek to modify the 1959 scheme at all. Since the Notification dated April 16, 1999 is, *ex facie,* misconceived and meaningless as regards Saharanpur-Delhi route, the proceedings taken pursuant thereto by the Hearing Authority and his decision dated October 11, 1999 also have no legal effect. [Para 33] [562-A-F]

Jeewan Nath Wahal v. State Transport Appellate Tribunal* **(C.A. No.1616 of 1968) decided by S.C. on 03.04.1968; ***Shri Chand v. Govt. of U.P. Lucknow and Ors. Citizen Council for Public Service v. Govt. of U.P. and Anr.* **(1985) 4 SCC169;** ****Ram Krishna Verma and Ors. v. State of U.P. and Ors.* **(1992) 2 SCC 620;** *Nisar Ahmad and Ors. v. State of U.P. and Ors.* **1994 Suppl. (3) SCC 460;** *Gajraj*

Singh and Ors. v. *State of U.P. and Ors.* **(2001) 5 SCC 762, referred to.**

Section 102 of the 1988 Act and the extent of authority to the Hearing Authority

5.1. A close look at section 102 of the Motor Vehicles Act, 1988 would make it manifestly clear that modification of the approved scheme may be done by the State Government in the public interest after giving opportunity of being heard in respect of proposed modification to the STU and the persons likely to be affected by the proposed modification. The modification proposed is required to be published in the Official Gazette and in one of the newspapers in the regional languages circulating in the concerned area under section 102(2). It was submitted that in the proposed modification published in the Official Gazette on April 16, 1999, the authority to hear the objections/representations was given to Z-Special Secretary and Additional Legal Remembrancer and the said Hearing Authority after hearing the objections of the affected persons and the UPSRTC approved the proposed modification and rejected the objections received in this regard and the approval by the Hearing Authority of the proposed modification by his order dated October 11, 1999 is the approval of the State Government. It cannot be said that the order dated October 11, 1999 of the Hearing Authority approving the proposed modification published in the Official Gazette dated April 16, 1999 is an order of the State Government modifying the approved scheme of 1993 under section 102(1) of the 1988 Act because Z was given authority to hear the representations received by the State Government to the proposed modification but no authority was given to him to approve the proposed modification or modify the approved scheme. The Notification dated April 16, 1999 does not empower the Hearing Authority to approve or modify the scheme; he has only been empowered to hear

the objections. That a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted. But based on such principle the limited authority of hearing given to the Hearing Authority by the State Government cannot be treated as enlarged in its scope. A delegatee must confine his activity within four corners of the powers in vested in him and if he has acted beyond that, his action cannot have any legal sanction unless ratified by the delegator. [Para 35] [563-H; 564-A-H; 565-A]

Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr. **AIR 1959 SC 308, referred to.**

5.2. A distinction must be maintained where the hearing authority is empowered by the State Government to hear objections and approve the proposed modification or modify the approved scheme and a case where the hearing authority is authorized to hear the objections/representations relating to the proposed modification to the approved scheme. In the latter case, the authority delegated to the Hearing Authority is limited and he is not authorized to approve the proposed modification or modify the approved scheme. The instant case falls in the latter category and accordingly the order of the Hearing Authority dated October 11, 1999 is in excess of the authority given to him and cannot be construed as a final order of approval under section 102 (1) of the 1988 Act. Whether such limited authority of hearing to the Hearing Authority makes any legal sense is an aspect for consideration by the State Government. Suffice, however, to say that it was not open for the Hearing Authority to approve the proposed modification or modify the proposed scheme. [Para 36] [565-B-E]

Invocation of Section 21 of General Clauses Act : whether valid

6.1. Having held that the order of the Hearing Authority dated October 11, 1999 is in excess of the authority given to him and that the said order has no legal effect, there was no impediment for the State Government in exercising its power under section 102 of the 1988 Act read with section 21 of the General Clauses Act, 1897 to rescind the Notification dated April 16, 1999. [Para 37] [565-F-G]

Kamla Prasad Khetan and Anr. v. Union of India **AIR 1957 SC 676, referred to.**

6.2. Under section 21 of the General Clauses Act, an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. In the instant case, there is no doubt that the Notification dated April 15, 2000 has been made in the same manner as the earlier Notification dated April 16, 1999. Since the order of the Hearing Authority dated October 11, 1999 is not an order of approval under section 102(1) of the 1988 Act and cannot be treated as such, the power of the State Government to rescind the Notification dated April 16, 1999 did not get exhausted. The submission that the draft Notification dated April 16, 1999 merged in the order dated October 11, 1999 is fallacious and devoid of any substance. [Para 40] [566-E-G]

6.3. It cannot be said that even otherwise the material on record demonstrated that the order of the modification dated October 11, 1999 was approved by the Principal Secretary of the Department and, thus, there was an approval by the State Government. Except the decision of the Hearing Authority dated October 11, 1999 there is nothing on record to conclude that the State Government had approved the proposed modification as

notified on April 16, 1999. Even if it is assumed that an executive action not expressed to be made in the name of the Governor as contemplated under Article 166(1) of the Constitution may not vitiate such action as nullity. [Para 41] [566-H; 567-A-C]

6.4. The non-compliance with the provisions of either of clauses of Article 166 would lead to the result that order in question would lose the protection which it would otherwise enjoy had the proper mode for expression and authentication been adopted, but then there has to be some formal order by the State Government under section 102(1) of the 1988 Act. Moreover, there is nothing on record even to indicate that the order dated October 11, 1999 of the Hearing Authority was communicated to the appellants or any of the affected parties. The order dated October 11, 1999 is not an order as contemplated under Section 102 (1) of the 1988 Act by the State Government approving the modification proposed in the Notification dated April 16, 1999. [Para 41] [567-C-E]

Dattatraya Moreshwar Pangarkar v. The State of Bombay and Ors, **(1952) 1 SCR 612, relied on.**

6.5. The order of the Hearing Authority dated October 11, 1999 cannot be treated as an order of the State Government under section 102(1) of the 1988 Act. [Para 42] [567-F-G]

6.6. The submission that the opportunity of hearing was required to be given to the appellants before issuance of Notification dated April 15, 2000 has no merit since this submission is founded on the premise that the order of the Hearing Authority dated October 11, 1999 is the order of the State Government. What section 21 of the General Clauses Act requires is that the authority empowered to issue notification must exercise its power to rescind such notification in the like manner. The Notification dated April 15, 2000 has been made in the

same manner as the earlier Notification dated April 16, 1999. [Para 43] [567-G-H; 568-A-B]

Samsher Singh v. State of Punjab and Anr. **(1974) 2 SCC 831;** *Capital Multi-purpose Co-operative Society Bhopal and Ors. v. State of M.P. and Ors.* **(1967) 3 SCR 329;** *A. Sanjeevi Naidu, Etc. v. State of Madras and Anr.* **(1970) 1 SCC 443;** *M/s. Nehru Motor Transport Co-operative Society Ltd. and Ors. v. State of Rajasthan and Ors.* **AIR 1963 SC 1098;** *Afsar Jahan Begum (Smt) and Ors. v. State Of M.P. and Ors.* **(1996) 8 SCC 38;** *C.P.C. Motor Service, Mysore v. State of Mysore and Anr.* **AIR 1966 SC 1661;** *Karnataka State Road Transport Corporation v. Ashrafulla Khan and* Ors. **(2002) 2 SCC 560, referred to.**

Case Law Reference:

(1985) 4 SCC169	**Referred to.**	**Para 11,12, 33,**
(1992) 2 SCC 620	**Referred to.**	**Para 14, 15, 16, 23, 32, 33**
(1974) 2 SCC 831	**Referred to.**	**Para 21**
(1967) 3 SCR 329	**Referred to.**	**Para 21**
(1970) 1 SCC 443	**Referred to.**	**Para 21**
AIR 1959 SC 308	**Referred to.**	**Para 21, 35**
AIR 1963 SC 1098	**Referred to.**	**Para 21**
(1996) 8 SCC 38	**Referred to.**	**Para 26**
AIR 1966 SC 1661	**Referred to.**	**Para 26**
(2002) 2 SCC 560	**Referred to.**	**Para 26**
(1985) 4 SCC 557	**Relied on.**	**Para 30**
(1974) 2 SCC 750	**Relied on.**	**Para 31**
(1960) 3 SCR 742	**Relied on.**	**Para 32**
1994 Suppl.(3) SCC 460	**Referred to.**	**Para 33**
(2001) 5 SCC 762	**Referred to.**	**Para 33**
AIR 1957 SC 676	**Referred to.**	**Para 39**
(1952) 1 SCR 612	**Relied on.**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5951 of 2002.

