BHANUMATI ETC. ETC.

v.

STATE OF UTTAR PRADESH THROUGH ITS PRINCIPAL SECRETARY AND OTHERS

(Civil Appeal Nos. 4135-4152 of 2010)

MAY 4, 2010*

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

U.P. Panchayat Laws (Amendment) Act, 2007 – ss. 15 and 28 – Challenge to – On the ground of incorporation of the concept of no-confidence motion as regard the office of Chairperson of Panchayat in the statute – Substitution of the provision 'more than half' in place of 'not less than two thirds' relating to majority for moving no-confidence motion and block period of 'one year' for initiation of no-confidence motion in place of 'two years' – Held: The 2007 Act is constitutionally valid – Provision of no-confidence is not inconsistent with Part IX of the Constitution – Statutory provision of no-confidence motion against Chairperson is a pre-Constitutional provision and was there in s. 15 of the 1961 Act – If no-confidence motion is passed against Chairperson of Panchayat, he/she ceases to be Chairperson, but continues to be a member of Panchayat and Panchayat continues with a newly elected Chairperson – Thus, there is no institutional set back or impediment to the continuity or stability of Panchayati Raj Institution – Entry 5, list II of 7th Schedule is wide enough to authorize legislation of no-confidence against Chairperson of Panchayat – Uttar Pradesh Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 – Constitution of India, 1950 – Part IX, 7th Schedule Entry 5, list II.

In the Uttar Pradesh Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961, for initiation of no-confidence motion in reference to Kshettra Samiti/ Panchayat, the block period was of 12 months and the majority of more than half of the total number of members of Kshettra Samiti was required. The 1961 Act was amended several times in 1965, 1976, 1990, 1994 and 1998. In 2007 again by Act No. 44 of 2007, for initiation of no-confidence motion, the block period of 'two years' was substituted by 'one year' and as regard the provision relating to the majority for moving no-confidence motion, the words 'not less than two-third' was substituted by words 'more than half'. The appellants challenged the constitutional validity of U.P. Panchayat Laws (Amendment) Act, 2007. The High Court upheld the same. Hence these appeals.

Appellants contended that there is no concept of no-confidence motion in the detailed constitutional provision under Chapter IX of the Constitution, thus, the incorporation of the said provision in the statute militates against the principles of Panchayti Raj Institution; and that the substitution of the provision 'more than half' in place of 'not less than two thirds' and the words 'one year' in place of 'two years' in ss. 15 and 28 of the amendment Act dilutes the principle of stability and continuity which are main purposes behind the object and reasons of the Constitutional amendments in Part IX of the Constitution.

Dismissing the appeals, the court

HELD: 1. The constitutional validity of the U.P. Panchayat Laws (Amendment) Act, 2007 (U.P. act 44 of 2007) is upheld. Considering all the aspects, there is no reason to take a view different from the one taken by the High Court. The judgment of the High Court is upheld. All interim orders are vacated. [Paras 110 and 111] [623-A-B; 622-H]

2.1. Under the Constitutional scheme introduced by

* Judgment Recd. On 24.7.2010.

the 73rd Amendment Government State is no longer a service provider but is a felicitator for the people to initiate development on the basis of equity and social justice and for the success of the system people have to be sensitized about their role and responsibility in the system. Thus, the composition of the Panchayat, its function, its election and various other aspects of its administration are now provided in great detail under the Constitution with provisions enabling the State Legislature to enact laws to implement the Constitutional mandate. Thus, formation of Panchayat and its functioning is now a vital part of the Constitutional scheme under Part IX of the Constitution. The object and the reasons of Part IX are to lend status and dignity to Panchayati Raj Institutions and to impart certainty, continuity and strength to them. [Paras 52, 53 and 75] [608-G-H; 609-A-B; 614-G]

2.2. A Constitution is not to give all details of the provisions contemplated under the scheme of amendment. In the 73rd amendment of the Constitution, under various articles, like Articles 243A, 243C(1), (5), 243D(4), 243X(6), 243F(1) (6), 243G, 243H, 243I (2), 243J, 243(K) (2), (4) of the Constitution, the legislature of the State has been empowered to make law to implement the Constitutional provisions. Article 243C(5) provides for election of Chairperson. Therefore, the submission that the provision of no-confidence motion against the Chairman, being not in the Constitution, cannot be provided in the statute, is wholly unacceptable when the Constitution specifically enables the State Legislature to provide the details of election of the Chairperson. [Paras 57, 58 and 59] [609-G-H; 610-C-D]

2.3. The statutory provision of no-confidence motion against the Chairperson is a pre-Constitutional provision and was there in section 15 of the 1961 Act. The provision for no-confidence motion against the Chairperson was

never repealed by any competent legislature as being inconsistent with any of the provisions of Part IX. On the other hand by subsequent statutory provisions the said provision of no-Confidence has been confirmed with some ancillary changes but the essence of the no-confidence provision was continued. Thus, the provision of no-confidence is not inconsistent with Part IX of the Constitution. [Paras 60, 62 and 66] [610-D-E; 611-A-B; 612-B]

2.4. The provision of Article 243N of the Constitution makes it clear if the Panchayat laws, in force in a State prior to Constitutional Amendment, contain provisions which are inconsistent with Part IX, two consequences will follow: those provisions will continue until amended or repealed by competent legislature or authority, and those provisions will continue until one year from commencement of the Constitution amendment, if not repealed earlier. [Para 63] [611-D-E]

2.5. The submissions by appellants cannot be accepted in view of a very well known Constitutional Doctrine, namely, the Constitutional doctrine of silence. [Para 67] [612-C]

The Silence of Constitutions (Routledge, London and New York) by Michael Folley, **referred to.**

2.6. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by 73rd Constitutional amendment by making detailed provision for democratic decentralization and self Government on the principle of grass root democracy cannot be interpreted to exclude the provision of no-confidence motion in the respect of the office of the Chairperson of the Panchayat just because of its silence on that aspect. [Para 69] [612-G-H; 613-A]

2.7. The provision of no-confidence was a pre-73rd Amendment statutory provision and that was continued even after the 73rd Amendment in keeping with mandate of Article 243N. This continuance of the no-confidence provision, was not challenged by the appellants. The High Court noted the said aspect. [Para 70] [613-B]

2.8. The submission that as a result of the impugned amendment stability and dignity of the Panchayati Raj Institution has been undermined is not well founded. As a result of no-confidence motion the Chairperson of a Panchayat loses his position as a Chairperson but he remains a member, and the continuance of Panchayat as an institution is not affected in the least. Going by the said tests, no lack of legislative competence is found on the part of the State Legislature in enacting the impugned amendment Act. [Paras 72 and 73] [614-D-E]

2.9. If a no-confidence motion is passed against the chairperson of a Panchayat, he/she ceases to be a Chairperson, but continues to be a member of the Panchayat and the Panchayat continues with a newly elected Chairperson. Therefore, there is no institutional set back or impediment to the continuity or stability of the Panchayati Raj Institution. [Para 76] [614-H; 615-A]

2.10. These institutions must run on democratic principles. In democracy all persons heading public bodies can continue provided they enjoy the confidence of the persons who comprise such bodies. This is the essence of democratic republicanism. This explains why this provision of no-confidence motion was there in the Act of 1961 even prior to the 73rd Constitution amendment and has been continued even thereafter. Similar provisions are there in different States in India. Such a provision is wholly compatible and consistent with the rejuvenated Panchayat contemplated in Part IX of the Constitution and is not at all inconsistent with the same. [Paras 77 and 84] [615-B-C; 616-B]

2.11. Democracy demands accountability and transparency in the activities of the Chairperson especially in view of the important functions entrusted with the Chairperson in the running of Panchayati Raj Institutions. Such duties can be discharged by the Chairperson only if he/she enjoys the continuous confidence of the majority members in the Panchayat. So any statutory provision to demonstrate that the Chairperson has lost the confidence of the majority is conducive to public interest and adds strength to such bodies of self Governance. Such a statutory provision cannot be called either unreasonable or ultra vires Part IX of the Constitution. [Para 85] [616-C-D]

2.12. Any head of a democratic institution must be prepared to face the test of confidence. Neither the democratically elected Prime Minister of the Country nor the Chief Minister of a State is immune from such a test of confidence under the Rules of Procedure framed under Articles 118 and 208 of the Constitution. Both the Prime Minister of India and Chief Ministers of several States heading the Council of Ministers at the Centre and in several States respectively have to adhere to the principles of collective responsibilities to their respective houses in accordance with Articles 75(3) and 164(2) of the Constitution. [Para 86] [616-E-F]

2.13. There is vast difference in Constitutional status and position between the post of Chairperson of a Panchayat and the President. The two posts are not comparable at all by any standards. Even the President of India is subject to impeachment proceedings under Article 61 of the Constitution. No one is an 'imperium in imperio' in the Constitutional set up. [Para 88] [617-A-B]

2.14. The submission that 2007 Amendment Act lacks legislative competence has no merit. The relevant legislative entry in respect of Panchayat is in Entry 5, list

II of the 7th Schedule. The Entry 5 of List II of the 7th Schedule is wide enough to authorize legislation of no-confidence against the Chairperson of the Panchayat. It is well known that legislative entry is generic in nature and virtually constitutes the legislative field and has to be very broadly construed. These entries demarcate 'areas', 'fields' of legislation within which the respective laws are to operate and do not merely confer legislative power as much. The words in the entry should be held to extend to all ancillary and subsidiary matters which can be reasonably said to be encompassed by it. [Paras 94, 95 and 97] [618-G-H; 619-G; A-B]

Diamond Sugar Mills Limited and Anr. vs. The State of Uttar Pradesh and Anr. **AIR 1961 SC 652;** *State of Tamil Nadu vs. M/s. Payarelal Malhotra and Ors.* **1976 (1) SCC 834;** *Commissioner of Sales Tax_M.P. vs. Popular Trading Company, Ujjain* **2000 (5) SCC 511, distinguished.**

Hans Muller of Nurenburg vs. Superintendent, Presidency Jail, Calcutta and Ors. **AIR 1955 SC 367;** *Navinchandra Mafatlal, Bombay vs. Commissioner of Income Tax, Bombay City* **AIR 1955 SC 58;** *Jilubhai Nanbhai Khachar etc. etc. vs. State of Gujarat and Anr.* **AIR 1995 SC 142, relied on.**

Authorized Officer, Thanjavur and another vs. S. Naganatha Ayyar and Ors. **(1979) 3 SCC 466;** *Mohan Lal Tripathi vs. District Magistrate, Rai Bareilly and Ors.* 1992 (4) SCC 80; *Ram Beti vs. District Panchayat Raj Adhikari and Ors.***1998 (1) SCC 680;** *State of Bihar and Ors. vs. Bihar Distillery Limited* **JT 1996 (10) S.C. 854;** *Dharam Dutt and Ors. vs. Union of India and Ors.* **(2004) 1 SCC 712;** *State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and Ors.* **(2005) 8 SCC 534, referred to.**

Seaford Court Estates Ltd. vs. Asher **1949 (2) K.B. 481, referred to.**

Case Law Reference:

(1979) 3 SCC 466	**Referred to.**	**Para 43**
1992 (4) SCC 80	**Referred to.**	**Para 89**
1998 (1) SCC 680	**Referred to.**	**Para 92**
AIR 1955 SC 367	**Relied on.**	**Para 95**
AIR 1955 SC 58	**Relied on.**	**Para 95**
AIR 1995 SC 142	**Relied on.**	**Para 95**
AIR 1961 SC 652	**Distinguished.**	**Para 96**
1976 (1) SCC 834	**Distinguished.**	**Para 98**
2000 (5) SCC 511	**Distinguished.**	**Para 101**
JT 1996 (10) S.C. 854	**Referred to.**	**Para 103**
1949 (2) K.B. 481	**Referred to.**	**Para 104**
(2004) 1 SCC 712	**Referred to.**	**Para 106**
(2005) 8 SCC 534	**Referred to.**	**Para 108**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4135-4152 of 2010.

From the Judgment and Order dated 6.2.2009 of the High Court of Judicature at Allahabad, Lucknow Bench Lucknow in W.P. Nos. 7417, 7924, 7940, 8124, 8260, 8387 and 8796 of 2007, 308, 461, 463, 1101, 1657, 1908, 2494, 3140, 3457, 4865 and 5330 of 2008.

WITH

C.A. Nos. 4153, 4154-55, 4156-57, 4159-64, 4165, 4166, 4167, 4168, 4169, 4170, 4171, 4172, 4173, 4174-75, 4176, 4177, 4178 of 2010.

Sunil Gupta, Mohit Chaudhary, Tanmaya Agarwal, Puja

Sharma, Ramesh Gopinathan, A. Das, Bharat Singh, Rakesh Rao, Minakshi, Vij, Abhijat P. Medh, Abha R. Sharma, Ashok Kumar Singh, Anil Kumar Pandey, Kamlesh Pandey, K.L. Janjani, Pankaj Singh, Praveen Agrawal, AP & J Chambers for the Appellants.