From the Judgment & Order dated 23.4.2002 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 24070 of 2000.

WITH

C.A. Nos. 4894, 4895 of 2010.

Dinesh Dwivedi, Nagendra Rai, P.N. Gupta for the Appellants.

Ratnakar Dash, Shail Kr. Dwivedi, Addl. A.G., Raj Kumar Gupta, Rajeev Kr. Dubey, Kamlendra Mishra, Vandana Mishra, Pramod Swarup, Rani Chhabra, Garima Prashad, Neha Goyal for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Delay condoned and leave granted in SLP(C) No.820 of 2003. Leave also granted in SLP (C) No. 21707 of 2002. The applicants in the I.As. for impleadment are allowed to intervene.

Introduction

2. Five writ petitions by various operators came to be filed before High Court of Judicature at Allahabad questioning the Notification dated April 15, 2000 issued by the State of U.P. rescinding the earlier Notification dated April 16, 1999 and for

consequential reliefs. The Division Bench of Allahabad High Court heard these writ petitions together and by a common judgment dated April 23, 2002 dismissed all the writ petitions. It is from this common judgment that these three appeals by special leave arise.

Facts

3. The brief facts in relation to these appeals may be set out first.

A. Appeal by Rasid Javed and others

4. The appellants in this appeal claim that they have been operators on Saharanpur-Karnal route (inter-State route) via Jandhera – Rampur – Gangoh – New Yamuna Bridge. In the Notification published on April 16, 1999 under Section 102(1) of the Motor Vehicles Act, 1988 (for short, 'the 1988 Act'), the State Government proposed to modify the scheme notified on May 29, 1993 by providing that permit holders bearing Nos. 168/94, 169/94. 170/94, 171/94, 172/94, 173/94, 222/94, 233/94, 23/95, 24/95, 25/95, 739/89, 242/94, 764/90, 787/90, 772/90, 800/90 and 784/90 shall be allowed to operate their buses along with the Uttar Pradesh State Road Transport Corporation (UPSRTC) on Saharanpur-Karnal route (via Jandhera-Rampur-Gangoh-New Yamuna Bridge) provided that they get their permits counter-signed by State of Haryana for plying their buses in that State. By the said Notification, objections were invited from the UPSRTC and the persons likely to be affected by the proposed modification and Shri Zamirruddin, Special Secretary and Additional Legal Remembrancer, Uttar Pradesh was appointed Hearing Authority to hear and decide the objections that may be received. Pursuant to the said Notification, objections were received and the Hearing Authority after hearing the affected parties held in its Order dated October 11, 1999 that proposed modification be approved, i.e. private operators be allowed to ply their vehicles. According to

the appellants, they are covered by the permits mentioned at Sl. No. 1 [column 4 - (c)(iii)] of the Schedule to the Notification dated April 16, 1999.

B. Appeal by Masood Ahmad and others

5. The appellants in this appeal claim to be permit holders in respect of Saharanpur-Loni route via Shamli-Baghpat-Marginal Bandh Road – ISBT Delhi. According to them, they are covered by Sl. No.1 [column 4 - (c)(i)] of the Schedule to the Notification dated April 16, 1999. By the said Notification, the approved scheme dated May 29, 1993 was sought to be modified and it was proposed to allow these operators to operate their buses along with the UPSRTC on Saharanpur-Loni via Shamli-Baraut-Baghpat-Marginal Bandh Road – ISBT Delhi route.

C. Appeal by Raghunandan Goyal and Others

6. The appellants claim to have been granted inter-State permits by the State Transport Authority (STA), Uttar Pradesh for an inter-State route known as Meerut-Chandigarh via Baraut-Shamli-Gangoh-Saharanpur-Sarsawa-Yamuna Nagar-Ambala. Their case is that in the draft modification published in the Notification dated April 16, 1999, their permits are mentioned at Sl. No. 1 [column 4 - (c)(ii)] of the Schedule thereof. By the said modification, it was proposed to allow these operators to operate their buses along with the UPSRTC on Meerut-Chandigarh via Baraut-Shamli-Gangoh-Saharanpur-Sarsawa-Yamuna Nagar-Ambala route provided that the permit holders get their permits counter-signed by the State Government of Haryana for plying their buses in that State.

Saharanpur-Delhi route (the 1959 Scheme) and previous litigation

7. On February 26, 1959, a draft scheme was published under Section 68-C of the Motor Vehicles Act, 1939 ('the 1939

Act' for short) in respect of the inter-State route viz; Saharanpur – Delhi proposing to authorize the State Transport Undertaking (STU) of Uttar Pradesh to operate stage carriages on the said route to the exclusion of all other operators.

8. On September 29, 1959 the State Government approved the said draft scheme and published it under sub-section (3) of Section 68-D of 1939 Act (hereinafter referred to as 'the 1959 Scheme'). The 1959 Scheme provided 50 (25 each way) State Road Transport Services or more as may appear necessary from time to time on that route or portion thereof from November 1, 1959 or thereafter. It was provided in the approved scheme that the persons other than the STU will not be permitted in plying any road transport service on the said route or portion thereof except as mentioned therein.

9. A group of writ petitions, one by 32 operators and the other by 18 operators was filed before the High Court of Allahabad questioning the validity of the 1959 Scheme. The High Court vide its judgment dated October 30, 1961 directed the State Government not to enforce the 1959 Scheme against 32 operators who had filed the first batch of writ petitions and it was directed that the State Government should hold a fresh enquiry into the question whether the scheme should be approved or not. Similar judgment was passed in the other batch of writ petitions relating to 18 operators on February 7, 1962.

10. The aforesaid judgments of Allahabad High Court were affirmed by this Court in *Jeewan Nath Wahal v. State Transport Appellate Tribunal* (C.A. No.1616 of 1968) decided on 03.04.1968. In *Jeewan Nath Wahal,* it was held that the 1959 Scheme was operative and not affected and its enforcement was prohibited against 50 operators only who approached the High Court. It was further held that the STU has the exclusive right to ply its vehicles on the notified route (Saharanpur – Delhi route).

11. Two writ petitions, one by *Shri Chand*[1] and the other by *Citizen Council for Public Service* were directly filed before this Court under Article 32 of the Constitution in the year 1985 challenging the validity of proceedings which were pending before the State Government pursuant to a draft scheme published on February 26, 1959. This Court allowed these writ petitions on August 23, 1985 by the following order :

> "……In the instant case the delay is in the order of 26 years. In view of the above decisions we allow these writ petitions and quash the impugned scheme published on February 26, 1959 and the proceedings which have taken place till now pursuant thereto and direct the State Government not to proceed with the hearing of the matter. It is now open to the State Transport Undertaking of Uttar Pradesh to publish a fresh draft scheme under Section 68-C of the Act if it is of opinion that it is necessary to do so. We, however, permit the State Transport Undertaking to run the stage carriage vehicles which it is now running on the route in question under permits issued pursuant to the scheme which is now quashed, till February 28, 1986 or till they are replaced by temporary permits to be issued under sub-section (1-A) of Section 68-F of the Act after the publication of a fresh draft scheme or by permits issued under Chapter IV of the Act, whichever is earlier."

12. Pursuant to the aforesaid decision in *Shri Chand's case*[1], the UPSRTC published a draft scheme on February 13, 1986 for 39 routes; Saharanpur – Delhi (Saharanpur-Nanauta-Thanabhawan-Shamlikandhla – Baraut – Baghpat – Loni-Delhi) being the 1st Item in the draft scheme.

The 1988 Act and matters before this Court in respect of Saharanpur-Delhi route

1. *Shri Chand v. Govt. of U.P., Lucknow & Ors.*
Citizen Council for Public Service v. Govt. of U.P. & Anr. [(1985) 4 SCC 169]

13. While the said draft scheme was pending, the 1939 Act was repealed and the 1988 Act came into force with effect from July 1, 1989.

14. It appears that immediately after the 1988 Act came into force, two things happened viz; (one) some operators were granted permits for Saharanpur to Ghaziabad via Shahdara routes and (two) the Hearing Authority held that the draft scheme published on February 13, 1986 by the UPSRTC under the 1939 Act had lapsed by operation of Section 100 (4) of the 1988 Act. Ram Krishna Verma and few others filed writ petitions in the High Court of Allahabad challenging the grant of permits for Saharanpur to Ghaziabad via Shahdara route while the UPSRTC challenged the order of the Hearing Authority by a separate writ petition. The writ petition filed by the UPSRTC was dismissed by Allahabad High Court on March 16, 1990. The writ petitions filed by Ram Krishna Verma and others were also dismissed by the Allahabad High Court on July 23, 1990. Special leave petitions were filed against the aforesaid judgments before this Court in which leave was granted. These appeals (*Ram Krishna Verma and Ors. v. State of U.P. & Ors*.[2]) were allowed vide judgment dated March 31, 1992. This Court held that the nationalization of Saharanpur – Delhi route by the 1959 Scheme is operative to the total exclusion of every operator except UPSRTC and 50 operators whose objections were upheld by the High Court. In the operative order, this Court quashed the permits granted to the private operators under Section 80 of the 1988 Act on the respective routes, parts or portions of the nationalized routes or February 13, 1986 draft scheme.

15. After decision of this Court in *Ram Krishna Verma*[2], the competent authority approved the Scheme and directed the same to be published. On May 29, 1993, the approved scheme (for short, 'the 1993 Scheme') was published in the Gazette. At Serial No. 1 of the 1993 Scheme is Saharanpur-Delhi route.

2. (1992) 2 SCC 620.

16. The controversy with regard to the extent and effect of the draft scheme dated February 13, 1986 and the 1993 Scheme vis-à-vis the 1959 Scheme relating to Saharanpur-Delhi notified route reached this Court on more than one occasion. We have noticed some of these decisions in earlier part of the judgment and shall consider this aspect further a little later. Suffice it to state here that the 1993 Scheme came to be published pursuant to decision of this Court in *Ram Krishna Verma*[2].

Present controversy

17. By a Notification published on April 16, 1999, the State Government, in exercise of the powers under sub-section (1) of Section 102 of the 1988 Act proposed to make modification in the 1993 Scheme to the extent mentioned in column 4 of the Schedule appended thereto. In respect of Saharanpur-Delhi route modification proposed was as follows :

"Sl. No.	Notification No. and date By which the Routes were Notified.	Name of the notified route in which the modification Is proposed.	Modification proposed
1.	2.	3.	4.
1.	No. 1635/30.2.93 565'85 dated May 29, 1993	Saharanpur-Delhi & 38 Delhi & 38 other routes	In the said scheme after Clauses (b) of the following clause shall be inserted, namely : (c) Notwithstanding anything contained in clauses (a) and (b) the private bus operator; (i) holding permit numbers P.S.T.P./ MPMV 1/89, 2/89, 3/ 89, 4/89, 5/89, 6/89, 7/ 89, 8/89, 9/89, 10/89,

11/89, 12/89, 13/89, 14/89, 16/89, 17/89, 18/89, 19/89, Shall be allowed to operate their buses alongwith U.P.S.R.T.C. on the route namely, Saharanpur-Loni Via-Shamali-Baraut-Baghpat-Marginal Bandh Road-ISBT Delhi.

(ii) holding permit numbers P.S.R.T.P. 303/89, P.S.T.P. 304/89 and, P.S.T.P. 305/89, shall be allowed to operate their buses alongwith U.P.S.R.T.C. on the Route namely Meerut-Chandigarh via Baraut-Shamli-Gangoh-Saharanpur–Sarsawa-Yamuna–Ambala; and

(iii) holding permit numbers 168/94, 169/94, 170/94, 171/94, 172/94, 173/94, 222/94, 233/94, 23/95, 24/95, 25/95, 739/89, 242/94, 764/90, 787/90, 772/90, 800/90, 784/90, shall be allowed to operate their buses alongwith U.P.S.R.T.C. on the route namely :- Saharanpur-Karnal via Jandhera-Rampur-Gangoh – Nea Yamuna Bridge :

Provided that the permit Holders sub-clauses (ii) and (iii) above shall get their permits counter-signed by the State Government of Haryana for plying their buses in the State of Haryana. ”

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18. The Notification provided that the UPSRTC and any other person likely to be affected by the proposed modification may make representations within 30 days from the date of publication of the Notification in the Gazette and that the representations so received will be heard by the Hearing Authority Shri Zamiruddin, Special Secretary and Additional Legal Rememberancer, Uttar Pradesh.

19. In pursuance thereof various representations were received. The Hearing Authority after hearing the concerned parties who made the representations passed an order on October 11, 1999 approving the notified proposed modification and the objections presented by the UPSRTC and other objectors were dismissed.

20. The State Government, however, by a Notification dated April 15, 2000 in exercise of the powers under Section 102 of 1988 Act read with Section 21 of General Clauses Act, 1897 rescinded the Notification dated April 16, 1999.

Main submissions of the parties

21. Mr. Dinesh Dwivedi, learned senior counsel led the arguments on behalf of the appellants. He argued that it was not open to the State Government to withdraw the Notification dated April 16, 1999 after it had been approved by the Hearing Authority by his order dated October 11, 1999. According to him, the order passed by the Hearing Authority on October 11,

1999 is the order of the State Government under Section 102(1) and (2) of the 1988 Act. It is so because in the draft Notification dated April 16, 1999, Shri Zamirudeen, Special Secretary and Additional Legal Remembrancer was appointed as the Authority to hear the objections and he was acting as the State Government under the U.P. Rules of allocation of business. In this regard, learned senior counsel placed reliance on three decisions of this Court, viz., *Samsher Singh* v. *State of Punjab and another*[3]; Capital *Multi-purpose Co-operative Society Bhopal and others* v. *State of M.P. and others*[4] and A. *Sanjeevi Naidu, Etc.* v. *State of Madras and another*[6]. Mr. Dinesh Dwivedi also submitted that decision under Section 102(1) of the 1988 Act has to be by the same Authority who heard the objections and there could not be divided responsibility of a quasi judicial act. He sought support from a decision of this Court in *Gullapalli Nageswara Rao and others* v. *Andhra Pradesh State Road Transport Corporation and another*). He further argued that once the decision has been taken by the Competent Authority then the State Government cannot modify that decision because it is a quasi judicial decision. He placed reliance on M/s. *Nehru Motor Transport Co-operative Society Ltd. & Ors.* v. *State of Rajasthan & Others*[7]. In the alternative, learned Senior Counsel submitted that even otherwise the material on record demonstrated that the order of modification dated October 11, 1999 was approved by the Principal Secretary of the Department.

22. Mr. Dinesh Dwivedi, learned senior counsel would also contend that approval order passed under Section 102(1) and (2) was not required to be published in the Official Gazette. He invited our attention to Section 68-E of 1939 Act and Sections

3. (1974) 2 SCC 831.
4. (1967) 3 SCR 329.
5. (1970) 1 SCC 443.
6. AIR 1959 SC 308.
7. AIR 1963 SC 1098.

100(3) and 102 of 1988 Act to indicate the difference in the two provisions. He further submitted that Section 21 of the General Clauses Act, 1897 is not at all attracted as the power that was sought to be exercised has been expressly provided in Section 102 of the 1988 Act.