Dinesh Dwivedi, Shail Kr. Dwivedi, AAG, Niranjana Singh, Shalini Kumar, Shrish Kumar Misra, Shivpati B. Pandey, Vishwajit Singh, Ritesh Agarwal, Siddharth Sengar, Abhindra Maheshwari, Samir Ali Khan, Gaurav Dhama, Anjani Kumar Singh, P.K. Jain, D.K. Goswami, Gajinder Giri, Shiv Sagar Tiwari, Sahrya & Co., Mridula Ray Bharadwaj, Ashok K. Mahajan and Rajeev Kumar Bansal for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. These appeals have been filed assailing the judgment dated 6th February, 2009 by the Lucknow Bench of Allahabad High Court whereby the High Court upheld the Constitutional validity of U.P. Panchayat Laws (Amendment) Ordinance, 2007 (U.P. Ordinance 26 of 2007) which later on became U.P. Panchayat Laws (Amendment) Act, 2007 (U.P. Act 44 of 2007). As the validity of the said amendment was in issue in all the appeals, they were heard together and are decided by this judgment.

2. In the course of argument before this Court factual controversies were not very much raised. The appeals were mostly argued on the legality of the amendment from various angles which will be considered hereinabelow.

3. The administration of Kshetra Samities and Zila Parishads in Uttar Pradesh (hereinafter, UP) is governed by Uttar Pradesh Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 (hereinafter, '1961 Act'). Prior to that there was United Provinces Panchayat Raj Act, 1947. The 1961 Act suffered several amendments in 1965, 1976, 1990, 1994, 1998 & 2007 by UP Act 16 of 1965, UP Act 37 of 1976, UP Act 20

of 1990, UP Act 9 of 1994 and UP Act 44 of 2007 respectively. The 1994 amendment by UP Act 9 of 1994 was in respect of both the 1947 and 1961 Acts. That amendment was made in keeping with the objectives incorporated in the Constitution (73rd Amendment) Act, 1992.

4. Several aspects of the amendment act were challenged. Firstly, it was challenged that the offices of "Up-Pramukh", "Senior Up-Pramukh", 'Junior Up-pramukh" and "Upadhyaksha" have been omitted by Section 9 of the Amendment Act, being UP Act 44 of 2007 (hereinafter, the amendment Act).

5. Similarly amendment was made to United Provinces Panchayat Raj Act, 1947 by Section 2 of the Amendment Act.

6. For a proper appreciation of the effect of amendment, Section 2 of the amendment Act is set out:

> "In the United Provinces Panchayat Raj Act, 1947, hereinafter in this chapter referred to as the principal Act, the word "Up-Pradhan" wherever occurring including the marginal headings, shall be omitted."

7. There has been a general amendment to 1961 Act by Section 9 of the amendment Act. Section 9 is therefore set out:

> "In the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, hereinafter in this chapter referred to as the principal Act, the words "Up-Pramukh", "Senior Up Pramukh", "Junior Up Pramukh" and "Upadhyaksha" wherever occurring including the marginal headings and Schedules, shall be omitted."

8. Challenging the said amendment, it was urged by the learned counsel that by bringing about such amendment, the essence of the Panchayati principles has been eroded and provisions have been made for executive interference.

9. The learned counsel further urged that such amendment has been made in total contravention of the principle enshrined in Part IX of the Constitution. It was urged that Part IX of the Constitution provides for a three tire structure of Panchayat administration and the reasons for such a three tire is to minimize the scope of executive interference. It was urged if the Pradhan or Pramukh of the unit of governance in Panchayat is, for any reason, removed or disqualified, from running the administration, the up-pradhan or the up-pramukh, prior to such amendment could have taken over, whereas the abolition of those offices will pave the way of executive interference.

10. Challenging the amendment it was further urged that there is no concept of no-confidence motion in the detailed constitutional provision under Chapter IX of the Constitution. Therefore, the incorporation of the said provision in the statute militates against the principles of Panchayti Raj Institution. Apart from that the substitution of the provision 'more than half' in place of 'not less than two thirds' and the words 'one year' in place of 'two years' in Sections 15 and 28 of the amendment Act further dilutes the principle of stability and continuity which are main purposes behind the object and reasons of the Constitutional amendments in Part IX of the Constitution.

11. The exact provisions of the aforesaid amendments by the impugned amendment Act are as follows:

"In Section 15 of the principal Act,-

(a) in sub-section (11) for the words "not less than two thirds" the words "more than half" shall be substituted.

(b) In sub-section (12) and sub-section (13) for the words "two years" the words "one year" shall be substituted.

In Section 28 of the principal Act-

(a) in sub-section (11) for the words "not less than two thirds" the words "more than half" shall be substituted.

(b) in sub-section (12) and sub-section (13) for the words "two years" the words "one year" shall be substituted.

12. In order to appreciate these submissions this Court may examine the genesis of the Constitutional provisions about Panchayat prior to 73rd Amendment of the Constitution.

13. Prior to the Constitution (73rd Amendment) Act, 1992, the Constitutional provisions relating to Panchayat was confined to Article 40. Article 40, one of our Directive Principles, runs as under:

"40. Organization of village Panchayats - The State takes steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government."

14. The Constitution's quest for an inclusive governance voiced in the Preamble is not consistent with Panchayat being treated merely as a unit of self-Government and only as part of Directive Principle.

15. If the relevant Constituent Assembly Debates are perused one finds even that Constitutional provision about Panchayat was inducted after strenuous efforts by some of the members. From the Debates we do not fail to discern a substantial difference of opinion between one set of members who wanted to finalize the Constitution solely on the Parliamentary model by totally ignoring the importance of Panchayat principles and another group of members who wanted to mould our Constitution on Gandhian principles of village Panchayat.

16. The word 'Panchayat' did not even once appear in the

draft Constitution. Graneville Austin in his treaties 'Indian Constitution: Corner Stone of a Nation' (Oxford) noted that the drafting Committee did not even discuss in its meetings the alternative principles of Gandhian view of panchayat. The draft Constitution was published on 26th February, 1948. (See page 34 in Austin)

17. One of the strongest critics of the draft Constitution was Dr. Rajendra Prasad and he opined that "the village has been and will even continue to be our unit in this country."

18. Subsequently other members like M.A. Ayangar and N.G. Ranga also suggested some amendments to the draft Constitution and both harped on the introduction of Panchayati Raj principles. Their arguments quoted by Graneville Austin, were on the following lines:

> "The State shall establish self-governing Panchayats for every village or a group of villages with adequate powers and funds to give training to rural people in democracy and to pave the way for effective decentralization of political and economic power." (Page 36)

19. Mr. Ayangar expressed his views very strongly by saying "Democracy is not worth anything, if once in blue moon individuals are brought together for one common purpose, merely electing X, Y and Z to the assembly and then disperse."

20. Somewhat similar opinion was expressed by S.C. Mazumdar and his views were, "the main sources of its (India's) strength lies in 'revitalized' villages but he accepted that for real purpose a strong unifying central authority is a necessity."

21. The opinion expressed by S.C. Mazumdar thus struck a balance between Gandhian principles and the parliamentary model of the Constitution.

22. However, under the strong pressure of criticism from various members, the Assembly rather grudgingly accepted

that an article concerning the Panchayat should be included in the Directive Principles. On 22nd November, 1948, K. Santhanam moved the official amendment and that is how Article 40, in its present form, came into existence. The amendment was accepted by Dr. Ambedkar.

23. About this article, Garneville Austin commented:

> "The incorporation of Article 40 in the Constitution has proved to have been less a gesture to romantic sentiment than a bow to realistic insight. And the aim of the article has long been generally accepted: if India is to progess, it must do so through reawakened village life." (Page 38 Supra)

24. Participating in the debates and supporting the amendments, some of the members made comments which are still very pertinent in appreciating the roots of our democratic policy on which is based the edifice of our Constitutional democracy.

> "Sir in my opinion the meaning of this Constitution would have been nothing so far as crores and crores of Indian people are concerned unless there was some provision like this in our Constitution. There is another point also viz., for thousands and thousands of years the meaning of our life in India as it has been expressed in various activities, was this that complete freedom for every individual was granted. It was accepted that every individual had got full and unfettered freedom; but as to what the individual should do with that freedom there was some direction. Individuals had freedom only to work for unity. With that freedom they are to search for unity of our people. There was no freedom to an individual if he works for disruption of our unity. The same principle was also accepted in our Indian constitution from time immemorial. Every village like organic cells of our body was given full freedom to express itself but at the same time with that

freedom they were to work only to maintain and preserve the unity of India.

Sir our village people are so much familiar with this system that if today there is our Constitution no provision like this they would not have considered this as their own Constitution or as something known to them, as something which they could call their own Constitution or as something known to them, as something which they could call their own country's Constitution. Therefore, Sir, I am glad and I congratulate both my friend the Hon'ble Mr. Santanam and the Hon'ble Dr. Ambedkar on moving this amendment as well as for acceptance of the same. Sir, I commend this."

(Shri Surendra Mohan Ghosh: West Bengal: General)

25. The opinion of Seth Govind Das from Central Provices and Berar is equally relevant:

"Ours is an ancient, a very ancient country and the village has had always an important position here. This has not been so with every ancient country. In Greece, for instance, towns had greater importance than villages. The Republics of Athens and Sparta occupy a very important place in the world history today. But no importance was attached by them to the villages. But in our country the village occupied such an important position that even in the legends contained in most ancient books – the Upanishads – if there are descriptions of forest retreats, of the sages, there are also descriptions of villages. Even in Kautilya's Arthashastra there are to be found references to our ancient villages. Modern historians have also admitted this fact. We find the description of our ancient village organization in 'Ancient Law' by Mr. Henry Man, 'Indian Village Community' by Baden Powell and in 'Fundamental Unity of India' by Sri. B.C. Pal. I would request the members of this House to go through these books. They will come

to know from these books the great importance, the village have had in India since the remotest times. Even during the Muslim rule villages were considered of primary importance. It was during the British regime that the villages fell into neglect and lost their importance. There was a reason for this. The British Raj in India was based on the support of a handful of people. During the British regime provinces, districts, tehsils and such other units were formed and so were formed the Taluqdaris, Zamindaris and Malguzaris. The British Rule lasted here for so many years only on account of the support of these few people.

Just as Mahatma Gandhi brought about revolution in every other aspect of this country's life so also he brought about a revolution in village life. He started living in a village. He caused even the annual Congress Sessions to be held in villages. Now that we are about to accept this motion I would like to recall to the memory of the members of this House a speech he had delivered here in Delhi, to the Asiatic Conferences. He had then advised the delegates of the various nations to go to Indian villages if they wanted to have the glimpse of the real India. He had told them that they would not get a picture of real India from the towns. Even today 80% of our population lives in villages and it would be a great pity if we make no mention of our villages in the Constitution."

26. In other representative democracies of the world committed to a written Constitution and rule of law, the principles of self Government are also part of the Constitutional doctrine. It has been accepted in the American Constitution that the right to local self-Government is treated as inherent in cities and towns. Such rights cannot be taken away even by legislature. The following excerpts from American Jurisprudence are very instructive:-

"Stated differently, it has been laid down as a binding principle of law in these jurisdictions that a statute which

attempts to take away from a municipal corporation its power of self-Government, except as to matters which are of concern to the State as a whole, is in excess of the power of the legislature and is consequently void. Under this theory, the principle of home rule, or the right of self-Government as to local affairs, is deemed to have existed before the constitution."

(Volume 56, American Jurisprudence, Article 125.)

27. Under 73rd Amendment of the Constitution, Panchayat became an 'institution of self governance' which was previously a mere unit, under Article 40.

28. 73rd Amendment heralded a new era but it took nearly more than four decades for our Parliament to pass this epoch making 73rd Constitution Amendment - a turning point in the history of local self-governance with sweeping consequences in view of decentralization, grass root democracy, people's participation, gender equality and social justice.

29. Decentralization is perceived as a pre-condition for preservation of the basic values of a free society. Republicanism which is the 'sine qua non' of this amendment is compatible both with democratic socialism and radical liberalism. Republicanism presupposes that laws should be made by active citizens working in concert. Price of freedom is not merely eternal vigilance but perpetual and creative citizen's activity.

30. This 73rd Amendment is a very powerful 'tool of social engineering' and has unleashed tremendous potential of social transformation to bring about a sea-change in the age-old, oppressive, anti human and status quoist traditions of Indian society. It may be true that this amendment will not see a quantum jump but it will certainly initiate a thaw and pioneer a major change, may be in a painfully slow process.

31. In order to understand the purport of the 73rd Constitutional amendment in Part IX of the Constitution, it is important to keep in view the Statements of Objects and Reasons behind the amendment. Excerpts from the same are set out:-

"THE CONSTITUTION(SEVENTY-THIRD AMENDMENT) ACT, 1992

Statement of Objects and Reasons appended to the Constitution (Seventy-second Amendment) Bill, 1991 which was enacted as the Constitution (Seventy-third Amendment) Act, 1992

Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged suppressions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them."

32. What was in a nebulous state as one of Directive Principles under Article 40, through 73rd Constitutional

Amendment metamorphosed to a distinct part of Constitutional dispensation with detailed provision for functioning of Panchayat. The main purpose behind this is to ensure democratic decentralization on the Gandhian principle of participatory democracy so that the Panchayat may become viable and responsive people's bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiring respect of common man.

33. In our judgment, this 73rd Amendment of the Constitution was introduced for strengthening the perambular vision of democratic republicanism which is inherent in the constitutional framework.