23. While dealing with the effect of the draft proposal dated April 16, 1999 and whether the 1993 Scheme superseded the 1959 Scheme, Mr. Dinesh Dwivedi submitted that there could not be operation of two notified schemes in respect of Saharanpur-Delhi route and consequently the judgment of this Court in *Ram Krishna Verma2* has to be read in the light of the provisions of law and not in contravention of the provisions of law. Learned senior counsel submitted that the 1959 Scheme has been superseded by the 1993 Scheme and that is what the State Government also understood. He also assailed the judgment of the High Court and submitted that writ petitions have been dismissed on the grounds contrary to law. Learned senior counsel submitted that the appellants have been granted permits validly in the year 1989 which have been renewed in the year 1994 and the High Court overlooked the fact that revocation of permits by virtue of the decision of this Court in *Ram Krishna Verma2* implied only revocation to the extent of only overlapping portion of Delhi-Saharanpur route. He, thus, submitted that appellants' permits are valid as far as non-notified portion is concerned.

24. Mr. Nagendra Rai, learned senior counsel appearing for the appellants in Civil Appeal No. 5951 of 2002 adopted the arguments of Mr. Dinesh Dwivedi and submitted that the 1959 Scheme stood modified by the 1993 Scheme published on May 29, 1993 and that for the same route, there could not be two approved schemes. He submitted that the approval order dated October 11, 1999 by the Hearing Authority is not passed by virtue of any delegation of power nor any right of appeal is available against the said order and as such the order dated October 11, 1999 is a final order of the State

Government in terms of Section 102 of 1988 Act and required no publication in the Official Gazette.

25. Mr. P.N. Gupta, learned counsel while adopting the arguments of Mr. Dinesh Dwivedi and Mr. Nagendra Rai contended that once the final order of approval was passed on October 11, 1999, the proposal for modification as provided in Notification dated April 16, 1999 could not have been cancelled or rescinded as the draft Notification dated April 16, 1999 merged in the final order dated October 11, 1999. According to him, the proposal for modification of the approved scheme under Section 102 of the 1988 Act and its approval by the State Government are not legislative in nature and consequently Section 21 of the General Clauses Act, 1897 has no application. Learned counsel would submit that even if it be assumed that the impugned Notification amounts to modify the approved scheme and Section 21 of the General Clauses Act has application, in that event the impugned Notification dated April 15, 2000 is vitiated because it has to be issued in the same manner as provided under Section 102 of 1988 Act which was not done. He also contended that once the modification was approved as per order dated October 11, 1999, the valuable rights accrued in favour of the appellants and that could not be taken away except after giving an opportunity of hearing and on this ground also the impugned Notification dated April 15, 2000 is bad in law.

26. Mr. Ratnakar Dash, learned senior counsel for the State of U.P. and Ms. Garima Prashad, learned counsel for the UPSRTC supported the impugned judgment. The thrust of their submission is that both approved schemes, namely, the 1959 Scheme and the 1993 Scheme are effective and in operation to make the Saharanpur-Delhi route fully nationalized for the exclusive operation by the STU and no private operator can operate on this route and, therefore, notified route viz; (Saharanpur-Delhi route) could not have been modified without modifying the 1959 Scheme. Learned senior counsel for the

State as well as counsel for the UPSRTC contended that the order of the Hearing Authority after hearing objections of the affected parties is a quasi-judicial order and is not the final order of the State Government. They contended that it was open to the State Government to modify the order of the Hearing Authority before publication of the modified scheme. Reliance in this connection was placed upon a decision of this Court in *Afsar Jahan Begum (Smt) And Other*s v. *State Of M.P. And Others*[8]. Learned counsel for the UPSRTC also contended that the appellants did not have permits on the route in question either in 1959 or 1986 or even in 1993 and that the permits given to the private operators under the draft scheme of 1986 as well as under the 1993 scheme have been quashed by Allahabad High Court and that appellants have no permits at all. She submitted that a total of 124 permits have been granted to UPSRTC on Saharanpur-Delhi route which are valid till the scheme remains in force and that the UPSRTC has been plying exclusively on the Saharanpur-Delhi route and there is no operation by the private operators. Learned counsel for the UPSRTC placed reliance upon the decisions of this Court in *Mysore State Road Transport Corporation* v. *Mysore State Transport Appellate Tribunal*[9]; *C.P.C. Motor Service, Mysore* v. *State of Mysore and Another*[10]*; Adarsh Travels Bus Service and Another* v. *State of U.P. and Others*[11] and *Karnataka State Road Transport Corporation* v. *Ashrafulla Khan And Others*[12] and submitted that no private bus can be allowed to overlap fully or partially on nationalized route if there is no mention of that in the scheme of nationalization of the said route itself.

The issue

27. In light of the contentions outlined above, the core

8. (1996) 8 SCC 38.
9. (1974) 2 SCC 750.
10. AIR 1996 SC 1661.
11. (1985) 4 SCC 557.
12. (2002) 2 SCC 560.

question that falls for consideration is : whether the Notification dated April 15, 2000 is invalid and vitiated by any legal flaw?

28. Insofar as the factual aspect is concerned, it does not seem to be in dispute that the permits granted to the appellants related to routes which overlapped the Delhi-Saharanpur notified route.

Our appraisal

(A) The effect of publication of a scheme under Section 68D

29. The expression "route" is defined in Section 2(28-A) of 1939 Act as follows :

> "S. 2 (28-A) "route" means a line of travel which specifies the highway which may be traversed by a motor vehicle between one terminus and another;"

30. Chapter IV-A of the 1939 Act makes special provisions relating to the STUs. Particularly Section 68-C provides for preparation and publication of scheme of road transport service by an STU. The objections to the draft scheme published under Section 68-C may be filed under Section 68-D. Sub-section (2) of Section 68-D provides that the State Government after considering the objections and hearing the objectors and the STU may approve or modify the scheme. Sub-section (3) of Section 68-D provides that the scheme as approved or modified under sub-section (2) shall be published in the Official Gazette by the State Government and the same shall then become final and called 'approved scheme'. Once the scheme has been published under sub-section (3) of Section 68-D, Section 68-FF imposes restriction on grant of permits in respect of notified area or notified route. From these provisions, it is apparent that once a scheme is published under Section 68-D in relation to any area or route or portion thereof, whether to the exclusion, complete or partial of other persons

or otherwise, no person other than the STU may operate on the notified area or notified route except as provided in the scheme itself. In *Adarsh Travels Bus Service11*, this Court held that a necessary consequence to these provisions is that no private operator can operate his vehicle on any part or portion of a notified area or notified route unless authorized so to do by the terms of the scheme itself.

31. A definite legal position has been crystalised by this Court in *Mysore State Road Transport Corporation*[9] that any route or area either wholly or partly can be taken over by a State Undertaking under any scheme published, approved and notified under the provisions of Chapter IV-A of 1939 Act and that if the scheme prohibits private transport operators to operate on the notified area or route or any portion thereof, the Regional Transport Authority (RTA) cannot either renew the permit of such private operators or give any fresh permit in respect of a route which overlaps the notified route.

32. That the scheme framed under Section 68-C of 1939 Act is a 'law' is settled by a Constitution Bench decision of this Court in the case of *H.C. Narayanappa and Ors.* v. *State of Mysore and Others*[13]. This position has been reiterated by this Court in *Ram Krishna Verma*[2]. *H.C. Narayanappa*[13] also holds that the scheme framed under Section 68-C of 1939 Act excludes the private operators from notified routes or areas.

(B) The status of appellants' permits

33. Insofar as Saharanpur-Delhi route is concerned, it became a notified route under the 1959 Scheme. The controversy regarding the 1959 Scheme reached this Court initially in *Jeewan Nath Wahal* case wherein a three-Judge Bench of this Court upholding the order of the High Court held in unambiguous terms that Saharanpur-Delhi route approved in the 1959 Scheme stood nationalized to the complete

13. (1960) 3 SCR 742.

exclusion of private operators except 50 operators against whom it was held not be operative till their objections are heard and decided by the Hearing Authority. The decision of this Court in *Shri Chand*[1] has been explained in subsequent decision in the case of *Ram Krishna Verma*[2] by holding that nationalization of Saharanpur-Delhi route in the 1959 Scheme cannot be said to have been quashed in *Shri Chand*[1] except to the extent of 50 operators and in any case the decision of a Bench of two-Judges in *Shri Chand*[1] cannot have the effect of overruling the decision of a Bench of three-Judges in *Jeewan Nath Wahal.* This Court further held in *Ram Krishna Verma*[2] that the fresh draft scheme published on February 13, 1986 must be construed to be in relation to 50 existing operators only. The same position was reiterated by this Court in *Nisar Ahmad and Ors.* v. *State of U.P. and Ors.*[14] and *Gajraj Singh and Ors.* v. *State of U.P. & Ors.*[15]*. In Gajraj Singh*[15]*,* it was clearly stated that insofar as Saharanpur-Delhi route is concerned, it shall be deemed to have been approved and maintained in terms of this Court's decision in *Ram Krishna Verma*[2]. In light of these decisions of this Court, there is no scope of any doubt that Saharanpur-Delhi route on its nationalization stood frozen under the 1959 Scheme against everyone except 50 operators. The draft scheme published on February 13, 1986 was confined to those 50 operators alone and not to other private operators. By the 1993 Scheme, Saharanpur-Delhi route stood frozen against 50 operators as well. The effect of these two schemes (1959 Scheme and 1993 Scheme), thus, has been that the entire Saharanpur-Delhi route became fully nationalized for the exclusive operation by the STU i.e., UPSRTC and no private operator could operate on the said route. As a matter of fact, consequent upon decision of this Court in the case of *Ram Krishna Verma*[2] and the settled legal position that RTA cannot either renew the permit of such private operators or give any fresh permit in respect of a route which overlaps the notified route, the appellants' permits stood cancelled and in any case

14. 1994 Suppl. (3) SCC 460

15. (2001) 5 SCC 762.

these permits lost their legal significance and sanctity. In this backdrop, the whole exercise undertaken by the State Government under sub-section (1) of Section 102 of 1988 Act proposing to modify the 1993 Scheme relating to Saharanpur – Delhi notified route was misconceived as the permits specified in that Notification did not exist in law. The finding of the High Court in the circumstances that the modification proposal dated April 16, 1999 proceeded on the misconception that petitioners (appellants herein) were holding permits on the concerned route cannot be said to be unjustified. Moreover, in the absence of any proposal to modify the 1959 Scheme, the modification proposed in the 1993 Scheme vide Notification dated April 16, 1999 was meaningless. The contention that the 1959 Scheme merged in the 1993 Scheme has no merit. It is true that 1959 Scheme was approved under 1939 Act and even after repeal of 1939 Act by 1988 Act, the State Government was competent to prepare fresh scheme by following the procedure contemplated in Sections 99 and 100 or modify that scheme under Section 102 of the 1988 Act but the proposed modification published in the Notification on April 16, 1999 does not seek to modify the 1959 scheme at all. Since the Notification dated April 16, 1999 is, *ex facie,* misconceived and meaningless as regards Saharanpur-Delhi route, the proceedings taken pursuant thereto by the Hearing Authority and his decision dated October 11, 1999 also have no legal effect.

(C) Section 102 of the 1988 Act and the extent of authority to the Hearing Authority

34. Chapter VI of the 1988 Act contains special provisions relating to the STUs. Section 99 thereof makes a provision for preparation and publication of proposal by the State Government regarding road transport service of an STU. As per sub-section (1) of Section 100, on the publication of such proposal, the objections may be filed before the State Government within 30 days therefrom. Sub-section (2) of

Section 100 provides that the State Government may approve or modify such proposal after hearing the objectors and the representatives of the STU. Sub-section (3) of Section 100 makes a provision that the scheme relating to the proposal as approved or modified under sub-section (2) shall be published in the Official Gazette in at least one newspaper in the regional language circulating in the area or route covered by such scheme. On publication of the said scheme in the Official Gazette, it becomes final. Section 102 of the 1988 Act empowers the State Government to modify the approved scheme in the public interest. Since the controversy relates to this Section, it is appropriate that we reproduce Section 102 of the 1988 Act as it is. The said Section reads thus:

> "S.102. *Cancellation or modification of scheme.*- (1) The State Government may, at any time, if it considers necessary, in the public interest so to do, modify any approved scheme after giving –
>
> (i) the State transport undertaking; and
>
> (ii) any other person who, in the opinion of the State Government, is likely to be affected by the proposed modification,
>
> an opportunity of being heard in respect of the proposed modification.
>
> (2) The State Government shall publish any modification proposed under sub-section (1) in the Official Gazette and in one of the newspapers in the regional languages circulating in the area in which it is proposed to be covered by such modification, together with the date, not being less than thirty days from such publication in the Official Gazette, and the time and place at which any representation received in this behalf will be heard by the State Government."

35. A close look at Section 102 would make it manifestly

clear that modification of the approved scheme may be done by the State Government in the public interest after giving opportunity of being heard in respect of proposed modification to the STU and the persons likely to be affected by the proposed modification. The modification proposed is required to be published in the Official Gazette and in one of the newspapers in the regional languages circulating in the concerned area under Section 102(2). On behalf of the appellants, it was contended that in the proposed modification published in the Official Gazette on April 16, 1999, the authority to hear the objections/representations was given to Shri Zamirruddin, Special Secretary and Additional Legal Remembrancer and the said Hearing Authority after hearing the objections of the affected persons and the UPSRTC approved the proposed modification and rejected the objections received in this regard and the approval by the Hearing Authority of the proposed modification by his order dated October 11, 1999 is the approval of the State Government. Is the order dated October 11, 1999 of the Hearing Authority approving the proposed modification published in the Official Gazette dated April 16, 1999, an order of the State Government modifying the approved scheme of 1993 under Section 102(1) of the 1988 Act? The answer has to be in the negative because Shri Zamirruddin was given authority to hear the representations received by the State Government to the proposed modification but no authority was given to him to approve the proposed modification or modify the approved scheme. The Notification dated April 16, 1999 does not empower the Hearing Authority to approve or modify the scheme; he has only been empowered to hear the objections. That a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted. This settled principle has also been highlighted by this Court in *Gullapalli Nageswara Rao*6 but based on such principle the limited authority of hearing given to the Hearing Authority by the State Government cannot be treated as enlarged in its scope. A delegatee must confine his activity within four corners of the

powers vested in him and if he has acted beyond that, his action cannot have any legal sanction unless ratified by the delegator.

36. A distinction must be maintained where the hearing authority is empowered by the State Government to hear objections and approve the proposed modification or modify the approved scheme and a case where the hearing authority is authorized to hear the objections/representations relating to the proposed modification to the approved scheme. In the latter case, the authority delegated to the Hearing Authority is limited and he is not authorized to approve the proposed modification or modify the approved scheme. The present case falls in the latter category and accordingly the order of the Hearing Authority dated October 11, 1999 is in excess of the authority given to him and cannot be construed as a final order of approval under Section 102 (1) of the 1988 Act. Whether such limited authority of hearing to the Hearing Authority makes any legal sense is an aspect for consideration by the State Government. Suffice, however, to say that it was not open for the Hearing Authority to approve the proposed modification or modify the proposed scheme.

(D) Invocation of Section 21 of General Clauses Act : whether valid

37. Having already held that the order of the Hearing Authority dated October 11, 1999 is in excess of the authority given to him and that the said order has no legal effect, we do not find that there was any impediment for the State Government in exercising its power under Section 102 of the 1988 Act read with Section 21 of the General Clauses Act, 1897 to rescind the Notification dated April 16, 1999.

38. Section 21 of the General Clauses Act, 1897 provides thus:

"S.21. *Power to issue, to include power to add to, amend,*

vary or rescind, notifications, orders, rules or bye-laws. – Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

39. The aforesaid provision came up for consideration before the Constitution Bench of this Court in *Kamla Prasad Khetan & Another v. Union of India*[16] way back in 1957. The majority opinion stated:

"It is to be remembered that S.21 of the General Clauses Act embodies a rule of construction, and that rule must have reference to the context and subject-matter of the particular statute to which it is being applied….".