34. On a close perusal of the 73rd Constitutional Amendment, one would be tempted to say that the vision of Surendra Nath Banerjee, expressed almost a century ago, about our local self-Government has been revived.

35. From the proceeding of the Council of Governor General of India (April 1913 to March 1914) we find, Surendra Nath articulated:

> "..the village is the fundamental, the indestructible unit of the Indian Social system, which has survived the over-throw of dynasties and the fall of empires. Sir, our village organizations carry the mind back to the dawn of human civilization and the early beginning of local self-government. They are dead now, but the instinct is there, deep down in the national consciousness, and under the fostering care of a wise and beneficent government, such as we now have it may be revivified into a living flame. Our system of local self-government has been built up from the top. That, perhaps, was inevitable under the circumstances. But the time has now come when it should be strengthened from below and the foundations laid well and deep....."

36. Unfortunately that time came very late and as late as

1993 when 73rd Amendment of the Constitution was brought about.

37. India has been and continues to be a predominantly rural country. There are 5 lakh 78 thousand 430 villages in which 74% of her people, which is about 750 million, live. Out of this village population 48% live below poverty line. Though our Constitution professes to be a democratic republic but our rural set up is largely feudal. The agrarian relationship of the majority of the people is very weak and helpless compared with few land holding families which control economic interest of larger sections of village society. Unfortunately our independence has not been able to change our political priorities and dynastic democratic pattern is the order of the day.

38. The vast majority of the rural masses still have to obey decisions taken by few people living in metropolitan centers representing an alien culture and ethos.

39. Here it may not be out of context to remember what was said by Bhagat Singh and Batukeshwar Dutta on 6th June, 1929 in their joint statement in connection with the criminal trial they faced in *Crown vs. Bhagat Singh*. In paragraphs 7 and 8 of their joint statement, the great martyr Bhagat Singh said:

> "7. I, Bhagat Singh was asked in the lower Court as to what we meant by the word 'Revolution'. In answer to that question, I would say that Revolution does not necessarily involve a sanguinery strife, nor is there any place in it for individual vendetta. It is not the cult of the bomb and the pistol. By Revolution we mean that the present order of things which is based on manifest injustice must change. The producers or the labourers, inspite of being the most necessary element of society are robbed by their exploiters of the fruits of their labour and deprived of their elementary right. On the one hand the peasant who grows corn for all starves with his family, the weaver who supplies world markets with textile fabrics cannot find enough to

cover his own and his children's bodies; the masons, the smith and the carpenters who rear magnificent palaces live and perish in slums; and on the other the capitalists exploiters, the parasites of society squander millions on their whims. These terrible inequalities and forced disparity of chances are heading towards chaos. This state of affairs cannot last; and it is obvious that the present order of Society is merry-making on the brink of a volcano and the innocent children of the Exploiters no less than millions of the exploited are walking on the edge of a dangerous precipice. The whole edifice of this civilization, if not saved in time, shall crumble. A radical change, therefore is necessary; and it is the duty of those who realize this to reorganize society on the socialistic basis. Unless this is done and the exploitation of man by man and of nations by nations, which goes marquerading as Imperialism, is brought to end, the sufferings and carnage with which humanity is threatened today cannot be prevented and all talks of ending wars and ushering in an era of universal peace is undisguised hypocricy. By revolution we mean the ultimate establishment of an order of society which may not be threatened by such a breakdown; and in which the sovereignty of the Proletariat should be recognized; and as the result of which a world-federation should redeem humanity from the bondage of capitalism and the misery of imperial wars.

8. xxx xxxx

Revolution is the inalienable right of mankind. Freedom is the imprescriptable birth right of all. The labourer is the real sustainers of society. The Soverignty of the people is the ultimate destiny of the workers.

For these ideals, and for these faith, we shall welcome any suffering to which we may be condemned. To the altar of this revolution we have brought our youth as

incense; for no sacrifice is too great for so magnificent a cause.

We are content; we await the advent of the Revolution 'Long live the Revolution'."

40. The ideas of Bhagat Singh, even if not wholly but substantially have been incorporated in the preambular vision of our Constitution. But the dream for which he sacrifised his life has not been fulfilled and the relevance of what he said can hardly be ignored. The ground realities, if at all, changed only marginally.

41. Let these momentous words of a convict in British India form part of the judicial record in the last Court of our Democratic Republic, the largest democracy in the world.

42. The 73rd Amendment of the Constitution, this Court thinks, is a forward step to bring about the radical changes in our social structure which inspired the struggle of Bhagat Singh, the great martyr.

43. When faced with a challenge to interpret such laws, Courts have to discharge a duty. The Judge cannot act like a phonographic recorder but he must act as an interpreter of the social context articulated in the legal text. The Judge must be, in the words of Justice Krishna Iyer, "animated by a goal oriented approach" because the judiciary is not a "mere umpire, as some assume, but an active catalyst in the Constitutional scheme" [See *Authorized Officer, Thanjavur and another vs. S. Naganatha Ayyar and others,* (1979) 3 SCC 466].

44. The Panchayati Raj Institutions structured under the said amendment are meant to initiate changes so that the rural feudal oligarchy lose their ascendancy in village affairs and the voiceless masses, who have been rather amorphous, may realize their growing strength. Unfortunately, effect of these changes by way of Constitutional Amendment has not been fully realized in the semi-feudal set up of Indian politics in which

still voice of reason is drowned in an uneven conflict with the mythology of individual infallibility and omniscience. Despite high ideals of Constitutional philosophy, rationality in our polity is still subordinated to political exhibitionism, intellectual timidity and petty manipulation. The 73rd Amendment of the Constitution is addressed to remedy these evils.

45. The changes introduced by the 73rd Amendment of the Constitution have given Panchayati Raj Institutions a Constitutional status as a result of which it has become permanent in the Indian Political system as a third Government.

46. On a careful reading of this amendment, it appears that under Article 243B of the Constitution, it has been mandated that there shall be Panchayat at the village, intermediate and district levels in accordance with the provisions of Part IX of the Constitution.

47. Article 243C provides for composition of Panchayat which contemplated the post of Chairperson.

48. Article 243D provides for reservation of seats and 243E provides for duration of Panchayat. Article 243F enumerates the grounds of disqualification of membership of the Panchayat and 243G prescribes the powers, authority and responsibilities of Panchayat. There are several other provisions relating to powers of the Panchayat to impose taxes and for constitution of Finance Commission in order to review financial position of the Panchayat. The accounts of the Panchayat are also to be audited as per Constitutional mandate under Article 243J. There are detailed provisions for elections of Panchayat under Article 243K. Article 243O imposes the bar to interference by Courts in electoral matters of the Panchayat.

49. In this connection particular reference may be made to the provision of Article 243G of the Constitution which is set out below:

> *"243G. Powers, authority and responsibilities of Panchayat.* - Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to-
>
> (a) the preparation of plans for economic development and social justice;
>
> (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

50. The said article is to be read in conjunction with 11th Schedule of the Constitution which came with the said 73rd Amendment.

51. To alter the planning process of the country a statutory planning body like District Planning Committee has been created. To ensure regular election to these bodies Election Commission has been created. In order to ensure people's participation Gram Sabha, a body at the grass root level, has been constitutionally planned. A perusal of the Constitution provision in the 73rd Amendment would show that the success of the system does not depend merely on the power which has been conferred but on the responsibility which has been bestowed on the people.

52. Under the Constitutional scheme introduced by the 73rd Amendment Government State is no longer a service provider but is a felicitator for the people to initiate development on the basis of equity and social justice and for the success of the system people has to be sensitized about their role and

responsibility in the system.

53. Thus the composition of the Panchayat, its function, its election and various other aspects of its administration are now provided in great detail under the Constitution with provisions enabling the State Legislature to enact laws to implement the Constitutional mandate. Thus formation of Panchayat and its functioning is now a vital part of the Constitutional scheme under Part IX of the Constitution.

54. Obviously such a system can only thrive on the confidence of the people on those who comprise the system.

55. In the background of these provisions, learned counsel for the appellants argued that the provision of no-confidence, being not in Part IX of the Constitution is contrary to the Constitutional scheme of things and would run contrary to the avowed purpose of Constitutional amendment which is meant to lend stability and dignity to Panchayati Institutions. It was further argued that reducing the period from 'two years' to 'one year' before a no-confidence motion can be brought further unsettles the running of the Panchayat. It was further urged that under the impugned amendment that such a no-confidence motion can be carried on the basis of a simple majority instead of two thirds majority dilutes the concept of stability.

56. This Court is not at all persuaded to accept this argument on various grounds discussed below.

57. A Constitution is not to give all details of the provisions contemplated under the scheme of amendment. In the said amendment, under various articles, like articles 243A, 243C(1), (5), 243D(4), 243X(6), 243F(1) (6), 243G, 243H, 243I (2), 243J, 243(K) (2), (4) of the Constitution, the legislature of the State has been empowered to make law to implement the Constitutional provisions.

58. Particularly Article 243C(5), which provides for election of Chairperson, specially provides:

"243C Composition of Panchayats – xxx xxx

(5) The Chairperson of-

(a) a Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and

?(b) a Panchayat at the intermediate level or district level, shall be elected by, and from amongst, the elected members thereof.

59. Therefore, the argument that the provision of no-confidence motion against the Chairman, being not in the Constitution, cannot be provided in the statute, is wholly unacceptable when the Constitution specifically enables the State Legislature to provide the details of election of the Chairperson.

60. It may be mentioned that the statutory provision of no-confidence motion against the Chairperson is a pre-Constitutional provision and was there in Section 15 of the 1961 Act.

61. In this context, Article 243N of the Constitution in Part IX is relevant and set out below:

"243N. Continuance of existing laws and Panchayats. - Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a Stale immediately before commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the

expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

62. It is clear that the provision for no-confidence motion against the Chairperson was never repealed by any competent legislature as being inconsistent with any of the provisions of Part IX. On the other hand by subsequent statutory provisions the said provision of no-Confidence has been confirmed with some ancillary changes but the essence of the no-confidence provision was continued. This Court is clearly of the opinion that the provision of no-confidence is not inconsistent with Part IX of the Constitution.

63. The provision of Article 243N of the Constitution makes it clear if the Panchayat laws, in force in a State prior to Constitutional Amendment, contain provisions which are inconsistent with Part IX, two consequences will follow:

(1) Those provisions will continue until amended or repealed by competent legislature or authority, and

(2) Those provisions will continue until one year from commencement of the Constitution amendment, if not repealed earlier.

64. Immediately after the Constitution amendment by way of Part IX, came Uttar Pradesh Panchayat Laws (Amendment) Act, 1994. This was enacted on 22.4.1994 to give effect to the provisions of Part IX of the Constitution. But the pre-existing provision of the no-confidence was not repealed. Rather it was confirmed with minor changes in subsequent amendment Acts of 1998 being UP Act 20 of 1998 and which was further amended in the impugned amendment Act of 2007 being UP Act 44 of 2007.

65. The appellants have not challenged U.P. Act 20 of 1998

by which Section 15 of 1961 Act was continued in amended version.

66. Therefore, the continuance of no-confidence provision has not been challenged – what has been challenged is the reduction of the period from 'two years' to 'one year' and the requirement majority from "not less than two-thirds" to "more than half". It is thus clear that the statutory provision of no-confidence is not contrary to Part IX of the Constitution.

67. Apart from the aforesaid reasons, the arguments by appellants cannot be accepted in view of a very well known Constitutional Doctrine, namely, the Constitutional doctrine of silence. Michael Folley in his treaties on 'The Silence of Constitutions' (Routledge, London and New York) has argued that in a constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content and substance of their structures." (Page 10) The learned author elaborated this concept further by saying "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and intermediate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components". (Page 82)

68. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution.

69. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by 73rd Constitutional amendment by making detailed provision for democratic decentralization and self Government on the principle of grass root democracy cannot be interpreted to exclude the provision of no-confidence motion in the respect

of the office of the Chairperson of the Panchayat just because of its silence on that aspect.

70. As noted above the provision of no-confidence was a pre-73rd Amendment statutory provision and that was continued even after the 73rd Amendment in keeping with mandate of Article 243N. This continuance of the no-confidence provision, as noted above was not challenged by the appellants. This aspect has been noted by the High Court in the impugned judgment. The High Court noted:

> "The original Act of the 1961 provides block period of 12 months for initiation of no-confidence motion in reference to Kshettra Samiti/Panchayat, which was amended in the year 1965 by U.P. Act No. 16 of 1965 and the block period was enhanced to 'two years' from '12 months'. Again in the year 1990 the block period was reduced as the words 'two years' was substituted by words 'one year' by U.P. Act No. 20 of 1990. In the year 1998 U.P. Act No. 20 of 1998 again amended Section 15 and the block period was again enhanced to 'two years'. In the year 2007 again by U.P. Act No. 44 of 2007 the term 'two years' was substituted by 'one year' by virtue of which the block period of 'two years' was reduced to 'one year'.

71. The amended provision for the required majority for no-confidence motion also has been noted in impugned judgment of the High Court.