40. It seems to be fairly settled that under Section 21 of the General Clauses Act, an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. In the instant case, there is no doubt that the Notification dated April 15, 2000 has been made in the same manner as the earlier Notification dated April 16, 1999. Since the order of the Hearing Authority dated October 11, 1999 is not an order of approval under Section 102(1) of the 1988 Act and cannot be treated as such, the power of the State Government to rescind the Notification dated April 16, 1999 did not get exhausted. The argument that the draft Notification dated April 16, 1999 merged in the order dated October 11, 1999 is fallacious and devoid of any substance.

41. Mr. Dinesh Dwivedi, learned senior counsel urged on behalf of the appellants that even otherwise the material on record demonstrated that the order of the modification dated October 11, 1999 was approved by the Principal Secretary of

16. AIR 1957 SC 676.

the Department and, thus, there was an approval by the State Government. We are unable to accept this submission. In the first place, except the decision of the Hearing Authority dated October 11, 1999 there is nothing on record to conclude that the State Government had approved the proposed modification as notified on April 16, 1999. Secondly, even if we assume that an executive action not expressed to be made in the name of the Governor as contemplated under Article 166(1) of the Constitution may not vitiate such action as nullity and as held by this Court in *Dattatraya Moreshwar Pangarkar v. The State of Bombay and Others*[17] the non-compliance with the provisions of either of clauses of Article 166 would lead to the result that order in question would lose the protection which it would otherwise enjoy had the proper mode for expression and authentication been adopted, but then there has to be some formal order by the State Government under Section 102(1) of the 1988 Act. Moreover, there is nothing on record even to indicate that the order dated October 11, 1999 of the Hearing Authority was communicated to the appellants or any of the affected parties. For all these reasons, the only conclusion that can be drawn is that the order dated October 11, 1999 is not an order as contemplated under Section 102 (1) of the 1988 Act by the State Government approving the modification proposed in the Notification dated April 16, 1999.

42. In view of our finding that the order of the Hearing Authority dated October 11, 1999 cannot be treated as an order of the State Government under Section 102(1) of the 1988 Act, it is not necessary to consider the question as to whether the order of the State Government under Section 102(1) of the 1988 Act is required to be published in the Official Gazette or not.

43. The contention of Mr. P.N. Gupta, learned counsel for some of the appellants that the opportunity of hearing was required to be given to the appellants before issuance of

17. (1952) 1 SCR 612.

Notification dated April 15, 2000 has no merit for more than one reason. For one, this contention is founded on the premise that the order of the Hearing Authority dated October 11, 1999 is the order of the State Government. Secondly, what Section 21 of the General Clauses Act requires is that the authority empowered to issue notification must exercise its power to rescind such notification in the like manner. We have already noticed in the preceding discussion that the Notification dated April 15, 2000 has been made in the same manner as the earlier Notification dated April 16, 1999.

Conclusion

44. For the reasons given above, we hold that the Notification dated April 15, 2000 is valid and does not suffer from any legal flaw and, accordingly, dismiss these appeals with no order as to costs. Interlocutory applications for impleadment stand disposed of, as indicated above.

N.J. Appeals dismissed.

VIJAYA BANK
v.
SHYAMAL KUMAR LODH
(Civil Appeal No. 4211 of 2007)

JULY 06, 2010

[G.S. SINGHVI AND C.K. PRASAD, JJ.]

Industrial Disputes Act, 1947:

s.33C(2) – Subsistence allowance – Application for suspension/subsistence allowance filed under s.33C(2) before the Labour Court, Dibrugarh constituted under s.7 of the Act – Employer situated within the local limits of its jurisdiction – Jurisdiction of Labour Court, Dibrugarh to decide the dispute – Held: Labour Court, Dibrugarh is not specified by the appropriate government i.e. Central Government for adjudication of the disputes under s.33C(2), however dispute can be entertained in view of s.10A(2) of 1946 Act – Industrial Employment (Standing orders) Act, 1946 – s.10A(2).

s.33C(2) – Expression 'labour court' – Includes Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

Jurisdiction: Incorrect label of the application and mentioning wrong provision neither confers jurisdiction nor denudes the Court of its jurisdiction.

Interpretation of statutes:

Explanation appended to a section – Object of – Held: Is to explain the meaning of the words contained in the section – Industrial Disputes Act, 1947 – s.33C(2).

Meaningful construction – Legislature never waste its words or says anything in vain – Construction rejecting the

words of a statute not to be resorted to, excepting for compelling reasons.

The question which arose for consideration in these appeals was whether the Labour Court, Dibrugarh constituted by the State Government under Section 7 of the Industrial Disputes Act, 1947 had jurisdiction to entertain the application filed by the respondent-employee of appellant bank for an award of suspension/ subsistence allowance filed under Section 33(2) of the Act.

Dismissing the appeals, the Court

HELD: 1.1. From a plain reading of Section 33C(2) of the Industrial Disputes Act, 1947, it is evident that money due to a workman has to be decided by such Labour Court "as may be specified in this behalf by the appropriate Government." Explanation appended to Section 33C of the Act provides to include any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State as Labour Court. The underlying object behind inserting explanation seems to be varying qualification prescribed for appointment of Presiding Officers of Labour Court by different State enactments. The Parliament took note of the fact while inserting explanation that there are different kinds of Labour Courts constituted under Industrial Disputes Act and State Acts and a question may arise whether a Labour Court constituted under Acts, Central or State could entertain a claim made under Section 33C(2) of the Act. [Para 12] [580-F-H; 581-A-B]

1.2. An explanation is appended ordinarily to a section to explain the meaning of words contained in that section. In view of the explanation appended to Section 33C of the Act, Labour Court shall include any Court constituted under any law relating to investigation and

settlement of industrial disputes in force in any State. It widens the choice of appropriate Government and it can specify not only the Labour Courts constituted under Section 7 of the Industrial Disputes Act, 1947 but such other Courts constituted under any other law relating to investigation and settlement of industrial disputes in force in any State. [Para 13] [581-B-E]

1.3. The power to adjudicate money claim is to be decided by the Labour Court "as may be specified in this behalf by the appropriate Government". Every word used by the Legislature carries meaning and therefore effort has to be made to give meaning to each and every word used by it. A construction brushing aside words in a Statute is not a sound principle of construction. The Court avoids a construction, if reasonably permissible on the language, which renders an expression or part of the Statute devoid of any meaning or application. Legislature never waste its words or says anything in vain and a construction rejecting the words of a Statute is not resorted to, excepting for compelling reasons. There does not exist any reason, much less compelling reason to adopt a construction, which renders the words "as may be specified in this behalf" used in Section 33C(2) of the Act as redundant. These words have to be given full meaning. These words in no uncertain terms indicate that there has to be specification by the appropriate Government that a particular court shall have jurisdiction to decide money claim under Section 33C(2) of the Act and it is that court alone which shall have the jurisdiction. Appropriate Government can specify the court or courts by general or special order in its discretion. In the present case, there is nothing on record to show that the Labour Court at Dibrugarh has been specified by the appropriate Government, i.e., Central Government for adjudication of the disputes under Section 33C(2) of the Act. [Para 14] [581-F-H; 582-A-C]

Treogi Nath and others v. Indian Iron and Steel Co.Ltd. and others **AIR 1968 SC 205, relied on.**

2. From a plain reading of the Section 10A(2) of the Industrial Employment (Standing orders) Act, 1946 it is evident that the Labour Court constituted under the Industrial Disputes Act, 1947 within the local limits of whose jurisdiction the establishment is situated, has jurisdiction to decide any dispute regarding subsistence allowance. In the present case, dispute pertains to subsistence allowance and the Labour Court where the workman had brought the action has been constituted under Section 7 of the Industrial Disputes Act, 1947 and further the appellant bank is situated within the local limits of its jurisdiction. The workman had, though, chosen to file application under Section 33C(2) of the Industrial Disputes Act but that shall not denude jurisdiction to the Labour Court, if it otherwise possesses jurisdiction. Incorrect label of the application and mentioning wrong provision neither confers jurisdiction nor denudes the Court of its jurisdiction. Relief sought for, if falls within the jurisdiction of the Court, it can not be thrown out on the ground of its erroneous label or wrong mentioning of provision. In the present case the Labour Court, Dibrugarh satisfies all the requirements to decide the dispute raised by the employee before it. [Para 16] [583-F-H; 584-A-B]

Case Law Reference:

AIR 1968 SC 205	**relied on**	**Paras 8, 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4211 of 2007.