> "The majority as provided in Section 15(11) of the Original Act of 1961 for passing of no-confidence motion was 'more than half of the total number of members of Kshettra Samiti'.
>
> In the year 1994 by U.P. Act No. 1994 the term 'member' in Section 15(11) was substituted by 'elected members' hence in 1994 also, the motion was to be carried through with the support of more than half of the

> total number of elected members of Kshettra Panchayat.
>
> In the year 1998 the required majority was enhanced to 'two-third' from more than half as the word 'more than half' in Section 15(11) was substituted by the word 'not less than two-third' by U.P. Act No. 20 of 1998.
>
> Lastly, in the year 2007 again the provision relating to the majority for moving no-confidence motion was amended by U.P. Act No. 44 of 2007 and the words 'not less than two-third' was substituted by the words 'more than half' in Section 15(11)."

72. The argument that as a result of the impugned amendment stability and dignity of the Panchayati Raj Institution has been undermined is also not well founded. As a result of no-confidence motion the Chairperson of a Panchayat loses his position as a Chairperson but he remains a member, and the continuance of Panchayat as an institution is not affected in the least.

73. Going by the aforesaid tests, as we must, this Court does not find any lack of legislative competence on the part of the State Legislature in enacting the impugned amendment Act.

74. The learned counsel for the appellant cited several judgments in support of the contention that the impugned amendment in relation to the provisions for no-confidence are unreasonable and ultra vires the provisions of Part IX.

75. It has already been pointed out that the object and the reasons of Part IX are to lend status and dignity to Panchayati Raj Institutions and to impart certainty, continuity and strength to them.

76. The learned counsel for the appellant unfortunately, in his argument, missed the distinction between an individual and an institution. If a no-confidence motion is passed against the chairperson of a Panchayat, he/she ceases to be a

Chairperson, but continues to be a member of the Panchayat and the Panchayat continues with a newly elected Chairperson. Therefore, there is no institutional set back or impediment to the continuity or stability of the Panchayati Raj Institution.

77. These institutions must run on democratic principles. In democracy all persons heading public bodies can continue provided they enjoy the confidence of the persons who comprise such bodies. This is the essence of democratic republicanism. This explains why this provision of no-confidence motion was there in the Act of 1961 even prior to the 73rd Constitution amendment and has been continued even thereafter. Similar provisions are there in different States in India.

78. Section 211 of the Tamil Nadu Panchayats Act, 1994 contains a provision for motion of no-confidence in respect of Vice-President of panchayat and Section 212 contains a provision for motion of non confidence in respect of chairman or vice-chairman of panchayat union council.

79. In the Bombay Village Panchayats Act, 1958 under Section 35 similar provision for motion of no-confidence is to be found.

80. In West Bengal Panchayat Act, 1973 under Section 12 there is a provision for the removal of Pradhan and Up-Pradhan if he has lost the confidence of the members of the Gram Panchayat.

81. In M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, Section 21 provides for No-confidence motion against Sarpanch and Up-Sarpanch.

82. There is a similar provision of No-confidence motion against Sarpanch under Section 19 of the Punjab Panchayati Raj Act, 1994 as also under Section 157 the Kerala Panchayat Raj Act, 1994.

83. The Karnataka Panchayat Raj Act, 1993 Section 49

has similar provision of a motion of no-confidence against Adhyaksha or Upadhyaksha of Gram Panchayat.

84. Such a provision is wholly compatible and consistent with the rejuvenated Panchayat contemplated in Part IX of the Constitution and is not at all inconsistent with the same.

85. Democracy demands accountability and transparency in the activities of the Chairperson especially in view of the important functions entrusted with the Chairperson in the running of Panchayati Raj Institutions. Such duties can be discharged by the Chairperson only if he/she enjoys the continuous confidence of the majority members in the Panchayat. So any statutory provision to demonstrate that the Chairperson has lost the confidence of the majority is conducive to public interest and adds strength to such bodies of self Governance. Such a statutory provision cannot be called either unreasonable or ultra vires Part IX of the Constitution.

86. Any head of a democratic institution must be prepared to face the test of confidence. Neither the democratically elected Prime Minister of the Country nor the Chief Minister of a State is immune from such a test of confidence under the Rules of Procedure framed under Articles 118 and 208 of the Constitution. Both the Prime Minister of India and Chief Ministers of several States heading the Council of Ministers at the Centre and in several States respectively have to adhere to the principles of collective responsibilities to their respective houses in accordance with Articles 75(3) and 164(2) of the Constitution.

87. The learned counsel for the appellant therefore compared the position of the Chairperson of a Panchayat with that of the President of India and argued that both are elected for five years and President's continuance in office is not subject to any vote of no-confidence. The post of Chairperson should have the same immunity.

88. This is an argument of desperation and has been advanced, with respect, without any regard to the vast difference in Constitutional status and position between the two posts. The two posts are not comparable at all by any standards. Even the President of India is subject to impeachment proceedings under Article 61 of the Constitution. No one is an 'imperium in imperio' in our Constitutional set up.

89. In this matter various judgments have been cited by the learned counsel for the appellant. Of those judgments only the judgment in *Mohan Lal Tripathi vs. District Magistrate, Rai Bareilly & others* [1992 (4) SCC 80] is on the question of the no-confidence motion against President of the municipality elected directly by the electorate. No-confidence motion was passed by the board against the said President and not by the electorate. That was challenged. This Court repelled the challenge and upheld the no-confidence motion holding that the recall by the Board amounts to recall by the electorate itself.

90. Upholding the aforesaid provision of no-confidence which is virtually a power of recall, this Court in *Mohan Lal Tripathi* (supra) held that the recall of the elected representative, so long it is in accordance with law, cannot be assailed on abstract laws of democracy. (Para 2, page 86 of the report)

91. Upholding the concept of vote of no-confidence in *Mohan Lal Tripathi* (supra) this Court further elaborated the concept as follows:

> "...Vote of no-confidence against elected representative is direct check flowing from accountability. Today democracy is not a rule of 'Poor' as said by Aristotle or of 'Masses' as opposed to 'Classes' but by the majority elected from out of the people on basis of broad franchise. Recall of elected representative is advancement of political democracy ensuring true, fair, honest and just representation of the electorate. Therefore, a provision in a statute for recall of an elected representative has to be

> tested not on general or vague notions but on practical possibility and electoral feasibility of entrusting the power of recall to a body which is representive in character and is capable of projecting views of the electorate. Even though there was no provision in the Act initially for recall of a President it came to be introduced in 1926 and since then it has continued and the power always vested in the Board irrespective of whether the President was elected by the electorate or Board. Rationale for it is apparent from the provisions of the Act..."

92. In *Ram Beti vs. District Panchayat Raj Adhikari & others* [1998 (1) SCC 680] this Court has upheld the provisions of Section 14 of U.P. Panchayat Raj Act, 1947 as amended by U.P. Act No. 9 of 1994 which empowers members of the Gram Panchayat to remove the Pradhan of Gram Sabha by vote of no-confidence. This Court held that such a provision is not unconstitutional nor does it infringe the principle of democracy or provisions of Article 14. This decision was rendered in 1997, which is after the incorporation of Part IX of the Constitution.

93. In fact, in *Ram Beti* (supra), this Court considered the impact of 73rd Amendment and also took into consideration the provisions of Article 243N introduced by 73rd Amendment. The ratio in *Mohan Lal Tripathi* (supra) was also affirmed in *Ram Beti* (supra).

94. In the background of this admitted position, the argument that 2007 Amendment Act lacks legislative competence has no merit. The relevant legislative entry in respect of Panchayat is in Entry 5, list II of the 7th Schedule. The said entry is:

> "5. Local Government, that is to say, the constitution and powers of municipal, corporations, improvement trusts, district boards mining settlement authorities and other local authorities for the purpose of local self Government or village administration."

95. It is well known that legislative entry is generic in nature and virtually constitutes the legislative field and has to be very broadly construed. These entries demarcate 'areas', 'fields' of legislation within which the respective laws are to operate and do not merely confer legislative power as much. The words in the entry should be held to extend to all ancillary and subsidiary matters which can be reasonably said to be encompassed by it. [See *Hans Muller of Nurenburg vs. Superintendent, Presidency Jail, Calcutta and others,* AIR 1955 SC 367; *Navinchandra Mafatlal, Bombay vs. Commissioner of Income Tax, Bombay City,* AIR 1955 SC 58, and also the decision of this Court rendered in *Jilubhai Nanbhai Khachar etc. etc. vs. State of Gujarat and another* reported in AIR 1995 SC 142 at 148].

96. About interpretation of entries in the 7th Schedule reliance was placed by the learned counsel for the appellant on the judgment of Constitution Bench of this court in *Diamond Sugar Mills Limited and another vs. The State of Uttar Pradesh and another* reported in AIR 1961 SC 652. In that case the Court considered the meaning of the word 'local area' in Entry 52 of the State List in the 7th Schedule. The Constitution Bench of this Court held that in considering the meaning of the words in the 7th Schedule, the Court should bear in mind that the entries of such schedule should be liberally interpreted as they confer rights of legislation. But at the same time the Court should be careful enough not to extend the meaning of the words beyond their reasonable connotation in an anxiety to preserve the power of the legislature. On the basis of the above interpretation this Court held that 'premises of a factory' is not a 'local area'.

97. The said decision has no application in the present case in as much as Entry 5 of List II of the 7th Schedule is wide enough to authorize legislation of no-confidence against the Chairperson of the Panchayat.

98. The next judgment cited on this point was rendered in

the case of *State of Tamil Nadu vs. M/s. Payarelal Malhotra and Others* [1976 (1) SCC 834].

99. In that decision meaning of the expression 'that is to say' was discussed with reference to Stroud's Judicial Dictionary.

100. Relying on Stroud, this Court held the expression 'that is to say' is resorted to for clarifying and fixing the meaning of what is defined. There is no difficulty about applying those principles to the facts of this case. In *Payarelal* (supra), this Court was construing the relevant entry in the context of single point Sales Tax subject to special conditions when imposed on separate categories of specified goods. Therefore, there is vast situational difference between the case in *Payarelal* (supra) and the present one.

101. The last decision cited on this point was rendered in the case of *Commissioner of Sales Tax M.P. vs. Popular Trading Company, Ujjain* [2000 (5) SCC 511]. This was also a case relating to Sales Tax and the expression 'that is to say' has been used. This Court in explaining the purport of 'that is to say' referred to the ratio in *Payarelal* (supra). Even if we accept the said ratio in construing the ambit of Entry 5 of List II in the 7th Schedule, this Court finds that the impugned provision of no-confidence against the Chairperson of the Panchayat is very much encompassed within Entry 5 if we read the entry liberally and in accordance with well settled principles of reading legislative entries in several lists of the 7th Schedule. The decision on *Popular Trading* (supra) does not at all advance the case of the appellant.

102. Learned counsel for the State of U.P. cited some decisions to point out how the Court should consider the challenge to the constitutional validity of a Statute. Some of the decisions cited by the learned counsel are quite helpful and are considered by this Court.

103. In the case of *State of Bihar & Ors. vs. Bihar Distillery Limited* – JT 1996 (10) S.C. 854, this Court in paragraph 18 at page Nos. 865-866 of the report laid down certain principles on how to judge the constitutionality of an enactment. This Court held that in this exercise the Court should (a) try to sustain validity of the impugned law to the extent possible. It can strike down the enactment only when it is impossible to sustain it; (b) the Court should not approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed; (c) the Court should consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with; (d) the Court should strike down the Act only when the unconstitutionality is plainly and clearly established; (e) the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it. This Court abstracted those principles from various judgments of this Court.

104. In *State of Bihar* (supra), this Court also considered the observations of Lord Denning in *Seaford Court Estates Ltd. vs. Asher* – [1949 (2) K.B. 481] and highlighted that the job of a judge in construing a statute must proceed on the constructive task of finding the intention of Parliament and this must be done (a) not only from the language of the statute but also (b) upon consideration of the social conditions which gave rise to it (c) and also of the mischief to remedy which the statute was passed and if necessary (d) the judge must supplement the written word so as to give 'force and life' to the intention of the legislature.

105. According to Lord Denning these are the principles laid down in Heydon's case and is considered one of the safest guides today. This Court also accepted those principles. (See para 21 at page 867 of the report).

106. Reliance was also placed on another decision of this Court in *Dharam Dutt and Ors. vs. Union of India & Ors.* – (2004) 1 SCC 712. This judgment is relevant in order to deal with the argument of the learned counsel for the appellants that

in reducing the period for bringing the no-confidence motion from 'two years' to 'one year' and then in reducing the required majority from 2/3rd to simple majority, the legislature was guided by the sinister motive of some influential Ministers to get rid of a local leader who, as a Pradhan of Panchayat, may have become very powerful and competitor of the Minister in the State.

107. In *Dharam Dutt* (supra) this Court held that if the legislature is competent to pass a particular law, the motive which impelled it to act are really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded Parliament into passing the Act would be of no use at all. (See page 713 of the report).

108. Reliance was also placed on the Constitution Bench judgment of this Court in *State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and Ors.* – (2005) 8 SCC 534. Chief Justice Lahoti speaking for the Bench laid down in para 37, page 562 of the report that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in legislative process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. Of course the Court must always recognize the presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies heavily on the party which assails it.

109. 6Chief Justice Lahoti also laid down several parameters in considering the constitutional validity of a statute at page No.562-563 of the report. One of the parameters which is relevant in this case is however important the right of citizen or an individual may be it has to yield to the larger interests of the country or the community.

110. Considering all these aspects, this Court sees no

reason to take a view different from the one taken by the Hon'ble High Court.

111. For the reasons aforesaid this Court upholds the Constitutional validity of the U.P. Panchayat Laws (Amendment) Act, 2007 (U.P. Act 44 of 2007) and the appeals are dismissed. The judgment of the Hon'ble High Court is upheld and affirmed. All interim orders are vacated. There shall be no order as to costs.

N.J. Appeals dismissed.

ATLA SIDDA REDDY

v.

BUSI SUBBA REDDY AND ORS.

(Special Leave Petition (C) No. 4549 of 2008)

MAY 06, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

***Suit**: Suit for declaration of title – Suit property sold by DW-4 by registered sale deed in 1968 – Petitioner claiming title over property on the basis of registered sale deed executed by DW-4 in 1974 – Held: DW-4 was not competent to execute the subsequent sale deed in 1974 in respect of same property – Petitioner therefore did not acquire any title to the suit property – Deeds and documents.*

The petitioner filed a suit for declaration of title to the suit property. The basis of petitioner's claim was that suit property was sold by DW-4 to 'SG' by a registered deed dated 10.5.1974 (Ext.A-1) from whom the petitioner purchased the suit property in 1984. The defence of defendant was that DW-4 sold the suit property by a registered deed dated 22.5.1968 (Ext.B-1) to one 'TH' who then sold it on 17.5.1982 to 'PP'. The defendant then purchased the suit property from 'PP' by registered deed in 1985.

The trial court dismissed the suit and held that in view of registered deed dated 22.5.1968 by DW-4, she was no longer competent to execute the subsequent sale deed in respect of same property in favour of 'SG' through whom the petitioner claimed title. The First Appellate Court decreed the suit holding that the evidence of DW-4 was not reliable as she neither knew 'TH' nor the scribe

of the sale deed. However, the High Court accepted the evidence of DW-4 and held that since Ext.B-1 was prior in point of time in relation to the subsequent document executed in favour of 'SG', the petitioner, who had acquired his title through 'SG', did not acquire any title to the suit properties. On such finding, the High Court reversed the decision of the first Appellate Court. Aggrieved petitioner filed special leave petition.

Dismissing the special leave petition, the Court

HELD: Ext.B2 was a crucial document and was admittedly anterior in point of time to Ext.A1 subsequently executed by DW-4 when she had already divested herself of title to the suit properties. The petitioner did not, therefore, acquire any title to the suit property and the suit was rightly dismissed. [Para 11] [629 -A-B]

CIVIL APPELLATE JURISDICTIO : SLP (Civil) No. 4549 of 2008.

From the Judgment & Order dated 18.4.2007 of the High Court of Andhra Pradesh at Hyderabad in Second Appeal No. 656 of 1997.

A. Subba Rao for the Petitioner.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Despite service of notice, the respondents have not appeared to contest the Special Leave Petition which is directed against the judgment and order dated 18th April, 2007, passed by the Andhra Pradesh High Court in S.A. No.656 of 1997.

2. In September, 1988, the petitioner filed O.S. No.735 of 1988 in the Court of District Munsif, Cuddapah, inter alia, for declaration of the petitioner's title to the plaint schedule property

and for permanent injunction to restrain the defendant No.1 and his men from interfering with the petitioner's peaceful possession therein and enjoyment thereof. The III Additional District Munsif dismissed the petitioner's suit on 29.11.1990, upon holding that the petitioner had failed to establish the title of his predecessor-in-interest in the suit land. The petitioner preferred an appeal, being A.S.No.113 of 1990, in the Court of 1st Additional District Judge, Cuddapah, which was allowed on 26th March, 1997. The judgment and order of the trial court was set aside and the suit was decreed in favour of the petitioner.

3. It may be indicated that the defendant No.1 Koppolu Subba Reddy, died during the pendency of the appeal before the 1st Additional District Judge, Cuddapah, and the Respondents Nos. 2 to 4 herein were brought on record as his legal representatives. The respondents herein filed Second Appeal No.656 of 1997, in the Andhra Pradesh High Court and the same was allowed by the learned Single Judge on 18th April, 2007. The judgment and decree of the 1st Additional District Judge was set aside and the judgment and decree of the trial court dismissing the petitioner's suit was restored.

4. In order to appreciate the submissions of Mr. A. Subba Rao, learned advocate, appearing in support of the Special Leave Petition, it is necessary to set out the facts of the case in brief.

5. According to the petitioner, the suit property belonged to the defendant No.1, Koppolu Subba Reddy who sold the same to one Pasupula Lakshmamma by a registered deed of sale dated 19.7.1966. Lakshmamma, in her turn, sold the property to one Syed Ghouse Bi alias Chand Begum, a minor represented by her guardian and father Syed Ghouse, by a registered sale deed dated 10.5.1974 and the same was allegedly attested by the defendant No.1 himself. Thereafter, Syed Ghouse Bi alias Chand Begum sold the land to the petitioner by a registered deed of sale dated 5.3.1984 and the

petitioner is in peaceful possession and enjoyment of the said land in his own right since then. The suit was resisted by the defendant by filing a written statement wherein it was admitted that the suit lands originally belonged to the defendant No.1 who sold the same to Lakshmamma, but the said Lakshmamma sold all the lands, except Survey No.93/6, to one Thondolu Mahaboob Basha, son of Dathagiri by a registered deed of sale dated 22.5.1968. Subsequently, Thondolu Mahaboob Basha sold two portions of the said land, namely, Survey No.99/6 to an extent of 40 cents out of 52 cents and Survey No.99/6 to an extent of 47 cents, comprising the suit land, to Pallampalli Pedda Veera Reddy, by a registered deed of sale dated 17.5.1982. The defendant thereafter purchased the said two plots of land from the said Pallampalli Pedda Veera Reddy by a registered deed dated 7.11.1985. The defendant, accordingly, was the absolute owner of the said land and he has been in possession and enjoyment of the property since then.

6. In the light of the pleadings of the parties to the suit, the main issue which fell for decision of the trial court was whether the petitioner had acquired title to the suit properties by virtue of the deed of sale dated 5.3.1984 executed in his favour by Syed Ghouse Bi alias Chand Begum in view of the case of the defendant that Lakshmamma had already sold the suit property to one Thondolu Mahaboob Basha by a registered deed of sale dated 22.5.1968 (Ext.B2). In other words, what the Court was called upon to decide was whether Ext.B2 extinguished Lakshmamma's right in the suit property so that she no longer had any right to execute and register the sale deed dated 10th May, 1974 executed in favour of Syed Ghouse Bi alias Chand Begum.

7. The trial court came to the finding that in view of the registered sale deed dated 22.5.1968 executed by Lakshmamma in favour of Thondolu Mahaboob Basha in respect of the suit property, she was no longer competent to

execute the subsequent sale deed in respect of the same property in favour of Syed Ghouse Bi alias Chand Begum through whom the plaintiff/petitioner claims title. The trial court thereupon dismissed the suit.

8. The First Appellate Court, however, chose not to rely on the evidence of Lakshmamma, (DW.4), who in her deposition was not certain as to how the sale deed was said to have been executed by her in favour of Thondolu Mahaboob Basha as she neither knew him nor the scribe, who is said to have written the sale deed.

9. The First Appellate Court held that the testimony of DW.4, Lakshmamma, did not inspire confidence and, accordingly, discarded the same as far as the sale deed in favour of Thondolu Mahaboob Basha on 22.5.1968 (Ext.B2) is concerned and relied on the subsequent deed executed in favour of Syed Ghouse Bi alias Chand Begum dated 10.5.1974 (Ext.A1), and decreed the suit.

10. As indicated hereinbefore, the High Court accepted the evidence of DW.4 Lakshmamma and came to a finding that by virtue of Ex.B2 she had transferred all her rights, title and interest in the suit properties in favour of Thondolu Mahaboob Basha and having divested her of the title to the suit properties, she was no longer competent to execute a further sale deed in respect of the same property in favour of Syed Ghouse Bi on 16.3.1974 (Ex.A1). The High Court having accepted the sale deed dated 22.5.1968 in favour of Thondolu Mahaboob Basha as being genuine, it came to the conclusion that since the said document was prior in point of time in relation to the subsequent document executed in favour of Syed Ghouse Bi, the plaintiff/petitioner, who had acquired his title through Syed Ghouse Bi alias Chand Begum, did not acquire any title to the suit properties. On such finding, the High Court reversed the judgment and decree of the first Appellate Court.

11. The factual aspect having been dealt with in detail by

the Courts below, ending in the findings of the High Court, we are not inclined to delve into the facts any further. As indicated by the trial Court, Ext.B2 is a crucial document and was admittedly anterior in point of time to Ext.A1 subsequently executed by DW.4 in favour of Syed Ghouse Bi when she had already divested herself of title to the suit properties. The petitioner did not, therefore, acquire any title to the suit property and the suit was rightly dismissed.

12. Having regard to the above, the submissions advanced on behalf of the petitioner do not warrant any interference with the order of the High Court impugned therein and the same is, accordingly, dismissed, but without any order as to costs.

D.G. Special Leave Petition dismissed.

NAGALAND SENIOR GOVT. EMPLOYEES WELFARE ASSOCIATION & ORS.

v.

THE STATE OF NAGALAND & ORS.

(Civil Appeal No. 4955 of 2010)

JULY 6, 2010

[J.M. PANCHAL AND R.M. LODHA, JJ.]

Service Law:

Nagaland Retirement From Public Employment Act, 1991:

s.3(as amended by Amendment Act, 2009) – Providing for retirement of a person on completing 35 years of service from the date of joining or on attaining the age of 60 years, whichever is earlier – HELD: Is valid and does not suffer from the vice of arbitrariness/ irrationality nor is it violative of Articles 14 and 16 of the Constitution – There is no absolute proposition in law nor any invariable rule in the service jurisprudence that an employee can be made to retire from public employment on account of age alone – Fixation of maximum length of service as an alternative criterion for retirement from public service, by no stretch of imagination, can be held to be violative of any recognized norms of employment planning – High Court has rightly upheld the amendment – Constitution of India, 1950 – Articles 14 and 16.

The Nagaland Retirement From Public Employment Act, 1991 was amended by the Nagaland Retirement From Public Employment (Amendment) Act, 2007 (1st Amendment Act, 2007) increasing the age of superannuation from 57 to 60 years. This led to State-wide students unrest, and pursuant to the representation

made by the Naga-Students Federation on the issue of growing frustration amongst the youth of the State because of unemployment, the State Legislature, by the Nagaland Retirement From Public Employment (Second Amendment) Act, 2009 amended s. 3 of the Act prescribing, "a person in public employment shall hold office for a term of 35 years from the date of joining public employment or until he attains the age of 60 years, whichever is earlier." On July 20, 2009, the State Government issued an Office Memorandum asking all departments to submit the list of employees who would have completed 35 yeas of service by October 31, 2009. The Nagaland Senior Government Employees Welfare Association filed a writ petition before the High Court challenging the 2009 Amendment and the O.M. The single Judge as also the Division Bench of the High Court upheld the amendment.

In the instant appeal filed by the Employees' Association, the question for consideration before the Court was: "whether the impugned provision that prescribes retiring the persons from public employment in the State of Nagaland on completion of 35 years' service from the date of joining or until attaining the age of 60 years whichever is earlier, is arbitrary, irrational and violative of Articles 14 and 16 of the Constitution."

Dismissing the appeal, the Court

HELD: 1.1. Section 3 of the Nagaland Retirement From Public Employment Act, 1991 (as amended by the 2nd Amendment Act, 2009), which prescribes retiring the persons from public employment in the State on completion of 35 years' service from the date of joining or until attaining the age of 60 years, whichever is earlier, does not suffer from the vice of arbitrariness or irrationality and is not violative of Articles 14 and 16 of

the Constitution of India. The provision is consistent with the decision in the case of *Yeshwant Singh Kothari and the ratio in that case is squarely applicable to the case in hand. The High Court has rightly upheld the amendment. [para 29, 40-41 and 48] [651-D-E; 666-G]**

***Yeshwant Singh Kothari v. State Bank of Indore & Ors. 1993 (1) SCR 208 = 1993 (2) Suppl. SCC 592, relied on.**

K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr. 1985 (2) SCR 579 = 1985 (1) SCC 523, referred to.