From the Judgment & Order dated 10.01.2007 of the High Court of Gauhati in Writ Appeal No. 381 of 2001.

WITH

C.A. No. 4212 of 2007.

Jagat Arora, Rajiv Nanda, Rajat Arora for the Appellant.

A.K. Panda, Somnath Mukherjee for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. These appeals, by grant of leave arise out of a common judgment of the Division Bench of the Gauhati High Court dated 10th January, 2007 in Writ appeal No.381 of 2001 and Writ Appeal No.11 of 2002, whereby it had set aside the order of the learned Single Judge dated 22nd August, 2001 and 24th August, 2001 passed in Civil Rule No.3735 of 1995 and Civil Rule No.2771 of 1997 respectively.

2. Facts lie in a narrow compass :-

Shyamal Kumar Lodh-respondent herein is an employee of the appellant-Vijaya Bank. It is a Nationalised Bank. The employee filed application before the Labour Court, Dibrugarh constituted by the State Government under Section 7 of the Industrial Disputes Act, 1947 for an award computing his suspension/subsistence allowance under Section 33C(2) of the Act.

3. It is not in dispute that the appropriate Government in relation to an employee is the Central Government and the employee had filed the application before the Labour Court constituted by the State Government. It is further not in dispute that the Labour Court before whom the employee had filed the application has not been specified by the Central Government. On the application so filed the Labour Court issued notice to the appellant-employer. The appellant appeared before the Labour Court and questioned its jurisdiction to adjudicate the dispute on the ground that the said Court having not been specified by the Central Government under Section 33C(2) of

the Industrial Disputes Act, 1947 it had no jurisdiction to entertain the application.

4. The Labour Court by its order dated 19th August, 1995 over-ruled that objection and held that its jurisdiction to adjudicate the dispute is not ousted. Employer aggrieved by the aforesaid order dated 19th August, 1995 preferred writ application which was registered as Civil Rule No. 3735 of 1995. A learned Single Judge of the Gauhati High Court by its judgment dated 22nd August, 1995 passed in Civil Rule No.3735 of 1995 upheld its contention and while doing so observed as follows :

> "As the Labour Court at Dibrugarh was not specified by the appropriate Government they have no jurisdiction to issue notice to the Petitioner in both the cases."

5. During the pendency of the proceeding before the Labour Court, the employee filed application seeking enhancement of the subsistence allowance and the Labour Court by order dated 17th Ocober,1996 directed the employer to deposit recurring subsistence allowance in Court. Employee had also preferred writ petition against the aforementioned order dated 17thOctober, 1996 which was registered as Civil Rule No. 2771 of 1996.Following its earlier judgment dated 22nd August 1995 passed in Civil Rule No. 3735 of 1995, the learned Single Judge by its order dated 24th August, 2001 allowed the writ petition and quashed the aforesaid order dated 17.10.1996.

6. Employee, aggrieved by the aforesaid orders of the Single Judge, preferred separate appeals, which were registered as Writ Appeal No. 381 of 2001 and Writ Appeal No. 11 of 2002. Both the appeals were heard together and a Division Bench of the High Court by its common judgment dated 10th January, 2007 allowed the appeals and set aside both the orders of the Single Judge. While doing so it concurred with the Single Judge that as the Labour Court at

Dibrugarh has not been specified by the Central Government, it had no jurisdiction to entertain the petition preferred by the employee. However, on its finding that claim of subsistence allowance falls within Section 10A(2) of the Industrial Employment(Standing Order) Act, and the Branch of the Bank where the employee was working, fell within the limits of jurisdiction of Labour Court in question, it shall have jurisdiction to decide the claim. While doing so, it observed as follows :

> "In the instant case, the Labour Court at Dibrugarh has not been 'specified' by the Central Government for the said purpose and accordingly, we are unable to agree with the first submission advanced by the learned counsel for the appellant that the Labour Court at Dibrugarh would have jurisdiction to entertain the application filed by the Appellant only on the basis of the provisions under the Act.
>
> However, the provisions of the Standing Orders Act appear to indicate that a Labour Court constituted under the 1947 Act, whether by the State Government or Central Government, would have jurisdiction to entertain a claim of subsistence allowance payable to a workman on an application made to such Labour Court by the concerned workman. The provisions of Section 10A(2) of the Standing Orders Act is a special provision incorporated only for adjudicating on claim relating to payment of subsistence allowance.
>
> Having regard to the special provision under Section 10A(2) of the Standing Orders Act, we feel that the Labour Court of Dibrugarh, although constituted by the State Government, would have jurisdiction to entertain a claim for subsistence allowance even in respect of employees under a nationalized banks. It is not specified in Section 10A(2) of the Standing Orders Act that the Labour Court constituted under the 1947 Act has to be a Labour Court constituted by an appropriate Government. It is also not stipulated that the appropriate Government has to 'specify'

> such a Labour Court for entertaining on application under Section 10A(2) of the Standing Orders Act. The only requirement for assumption of jurisdiction by a Labour Court under Section 10A(2) of the Standing Orders Act is that the Labour Court has to be one, which has been constituted under the 1947 Act and the concerned establishment must be functioning within the local limits of the jurisdiction of such Labour Court.
>
> Having noted the provisions as above, we are of the view that the entertainment of the application by the Labour Court at Dibrugarh was proper in respect of the claim for subsistence allowance put forward by the Appellant, we hold that with regard to the claim for subsistence allowance put forward by the Appellant against the Respondent bank, the Labour Court at Dibrugarh has jurisdiction. We accordingly declare that the Labour Court at Dibrugarh was competent and had jurisdiction to entertain the claim for subsistence allowance put forward by the Appellant. The impugned decision of the learned Single Judge to the contrary is accordingly interfered with."

7. Employer is assailing this common order in these appeals.

8. Mr. Jagat Arora, learned counsel appearing on behalf of the appellant submits that in view of clear and unambiguous language employed in Section 33C(2) of the Industrial Disputes Act, the money due to an employee can be adjudicated by a Labour Court specified by the appropriate Government. He points out that the appropriate Government admittedly is the Central Government and it having not specified the Labour Court where the employee had brought the action, it had no jurisdiction to entertain and adjudicate the claim of the employee. In support of the submission reliance has been placed on a decision of this Court in the case of *Treogi Nath and others vs. Indian Iron and Steel Co.Ltd. and others* (AIR 1968 SC 205) and our attention has been drawn to the

following passage from paragraph 4 of the judgment which reads as follows:

> "The language of S.33-C(2) itself makes it clear that the appropriate Government has to specify the Labour Court which is to discharge the functions under this sub-section. The use of the expression "specified in this behalf" is significant. The words "in this behalf" must be given their full import and effect. They clearly indicate that there must be a specification by the appropriate Government that a particular Court is to discharge the function under S.33-C(2) and, thereupon, it is that court alone which will have jurisdiction to proceed under that provision. The mere fact that a Labour Court has been constituted under S.7(1) of the Act for the purpose of adjudication of industrial disputes as well as for performing other functions that may be assigned to it under the Act does not mean that that Court is automatically specified as the Court for the purpose of exercising jurisdiction under S.33-C(2) of the Act. S.33-C(2) confers jurisdiction only on those Labour Courts which are specified in this behalf, i.e., such Labour Courts which are specifically designated by the State Government for the purpose of computing the money value of the benefit claimed by a workman."

9. Mr. A.K. Panda, learned Senior Counsel, however, appearing on behalf of the employee-respondent submits that in view of the explanation appended to Section 33C of the Industrial Disputes Act, Labour Court includes any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State and the Labour Court before which employee laid his claim has been constituted for investigation and settlement of industrial disputes, it will have jurisdiction to entertain and adjudicate the money claim of the employee.

10. Before we advert to the rival submissions it is expedient to go into the legislative history of the enactment in question.

The Industrial Disputes Act, 1947 as originally enacted did not provide for any remedy to individual employee to enforce his existing rights and only way to enforce the existing rights was to raise an industrial dispute. The legislature inserted Section 20 in the Industrial Disputes (Appellate Tribunal) Act, 1950 (since repealed) which provided for the recovery of the money due from the employer under an award or decision. Further, by the Industrial Disputes (Amendment) Act, 1953 the legislature inserted Chapter 5A to the Industrial Disputes Act, 1947, and for the recovery of money due to an employee from his employer Section 25-I was enacted. The aforesaid insertion confined to the dues under Chapter 5A of the Act only but did not apply to moneys or benefits due under any award, settlement or any other provision of the Act. Taking note of the aforesaid lacunae the legislature passed the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956. This Act repealed the Industrial Disputes (Appellate Tribunal) Act, 1950 as also Section 25-I in Chapter 5A of the Industrial Disputes Act, 1947 and inserted Section 33C in the later Act. Section 33C as inserted by Amending Act, 1956 made provision for recovery of money due to an employee from his employer not only under the provision of Chapter 5A but also under settlement and awards. However, it did not prescribe any period of limitation and further only the workman entitled to a money or benefit himself could make an application. With a view to obviate this lacuna Section 33C of the Industrial Disputes Act, 1947 was recast by Section 23 of the Industrial Disputes (Amendment) Act, 1964(Act 36 of 1964). Section 33C of the Industrial Disputes Act, 1947 as stood before the amendment by Act 36 of 1964 read as follows:

> *"Section 33C. Recovery of Money Due from an Employer* – (1) Whey any money is due to a workman from an employer under a settlement or an award or, under the provisions of chapter 5A, the workman may, without prejudice to any other mode of recovery, make an application to the appropriate government for the recovery

of the money due to him, and if, the appropriate government is satisfied that any money is so due, it shall issue a certificate for that amount to the collector, who shall proceed to recover the same in the same manner as an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer, any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such labour court as may be specified in this behalf by the appropriate government and the amount so determined may be recovered as provided for in sub-section (1).

(3) For the purpose of computing the money value of a benefit, the labour court may, if it so thinks fit, appoint a commissioner who shall, after taking such evidence as may be necessary, submit a report to the labour court and the labour court shall determine the amount after considering the report of the commissioner and other circumstances of the case."

11. Section 33C of the Industrial Disputes Act, as amended by Section 23 of the Amendment Act 36 of 1964 made substantial changes in law with which we are not concerned in the present appeals, except explanation inserted in Section 33C, the effect whereof shall be considered in this judgment. Section 33C(2) and (5) of Industrial Disputes Act, as it stands today read as follows :

"33C. Recovery of money due from an employer –

(1) xxx xxx xxx xxx

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of

being computed in terms of money and if the question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government.

(3) xxx xxx xxx xxx

(4) xxx xxx xxx xxx

(5) Where workmen employed under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money, then subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen.

Explanation.—In this section "Labour Court" includes any court constituted under any law relating to investigation and settlement of industrial disputes in force in any State."

12. From a plain reading of Section 33C(2) it is evident that money due to a workman has to be decided by such Labour Court "as may be specified in this behalf by the appropriate Government." Section 7 of the Industrial Disputes Act, 1947 inter alia confers power to the appropriate Government for constitution of one or more Labour courts for the adjudication of industrial disputes. It also prescribes qualification for appointment as Presiding Officer of a Labour Court. Explanation appended to Section 33C of the Act provides to include any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State as Labour Court. The underlying object behind inserting explanation seems to be varying qualification prescribed for appointment of Presiding Officers of Labour Court by different State enactments. The Parliament took note

of the fact while inserting explanation that there are different kinds of Labour Courts constituted under Industrial Disputes Act and State Acts and a question may arise whether a Labour Court constituted under Acts, Central or State could entertain a claim made under Section 33C(2) of the Act.

13. An explanation is appended ordinarily to a section to explain the meaning of words contained in that section. In view of the explanation aforesaid Labour Court shall include any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State. Money due to an employee under Section 33C(2) is to be decided by "Labour Court as may be specified in this behalf by the appropriate Government". Therefore, the expression "Labour Court" in Section 33C(2) has to be given an extended meaning so as to include Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State. It widens the choice of appropriate Government and it can specify not only the Labour Courts constituted under Section 7 of the Industrial Disputes Act, 1947 but such other Courts constituted under any other law relating to investigation and settlement of industrial disputes in force in any State.

14. But this does not end the controversy. The power to adjudicate money claim is to the Labour Court "as may be specified in this behalf by the appropriate Government". Every word used by the Legislature carries meaning and therefore effort has to be made to give meaning to each and every word used by it. A construction brushing aside words in a Statute is not a sound principle of construction. The Court avoids a construction, if reasonably permissible on the language, which renders an expression or part of the Statute devoid of any meaning or application. Legislature never waste its words or says anything in vain and a construction rejecting the words of a Statute is not resorted to, excepting for compelling reasons. There does not exist any reason, much less compelling reason to adopt a construction, which renders the words "as may be specified in this behalf" used in Section 33C(2) of the Act as

redundant. These words have to be given full meaning. These words in no uncertain terms indicate that there has to be specification by the appropriate Government that a particular court shall have jurisdiction to decide money claim under Section 33C(2) of the Act and it is that court alone which shall have the jurisdiction. Appropriate Government can specify the court or courts by general or special order in its discretion. In the present case, there is nothing on record to show that the Labour Court at Dibrugarh has been specified by the appropriate Government, i.e., Central Government for adjudication of the disputes under Section 33C(2) of the Industrial Disputes Act. This question in our opinion has squarely been answered by this Court in the case of *Treogi Nath* (Supra). True it is that rendering this decision, this Court did not consider the explanation appended to Section 33C of the Act, as the lis pertained to period earlier to amendment but in view of what we have said above, excepting the widening of choice pertaining to Courts, explanation does not dispense with the requirement of specification of court by appropriate Government.

15. Having said so the next question which falls for determination is as to whether Labour Court at Dibrugarh could have entertained the application under Section 10-A of Industrial Employment (Standing Orders) Act, 1946. Section 10A of the Act reads as follows:

> *"10-A. Payment of subsistence allowance.*— (1) Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance-
>
> (a) at the rate of fifty per cent of the wages which workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Notwithstanding anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State."

16. From a plain reading of the Section 10A(2) of the aforesaid Act it is evident that the Labour Court constituted under the Industrial Disputes Act, 1947 within the local limits of whose jurisdiction the establishment is situated, has jurisdiction to decide any dispute regarding subsistence allowance. Here in the present case undisputedly dispute pertains to subsistence allowance and the Labour Court where the workman had brought the action has been constituted under Section 7 of the Industrial Disputes Act, 1947 and further the appellant bank is situated within the local limits of its jurisdiction. The workman had, though, chosen to file application under Section 33C(2) of the Industrial Disputes Act but that in our opinion shall not denude jurisdiction to the Labour Court, if it

otherwise possesses jurisdiction. Incorrect label of the application and mentioning wrong provision neither confers jurisdiction nor denudes the Court of its jurisdiction. Relief sought for, if falls within the jurisdiction of the Court, it can not be thrown out on the ground of its erroneous label or wrong mentioning of provision. In the present case the Labour Court, Dibrugarh satisfies all the requirements to decide the dispute raised by the employee before it.

17. As the matter is pending before Labour Court since long, it shall make endeavour to finally decide the dispute within 6 months from today. Appellant as also respondent are directed to appear before the Labour Court, within four weeks from today.

18. In the result, both the appeals are dismissed with cost, quantified at Rs.25,000/- to be paid by the appellant to the respondent.

D.G. Appeals dismissed.