1.2. It is true that 'superannuation' means discharge from service on account of age. Although the impugned provision does not use the expression 'superannuation' but broadly retirement is referred to as superannuation. There is no absolute proposition in law nor any invariable rule in the service jurisprudence that an employee can be made to retire from public employment on account of age alone. What the Constitution guarantees for the citizens is equality of opportunity under the employment of the Government and the prohibition of discrimination between its employees but there is no provision in the Constitution that restricts retirement from public employment with reference to age. Rather Article 309 empowers the appropriate Legislature to regulate the conditions of service of persons serving the Union or a State, as the case may be, by an enactment subject to the provisions of the Constitution. The competence of the Legislature to formulate uniform policy for retirement from public employment by enacting a law can hardly be doubted. [para 27] [649-B-E]

1.3. Fixation of maximum length of service as an alternative criterion for retirement from public service, by no stretch of imagination, can be held to be violative of any recognized norms of employment planning. There may be a large number of compelling reasons that may

necessitate the Government (or for that matter the Legislature) to prescribe the rule of retirement from the government service on completion of specified years. If the reasons are germane to the object sought to be achieved, such provision can hardly be faulted. [para 31] [654-H; 655-A-B]

2.1. That there is always a presumption in favour of the constitutionality of an enactment; and that the burden is upon the person, who attacks it, is a fairly well settled proposition. [para 32] [655-C]

Mohd. Hanif Quareshi & Ors. v. State of Bihar, this Court **1959 SCR 629 =1958 AIR 731;** *Mahant Moti Das v. S.P. Sahi* **1959 Suppl. SCR 503 = 1959 AIR 942;** *State of Uttar Pradesh v. Kartar Singh* **(1964) 6 SCR 679;** *A.C. Aggarwal, Sub-Divisional Magistrate, Delhi & Anr. v. Mst. Ram Kali etc.* **1968 SCR 205 =1968 AIR 1;** *The Amalgamated Tea Estates Co. Ltd. v. State of Kerala* **1974 (3) SCR 820 = 1974 (4) SCC 415;** *Pathumma & Ors. v. State of Kerala & Ors.* **1978 (2) SCR 537 = 1978(2) SCC 1; and** *Fertilisers and Chemicals Travancore Ltd. v. Kerala State Electricity Board and Anr*. **1988 (3) SCR 925 = 1988 (3) SCC 382, referred to.**

2.2. Section 3 of the Act as substituted by the 2nd Amendment Act, 2009, is designed to lay down a general framework of retirement policy. It seeks to put a cap on the number of years an employee may be allowed to be in the service of the State Government in order to make available job opportunities in a more equitable manner to its educated youth. It cannot be overlooked that the whole idea behind the provision is to create opportunities for employment and check unemployment. It is aimed to combat unrest amongst educated unemployed youth and to ensure that they do not join underground movement. The legislation of the kind the Court is concerned with must be regarded as establishing the government policy for retirement from public employment based on age or

length of service to achieve a legitimate aim in public interest, after balancing the competing interest of different groups, to permit better access to employment to large number of educated youth in the State and for the purpose of curbing the unemployment. The legitimacy of such an aim of public interest cannot be reasonably called into question. In any case, the impugned provision founded on peculiar considerations of the State does not appear to be unreasonable nor does it smack of any arbitrariness. From the material placed on record it cannot be said that impugned provision has been enacted without any data and consideration of broad aspects of the question. [para 39 and 41] [659-D-H; 662-F-G; 663-A-E]

State of Maharashtra v. Chandrabhan **1983 (3) SCR 327 = 1983 AIR 803, referred to.**

2.3. It cannot be said that the impugned provision is arbitrary not only from the point of view of the employees as a whole but also from the point of view of public interest since the public at large shall be deprived of the benefit of the mature experience of the senior government employees. If the State Government felt that it was not fair to deny the large number of educated youth in the State an opportunity of public employment because of existing provisions of retirement from public employment and accordingly decided to have the impugned provision enacted through the legislative process, in the guise of mature experience, such provision may not be held to be arbitrary and against public interest. [para 42] [663-F-H; 664-A]

2.4. It cannot be said that the alternative method of retirement by way of length of service would result in different age of superannuation of employees holding the same post depending upon their age of entry into service and would be manifestly violative of Articles 14 and 16

of the Constitution. Suffice it to say that alternative mode of retirement provided in the impugned provision is applicable to all the State Government employees. There is no discrimination. The impugned provision prescribes two rules of retirement, one by reference to age and the other by reference to maximum length of service. The classification is founded on valid reason. Pertinently, no uniformity in length of service can be maintained if the retirement from public employment is on account of age since age of the government employees at the time of entry into service would not be same. Conversely, no uniformity in age could be possible if retirement rule prescribes maximum length of service. The age at the time of entry into service would always make such difference. Merely because some employees had to retire from public employment on completion of 35 years of service although they have not completed 55 years of age does not lead to any conclusion that the impugned enactment is arbitrary, irrational, unfair and unconstitutional. [para 45-46] [665-F-H; 666-A-B; 665-C]

Case Law Reference:

1993 (1) SCR 208	**relied on**	**para 21**
1985 (2) SCR 579	**referred to**	**para 22**
1959 Suppl. SCR 503	**referred to**	**para 25**
1968 SCR 205	**referred to**	**para 25**
1974 (3) SCR 820	**referred to**	**para 25**
1959 SCR 629	**referred to**	**para 32**
(1964) 6 SCR 679	**referred to**	**para 34**
(1968) SCR 205	**referred to**	**para 35**
1978 (2) SCR 537	**referred to**	**para 36**
1988 (3) SCR 925	**referred to**	**para 37**
1983 (3) SCR 327	**referred to.**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4955 of 2010.

From the Judgment & Order dated 30.10.2009 of the High Court of Gauhati in Writ Petition No. 2980 of 2009.

Ram Jethmalani, B.N. Aggarwalla, Rajiv Mehta, Parthiv Goswami, Ahanthem Henry for the Appellants.

K.K. Venugopal, P.K. Goswami, K.N. Balgopal, AG, A.P. Mukundan, Nitya Nambiar, B.D. Vivek, Madhusimta Bora, Edward Belho, Timikha Koza, L.S. Jamir, Tsibu Khro, Tea Temsin Ao, Balaji Srinivasan, Enatdi Sema, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Charu Mathur for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

Introduction

2. A new State – State of Nagaland – was formed by the State of Nagaland Act, 1962 (for short, 'the 1962 Act') which came into force on December 1, 1963 comprising the territories which immediately before the appointed day were comprised in the Naga Hills – Tuensang Area of the State of Assam. Prior to the 1962 Act, Naga Hills-Tuensang Areas Act, 1957 was enacted by the Parliament by which certain changes were brought about with regard to the administration of the area viz., Naga Hills – Tuensang Area within the State of Assam. The pay structure applicable to civil servants of Assam was made applicable to the civil servants of the Naga Hills-Tuensang Area and as regards the service conditions including the age of superannuation, the Central Government Fundamental Rules and Subsidiary Rules were made applicable to them. After creation of the State of Nagaland, the

conditions of service of the State Government employees continued to be governed by the same Rules. In 1990, the superannuation age of all the State Government employees other than grade-IV employees was raised from 55 years to 58 years.

The 1991 Act

3. In 1991, Nagaland Retirement from Public Employment Act, 1991 (for short, 'the 1991 Act') was enacted by the State Legislature which came into force on June 18, 1991. Section 3 thereof provided for retirement from public employment. It states :

> "S.-3. *Retirement from public employment:* (1) Notwithstanding anything contained in any rule or orders for the time being in force, a person in public employment shall hold office for a term of thirty-three years from the date of his joining public employment or until he attains the age of fifty-seven years whichever is earlier :
>
> Provided that in special circumstances, a person under public employment may be granted extension by the State Government upto a maximum of one year;
>
> Provided further that the Government may have the cases of all persons under public employment screened from time to time to determine their suitability for continuation in public employment after the attainment of the age of fifty years.
>
> (2) All persons under public employment shall retire on the afternoon of the last day of the month in which he attains the age of fifty-seven years or on completion of thirty-three years of public employment whichever is earlier.
>
> (3) xxx xxx xxx xxx
>
> (4) xxx xxx xxx xxx

> (5) xxx xxx xxx xxx"

As a matter of fact, the 1991 Act replaced the Nagaland Retirement from Public Employment Ordinance, 1991.

Challenge to Section 3 (1991 Act)

4. The Confederation of All Nagaland State Service Employees Association ('the Confederation', for short) challenged the constitutional validity of Section 3 which provided for retirement from public employment on completion of 33 years from the date of joining employment or until the age of 57 years, whichever is earlier by filing a writ petition before the Gauhati High Court. The main grounds of challenge were : (i) that retirement of the government employees at the age of 57 is arbitrary and (ii) that classification of the government employees in two groups viz., one group of the government employees who are to retire on completion of 33 years service before attaining the age of 57 and the other group retiring at the age of 57 and having not completed 33 years of service is not permissible since retirement of government employees must be attributable to the age and not the length of tenure of service.

5. The Single Judge of the Gauhati High Court vide judgment dated January 18, 1993 upheld the reduction of retirement age from 58 to 57 years but struck down part of Section 3 of 1991 Act which prescribed the retirement from service on completion of 33 years of service. But no consequential relief was granted to the employees.

6. The Confederation challenged the order of the Single Judge dated January 18, 1993 by way of an intra court appeal insofar as consequential reliefs were denied to the employees. The Division Bench allowed the appeal on September 6, 1995 and held that affected employees shall be entitled to get their salary and other allowances and all other consequential benefits which they would have been entitled to upto the age of 57 years,

except those employees who were gainfully employed elsewhere.

7. The State of Nagaland (for short, 'the State') challenged the judgment and order dated September 6, 1995 to the extent the Division Bench granted consequential reliefs to the employees in Special Leave Petition (SLP) before this Court. Leave was granted and SLP was converted into Civil Appeal. However, on April 7, 1997 appeal was withdrawn by the State.

1st Amendment Act, 2007

8. By Nagaland Retirement from Public Employment (Amendment) Act, 2007 (for short, 'Ist Amendment Act, 2007), the superannuation age of the government employees in the State was enhanced from 57 years to 60 years with effect from November 15, 2007. Later on, the maximum age for entering the government service in the State was enhanced to 30 years for general category candidates and 35 years for SC/ST category candidates.

9. On October 17, 2008, the Naga-Students Federation (NSF) being not satisfied with the 1st Amendment Act, 2007 made a representation to the State Government voicing its concern that enhancement of retirement age had reduced the employment opportunities for the educated youth in the State. NSF demanded that the State Government should also fix maximum length of service that an employee may be entitled to put in before retirement. In pursuance of the representation made by NSF, the Department of Personnel and Administrative Reforms (for short, 'DOP & AR') submitted a Memorandum dated October 22, 2008 to the Cabinet for a decision as to whether the State Government should also prescribe maximum length of service for retirement of the State Government employees in addition to the upper age limit of 60 years and if so, what should be maximum length of the service for retirement.

10. The Cabinet in its meeting held on October 23, 2008 asked the DOP & AR to examine the matter in greater detail and prepare a profile of average length of service put in by the government employees at the time of superannuation and submit its findings and recommendations for further consideration of the Cabinet. DOP & AR then appears to have prepared its report and submitted the same to the Cabinet for consideration.

11. The Cabinet considered the subject again and appointed a High Power Committee (HPC), inter alia, to scrutinize the retirement profile of the government employees prepared by DOP & AR and make necessary recommendations regarding fixation of maximum length of service of the government employees and other service conditions.

12. On February 18, 2009, HPC held its meeting to examine the superannuation age of the State Government employees. HPC found gaps in the data base and, accordingly, recommended that DOP & AR should be nodal agency to streamline date base of government employees, and put in place a Common Data Base System by coordinating with the concerned departments. It transpires that based on the data available with the Government, the following compilations were made:

Table-1 : Grade wise employees of the State

Grade	No. of employees	Percentage
Class-I	3495	4%
Class-II	2203	3%
Class-III	59,598	74%
Class-IV	15,704	19%
Total	81,000	100%

Table-2 : State Agency Wise Employees

State Percentage	No. of employees	Agency
Secretariat	2322	3%
Directorate	8540	11%
District	70,138	86%
Total	81,000	100%

Table-3 : Number of years of completed service

Completed years of service	No. employees		
	As on 1st January, 2009	As on 1st July, 2009	As on 1st January 2010
More than			
40 years	222	294	362
36 years	1629	1997	2313
35 years	2343	2923	3250
34 years	3280	3954	4327
33 years	4357	4960	5156

Table-4 : Completed Age of employees as on 1st January, 2009 & 1st July, 2009

Age of employees	No. employees	
	1st January, 2009	1st July, 2009
59 years	101	268
58 years	409	1029
57 years	1088	2077
56 years	2096	3306
55 years	3346	4675

Table – 5

Entry into service	No. of employees
40 and above	21,889
35 to 39 years	28,721
30 to 34 years	13,404
25 to 29 years	2,259
Less than 25 years	1149

13. HPC on the basis of the aforesaid figures observed that most of the non-gazetted (Class-III and IV) employees have joined the service at a very early age, i.e. before 20 years and hence fixation of length of service as a criterion for superannuation may affect many of the Class-III and IV employees who joined the service at the age of 18-20 years. HPC also observed that employment opportunity in the government sector is limited but the qualified job seekers have increased manifold, thus, causing mismatch in the demand and supply for public jobs in the State.

2nd Amendment Act, 2009

14. On July 8, 2009 a Bill titled 'The Nagaland Retirement from Public Employment (Second Amendment) Bill, 2009' (for short, `Amendment Bill') was introduced on the floor of the House. By the said Bill the length of service of the State Government employees was proposed to be restricted to 35 years from the date of joining of service or till he/she attains the age of 60 years, whichever is earlier.

15. The State Legislature of Nagaland, on July 10, 2009 unanimously passed the Amendment Bill. Thus by Nagaland Retirement from Public Employment (Second Amendment) Act, 2009' (for short, '2nd Amendment Act, 2009'), Section 3 of 1991 Act as amended by 1st Amendment Act, 2007, was substituted by the following provision :

> "S.3(1).- Notwithstanding anything contained in any rule or orders for the time being in force, a person in public employment shall hold office for a term of 35 years from the date of joining public employment or until he attains the age of 60 years, whichever is earlier.
>
> S.3(2).- A person under public employment shall retire on the afternoon of the last day of the month in which he attains the age of 60 years, or in which he completes 35 years of public employment, whichever is earlier."

16. On July 20, 2009, the State Government issued Office Memorandum (OM) requesting all departments to submit the list of employees, who had completed 35 years of service by October 31, 2009.

Challenge to the 2nd Amendment Act, 2009

17. The appellant-Association challenged the constitutional validity of the 2nd Amendment Act, 2009 being arbitrary, irrational, ultra vires and violative of Articles 14, 16 and 21 of the Constitution and legality of the OM dated July 20, 2009 by

filing a writ petition before Gauhati High Court. The Association prayed that 2nd Amendment Act, 2009 be quashed to the extent it has introduced 35 years' service as one of the conditions for retirement of government employees and direction be issued to the State to superannuate its employees only on attaining the prescribed age of 60. The Association also prayed for quashing OM dated July 20, 2009.

18. The State justified 2nd Amendment Act, 2009 and OM dated July 20, 2009 by filing a detailed affidavit in opposition to the writ petition. They set up the plea that youth in the State were not getting an opportunity in the matters of public employment because of long period of service of the existing employees who would serve up to 42 years resulting in a sense of frustration and stagnation amongst educated youth; that educated youth who remain unemployed out of sheer desperation pursue avocation which is not in tune with the law; and that the amended law would result in removal of stagnation in the matters of employment to the unemployed and thereby making employment opportunities less arbitrary, reasonable and in consonance with the constitutional provisions. It was submitted that by 2nd Amendment Act, 2009, the employment prospects of the youth are protected whereby the number of years of service would be restricted to 35 years while maintaining the age of superannuation at 60 years. The State also submitted that the literacy rate in Nagaland is amongst one of the highest in India and the high literacy rate coupled with the fact that there are no other avenues for employment except through the Government sector has increased the unemployment problem to an alarming extent. After a thorough and systematic appreciation and study of the unemployment problem and also the social aspects, the State decided to prescribe the maximum length of service for retirement of its employees in addition to the upper age limit of 60 years. The State explained the peculiar circumstances that necessitated the insertion of 35 years of length of service in the government employment for superannuation.

19. The Division Bench after hearing the parties dismissed the writ petition on October 30, 2009. It is from this judgment and order that the present appeal arises.

20. Before we deal with the main submissions of the parties, an intervening factual aspect may be noticed here. In the month of February, 2009, the State made an application before the Gauhati High Court seeking review of the order dated January 18, 1993 passed by the Single Judge in the writ petition wherein constitutional validity of Section 3 of 1991 Act was challenged. However, the said review application was withdrawn on March 2, 2009.

Main submissions of the parties

21. Mr. Ram Jethmalani, learned senior counsel for the appellants submitted that retirement by way of superannuation in respect of government employees is permissible only on the basis of age and not on the basis of length of service. The contention is that retirement by way of superannuation in respect of government employees relates to discharge of an employee on account of attaining a particular age fixed for such retirement, which is uniformly applicable to all employees without discrimination. He submitted that where there is minimum and maximum age of entry into any service, the alternative method of retirement by way of length of service would inevitably result in different age of superannuation of employees holding the same post depending upon their age of entry to the service and that would result in manifest violation of Article 14 and Article 16 of the Constitution; it would also be inconsistent with the valuable right of a permanent government employee to continue service till the age of superannuation subject to rules of compulsory retirement in public interest and abolition of posts. Learned senior counsel submitted that insofar as decision of this Court in *Yeshwant Singh Kothari v. State Bank of Indore & Ors*[1] is concerned, it has no application,

1. 1993 Suppl. (2) SCC 592.

firstly, to the government employees and in the second place, he was not raising the arguments that were raised in that case but his contention is that prescribing retirement of government employees on completion of 35 years of service is arbitrary and irrational. According to learned senior counsel, in *Yeshwant Singh Kothari*1, the arguments were considered in the backdrop of discriminatory classification and not on the grounds of such action being arbitrary, irrational or unreasonable.

22. Mr. Ram Jethmalani, learned senior counsel vehemently contended that even if it be assumed that the alternative method of retirement by way of length of service is permissible in law, still the 2nd Amendment Act, 2009 prescribing retirement of government employees in the State on completion of 35 years of service is violative of Article 14 of the Constitution being arbitrary, unreasonable and unconstitutional. In this regard, he placed heavy reliance upon judgment of this Court in the case of *K. Nagaraj and Ors.* v. *State of Andhra Pradesh and Anr*[2]. It was submitted that the needs/responsibilities of a person between the age of 50 to 60 are the most as he has to educate his children, marry his children in addition to maintaining his family. He submitted that Class III and IV employees constitute 93 per cent of total employee strength in the State and that as a result of prescription of maximum length of service of 35 years, most of the government employees (who joined service before 20 years, i.e. at 18 and 19 years) would retire at the age of 53 or 54 years which is an unreasonably low age of retirement. In this regard, learned senior counsel referred to the report of the HPC wherein it is mentioned that most of the non-gazetted (Class-III and IV) employees have joined service at an early age, i.e. before attaining 20 years. Mr. Ram Jethmalani also invited our attention to the observations made in the report prepared by HPC wherein it was observed, 'the committee examined the data base available on the State employees and found that

2. (1985) 1 SCC 523.

there are many deficits and gaps in the data base'. It was, thus, submitted that the fixation of 35 years as the maximum length of service has been determined by the Government without any basis and in a most arbitrary fashion without any objectivity and certainly not on the basis of empirical data furnished by the scientific investigation. According to him, in the absence of full investigation into the multitudinous pros and cons and deep consideration of every aspect of the question, the prescription of alternative method of superannuation by way of length of service smacks of total arbitrariness. It was also contended that the impugned provision is arbitrary not only from the point of view of the employees as a whole but also from the point of view of public interest inasmuch as it is against public interest to deprive the public at large of the benefit of the mature experience of the senior government employees; pre-mature retirement at an unreasonable low age of 53 or 54 years when the employees are at their prime would be against public interest. The learned senior counsel would also contend that the impugned provision of prescribing retirement of government employees on completion of 35 years of service is actuated solely on the pressure exerted upon the State Government by NSF which itself is arbitrary.

23. Mr. P.K. Goswami, learned senior counsel for respondent no.4, supporting the appellants adopted the arguments of Mr. Ram Jethmalani.

24. On behalf of the contesting respondent nos. 1 to 3 – the State and its functionaries – Mr. K.K. Venugopal, learned senior counsel stoutly defended the 2nd Amendment Act, 2009 and impugned judgment of Gauhati High Court. He submitted that the State of Nagaland has a unique problem not faced by many other States in the country. He would submit that Nagaland has no industries either in the public sector or in the private sector where gainful opportunities are made available to the youth in the State although percentage of literacy is as high as 70%; that for lack of avenues of employment there is a grave danger arising out of insurgency and potential danger of

educated youth joining underground movement; that increase of retirement age from 57 years to 60 years in the year 2007 resulted in grave resentment from the Naga youth who protested through NSF which finally led to the enactment of the 2nd Amendment Act, 2009 and that alternative mode of retirement on completion of 35 years of service is consistent with the judgment of this Court in *Yeshwant Singh Kothari*1 and based on the policy of the Government and in public interest.

25. Mr. K.K. Venugopal, learned senior counsel argued that there is always presumption of constitutionality arising in favour of a statute and onus to prove its invalidity lies on a party which assails the same. He submitted that the Legislature is the best judge of the needs of the particular classes and to estimate the degree of evil so as to adjust its legislation accordingly. In this regard, he sought support from the decisions of this Court in *Mahant Moti Das v. S.P. Sahi*[3], *A.C. Aggarwal v. Mst. Ram Kali etc*[4]. and The *Amalgamated Tea Estates Co. Ltd. v. State of Kerala*[5]. Mr. K.K. Venugopal submitted that prescription of two rules of retirement, one by reference to age and the other by reference to years of completed service is permissible and the retirement policy manifested in 2nd Amendment Act, 2009 is neither arbitrary nor discriminatory.

The issue

26. On the contentions outlined above, the question that arises for consideration is : whether the impugned provision that prescribes retiring the persons from public employment in the State of Nagaland on completion of 35 years' service from the date of joining or until attaining the age of 60 years, whichever is earlier, is arbitrary, irrational and violative of Articles 14 and 16 of the Constitution.

3. AIR 1959 SC 942.
4. AIR 1968 SC 1.
5. 1974 (4) SCC 415.

Appraisal

(A) Should retirement from public employment be effected on account of age alone?

27. It is true that 'superannuation' means discharge from service on account of age. The dictionary meaning of 'superannuation' is to retire or retire and pension on account of age. Although the impugned provision does not use the expression 'superannuation' but broadly retirement is referred to as superannuation. There is no absolute proposition in law nor any invariable rule in the service jurisprudence that an employee can be made to retire from public employment on account of age alone. What the Constitution guarantees for the citizens is equality of opportunity under the employment of the Government and the prohibition of discrimination between its employees but there is no provision in the Constitution that restricts retirement from public employment with reference to age. Rather Article 309 empowers the appropriate Legislature to regulate the conditions of service of persons serving the Union or a State, as the case may be, by an enactment subject to the provisions of the Constitution. The competence of the Legislature to formulate uniform policy for retirement from public employment by enacting a law can hardly be doubted. The question that has to be asked is, whether such law meets constitutional tests?

28. The legality and validity of a provision permitting retirement on the basis of length of service directly came up for consideration before this Court in the case of *Yeshwant Singh Kothari*[1]. In that case, the appellants – employees of the State Bank of Indore (a subsidiary bank of the State Bank of India) – were aggrieved by their retirement on completion of 30 years of service whereas according to them they were entitled to service upto 58 years of age. They were initially in the employment of the Bank of Indore Limited which ceased to exist with effect from January 1, 1960 and became a

subsidiary bank known as the State Bank of Indore. The issue was raised in the context of the State Bank of India (Subsidiary Banks) Act, 1959 and the Regulations framed thereunder. This Court referred to Section 11(1) of 1959 Act and Regulation 19(1) which are as follows :

"S.11.- *Transfer of services of employees of existing banks.*— (1) Save as otherwise provided in this Act, every employee of an existing Bank in the employment of that bank immediately before the appointed day, shall, on and from that day, become an employee of the corresponding new bank and shall hold his office or service therein by the same tenure at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension, gratuity and other matters as he would have held the same on the appointed day, if the undertaking of the existing bank had not been transferred to and vested in the corresponding new bank and shall continue to do so *unless and until his employment in that bank is terminated or until his remuneration or other terms and conditions of service are revised or altered by the corresponding new bank under, or in pursuance of any law, or in accordance with any provision which, for the time being governs, his service*."

xxx xxx xxx xxx

"Regulation 19.- *Age of retirement*.— (1) An officer shall retire from the service of the Bank on attaining the age of fifty-eight years or upon the completion of thirty years service, whichever occurs first:

Provided further that the competent authority may, at its discretion, extend the period of service of an officer who has attained the age of fifty-eight years or has completed thirty years' service as the case may be, should such extension be deemed desirable in the interest of the Bank."

In the context of the aforesaid provisions, this Court ruled:

> "…..The provision in the Regulation in hand for maintaining the age of retirement at 58 years as before but in the same breath permitting retirement on the completion of 30 years of service, whichever occurs earlier, is in keeping with the policy of reckoning a stated number of years of office attaining the crest, whereafter inevitably is the descent, justifying retirement. In this context 30 years' period of active service is not a small period for gainful employment, or an arbitrary exercise to withhold the right to hold an office beyond thirty years, having not attained 58 years of age."

29. The impugned provision that prescribes retirement from the public employment at the age of 60 years or completion of 35 years of service, whichever is earlier, is apparently consistent with the decision in the case of *Yeshwant Singh Kothari*1 and the ratio in that case is squarely applicable to the case in hand. If 30 years' period of active service was not held a small period for gainful employment, or an arbitrary exercise to withhold the right to hold an office beyond 30 years, having not attained 58 years of age, a fortiori, retiring a person from public service on completion of 35 years of service without attaining age of 60 years may not be held to be unjustified or impermissible.

(B) K. Nagaraj Case

30. In the case of *K. Nagaraj*[2], the employees of the Government of Andhra Pradesh were aggrieved by an amendment in the Fundamental Rules and Hyderabad Civil Services Rules reducing the retirement age from 58 to 55 years. As a result of these amendments, over 18,000 government employees and 10,000 public sector employees were superannuated. The government employees challenged the said amendments on diverse grounds, inter-alia that the said

amendment violated Articles 14, 16 and 21 of the Constitution. This Court held that it was in public interest to prescribe age of retirement and while holding so observed that fixation of age would be unreasonable or arbitrary if it does not accord with the principles which are relevant for fixing the age of retirement or if it does not sub-serve any public interest. While ruling that in reducing the age of retirement from 58 to 55, the State Government cannot be said to have acted arbitrarily or irrationally, it was held :

> "On the basis of this data, it is difficult to hold that in reducing the age of retirement from 58 to 55, the State Government or the Legislature acted arbitrarily or irrationally. There are precedents within our country itself for fixing the retirement age at 55 or for reducing it from 58 to 55. Either the one or the other of these two stages is regarded generally as acceptable, depending upon the employment policy of the Government of the day. It is not possible to lay down an inflexible rule that 58 years is a reasonable age for retirement and 55 is not. If the policy adopted for the time being by the Government or the Legislature is shown to violate recognised norms of employment planning, it would be possible to say that the policy is irrational since, in that event, it would not bear reasonable nexus with the object which it seeks to achieve. But such is not the case here. The reports of the various Commissions, from which we have extracted relevant portions, show that the creation of new avenues of employment for the youth is an integral part of any policy governing the fixation of retirement age. Since the impugned policy is actuated and influenced predominantly by that consideration, it cannot be struck down as arbitrary or irrational. We would only like to add that the question of age of retirement should always be examined by the Government with more than ordinary care, more than the State Government has bestowed upon it in this case. The fixation of age of retirement has minute and multifarious

dimensions which shape the lives of citizens. Therefore, it is vital from the point of view of their well-being that the question should be considered with the greatest objectivity and decided upon the basis of empirical data furnished by scientific investigation. What is vital for the welfare of the citizens is, of necessity, vital for the survival of the State. Care must also be taken to ensure that the statistics are not perverted to serve a malevolent purpose."

xxx xxx xxx xxx

"…..the fact that the decision to reduce the age of retirement from 58 to 55 was taken by the State Government within one month of the assumption of office by it, cannot justify the conclusion that the decision is arbitrary because it is unscientific in the sense that it is not backed by due investigation or by compilation of relevant data on the subject. Were this so, every decision taken by a new Government soon after assumption of office shall have to be regarded as arbitrary. The reasonableness of a decision, in any jurisdiction, does not depend upon the time which it takes. A delayed decision of the executive can also be bad as offending against the provisions of the Constitution and it can be no defence to the charge of unconstitutionality that the decision was taken after the lapse of a long time. Conversely, decisions which are taken promptly cannot be assumed to be bad because they are taken promptly. Every decision has to be examined on its own merits in order to determine whether it is arbitrary or unreasonable. Besides, we have to consider the validity of a *law* regulating the age of retirement. It is untenable to contend that a law is bad because it is passed immediately on the assumption of office by a new Government. It must also be borne in mind that the question as to what should be the proper age of retirement is not a novel or unprecedented question which the State Legislature had to consider. There is a wealth of material

on that subject and many a Pay Commission has dealt with it comprehensively. The State Government had the relevant facts as also the reports of the various Central and State Pay Commissions before it, on the basis of which it had to take a reasonable decision. The aid and assistance of a well-trained bureaucracy which, notoriously, plays an important part not only in the implementation of policies but in their making, was also available to the Government. Therefore, the speed with which the decision was taken cannot, without more, invalidate it on the ground of arbitrariness."

Again in paragraph 34 of the report this Court repelled the argument of the appellants regarding arbitrary character of the action taken by the State Government, thus:

"Though Shri Ray presented his argument in the shape of a challenge to the Ordinance on the ground of non-application of mind, the real thrust of his argument was that the hurry with which the Ordinance was passed shows the arbitrary character of the action taken by the State Government. We have already rejected the contention of haste and hurry as also the argument that the provisions of the Ordinance are, in any manner, arbitrary or unreasonable and thereby violate Articles 14 and 16 of the Constitution."

31. As a matter of fact, in *K. Nagaraj*[2] this Court stated clearly that fixation of retirement age is a matter of employment policy of the Government and no inflexible rule can be laid down. However, if such policy is shown to violate recognized norms of employment planning, then such policy may not meet the test of rationality and reasonableness. The fact that employment policy was formulated hurriedly was not held sufficient to conclude that the policy suffered from non-application of mind or arbitrary. We are afraid, *K. Nagaraj case*2 instead of helping the appellants, rather supports the stand of the State. Fixation of maximum length of service as an alternative criterion for

retirement from public service, by no stretch of imagination, can be held to be violative of any recognized norms of employment planning. There may be a large number of compelling reasons that may necessitate the Government (or for that matter the Legislature) to prescribe the rule of retirement from the government service on completion of specified years. If the reasons are germane to the object sought to be achieved, such provision can hardly be faulted.

(C) Presumption of constitutionality

32. That there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon the person, who attacks it is a fairly well settled proposition. In *Mohd. Hanif Quareshi & Ors. v. State of Bihar*[6], this Court stated :

> "……The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

33. The aforesaid legal position was reiterated in *Mahant Moti Das* v. *S.P. Sahi, the Special Officer In Charge of Hindu Religious Trust & Ors.*[7]*i* in the following words :

6. AIR 1958 SC 731.

7. AIR 1959 SC 942.

> "The decisions of this Court further establish that there is a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest……"

34. In the case of State of *Uttar Pradesh* v. *Kartar Singh*[8], the Constitution Bench of this Court held that where a party seeks to impeach the validity of a rule on the ground of such rule offending Article 14, the burden is on him to plead and prove infirmity. This Court said :

> "……, if the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any apriori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Art. 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations. That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend Art. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration. If, therefore, the respondent desired to challenge the validity of the rule on the ground either of its unreasonableness or its discriminatory nature, he had to lay a foundation for it by setting out the facts necessary to sustain such a plea and adduce cogent and convincing evidence to make out his

8. (1964) 6 SCR 679.

case, for there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification of the zones and the prescription of the minimum standards to each zone, and where we have a rule framed with the assistance of a committee containing experts such as the one constituted under s. 3 of the Act, that presumption is strong, if not overwhelming……"

35. In *A.C. Aggarwal, Sub-Divisional Magistrate, Delhi & Anr.* v. Mst. *Ram Kali etc.*[9], the Constitution Bench of this Court reiterated the legal position thus :

"……..The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

36. In *Pathumma & Ors.* v. *State of Kerala & Ors.*[10], a seven-Judge Bench of this Court highlighted that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution. It was stated :

"It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason

9. AIR (1968) SC 1.

10. (1978) 2 SCC 1.

that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same……"

37. A two-Judge Bench of this Court in *Fertilisers and Chemicals Travancore Ltd.* v. *Kerala State Electricity Board and Anr*[11]*.* emphasized that the allegations of discrimination must be specific and that action of governmental authorities must be presumed to be reasonable and in public interest. It is for the person assailing it to plead and prove to the contrary.

(D) Impugned provision : whether arbitrary, unreasonable and irrational

38. The Statement of Objects and Reasons appended to Amendment Bill expressly states as follows :

"Whereas there are a large number of educated unemployed youths in Nagaland registered in the Employment Exchanges of Nagaland, who are in search of white collared employment, particularly under the Government sector;

And whereas, such white collared employment opportunities outside the Government sectors is very negligible due to less presence of organized private sector, and the employment avenues in the Government sector is also already saturated; and new job opportunities, in the Government sector arising out of normal retirement vacancies, or creation of new jobs are inadequate to cater to the rising expectations of the educated youth for white collared employment;

And whereas, the State Government, being a welfare State, considers it necessary that job opportunities under the Government sector should be shared by the citizens

11. (1983) 3 SCC 382.

in a more equitable manner, and that this objective can be better achieved by fixing the upper age limit for retirement from Government service, as well as by setting a limit on the maximum number of years a Government servant may be allowed to be in Government service;

Therefore, the State Government considers it expedient to introduce a bill in the State Assembly that would set a limit on the number of years a person may be allowed to be in the service of the State Government, by fixing the upper age limit, as well as the maximum length of service for any person to be in Government employment."

39. Section 3 as substituted by 2nd Amendment Act, 2009 is designed to lay down a general framework of retirement policy. It seeks to put a cap on the number of years an employee may be allowed to be in the service of the State Government in order to make available job opportunities in a more equitable manner to its educated youth. In the counter affidavit filed by the State before this Court in opposition to the SLP, the impugned clause has been principally sought to be justified on the following grounds :

- Nagaland is a small State, and industrially and economically, the State is in disadvantageous position.
- The avenues of employment in the State is strictly limited. There are about 3 lac educated unemployed youths waiting for their employment under the State.
- With the raising of retirement age from 57 to 60 years, it became necessary for the State to ensure and provide reasonable avenues of employment to a large body of educated youth.
- On delicate end fine balancing of the competing interest of different groups, namely, people waiting for employment and those already in employment, the State Government evolved an additional mode of retirement, i.e. completion of 35 years of service.
- Long period of service of the existing employees has resulted in sense of frustration and stagnation amongst large number of educated unemployed youth.

These were the grounds set up by the State in the counter affidavit before High Court as well.

40. It is appropriate at this stage to notice the view of the High Court in the impugned order. The High Court said :

"The ratio of the decision in Yeshwant Singh Kothari (supra) is contained in para 11 of the judgment. Retirement on attaining a particular age or alternatively on completion of a specified number of years of service, so long the number of years prescribed is not unreasonably small, can form a legally valid basis for framing of a retirement policy. This, to our mind, is the true ratio of the judgment in *Yeshwant Singh Kothari* (supra). The discussions in para 12 of the judgment, particularly, those pertaining to uniform retirement age of 58 was in the context of the facts of the case before the Supreme Court and the view taken with regard to the difference between a nationalized bank and a subsidiary bank has to be confined to the facts of the particular case. If we are correct in identifying the true ratio of the judgment in *Yeshwant Singh Kothari* (supra), we do not see any reason why the same cannot be per se made applicable to the employees under the State, if the State so decides. In this connection, we must also keep in mind that the observations of the Apex Court in para 7 of the judgment in Nagaraj (supra) with regard to the low age of retirement was rendered in a situation where the Apex Court was considering the question of reduction of the

retirement age from 58 to 55. In *Nagaraj* (supra), the Apex Court had no occasion to deal with the alternative rule of retirement, namely, upon completion of a specified number of years of service. In fact, we may very well take the view that what has been introduced by the second amendment by prescription of the alternative Rule of retirement is not a age of retirement but retirement on completion of 35 years of service which is an entirely independent yardstick. Retirement of an individual at the age of 53/54 years by adoption of the said yardstick is a consequence not of attaining a particular age but of completing the prescribed period of service.

21……The argument advanced on behalf of the petitioners that the Second Amendment Act infringes Article 14 and 16 of the Constitution by prescribing a low retirement age has already been dealt with in the discussions that have preceded. We have also held that prescription of length of service of 35 years cannot be said to be unreasonably short or small to bring about a situation of arbitrariness or unreasonableness, as has been contended on behalf of the petitioners. We have also held that retirement at the age of 53/54 years on completion of 35 years of service is a consequential effect of completion of the prescribed period of service……

22…..The rule of retirement on completion of 35 years of service has relevance to employees who have joined service at an age below 25 years and the prescription with regard to retirement at the age of 60 years is in respect of the persons joining service at the age of 25 and thereafter. The above two categories of employees, though performing similar duties and may be identically placed otherwise, can still be reasonably understood to form two different classes to whom application of two rules of retirement will not violate Article 14. The doctrine of equality enshrined by Article 14 of the Constitution is not necessary

to be nor it is capable of being applied with mathematical exactitude and some amount of advantage or disadvantage to persons who may seemingly appear to be equally placed can occur in a given situation. In the present case, persons joining Government service after 25 years of age, say at 30 or 35 years, though may retire at 60, will have a lesser period of service than the persons who may retire at an earlier age by virtue of the rule of retirement on completion of 35 years of service. Each and every instance of such advantage and corresponding disadvantage will not attract Article 14. In fact, uniformity to the extent possible, thereby, enhancing the concept of equality has been sought to be brought in by the Second Amendment Act by prescribing retirement on completion of 35 years of service.

23…….That apart, the materials placed before the Court along with the counter affidavit of the respondent State indicates that the policy decision with regard to retirement on completion of 35 years of service brought about by the Second Amendment Act was preceded by an elaborate and indepth study of the possible consequences of introduction of the said policy and the same is the result of a conscious attempt to balance different shades of opinion and interests."

41. We find ourselves in agreement with the aforesaid view of the High Court. It cannot be overlooked that the whole idea behind the impugned provision is to create opportunities for employment and check unemployment. The impugned provision is aimed to combat unrest amongst educated unemployed youth and to ensure that they do not join underground movement. As observed by this Court in *State of Maharashtra v. Chandrabhan*[12], public employment opportunity is national wealth in which all citizens are equally entitled to share. In our opinion the legislation of the kind we are concerned with must

12. AIR 1983 SC 803

be regarded as establishing the government policy for retirement from public employment based on age or length of service to achieve a legitimate aim in public interest to permit better access to employment to large number of educated youth in the State and for the purpose of curbing the unemployment. The legitimacy of such an aim of public interest cannot be reasonably called into question. In any case, the impugned provision founded on peculiar considerations of the State does not appear to be unreasonable nor it smacks of any arbitrariness. Moreover, the impugned provision is in consonance with the legal position highlighted by this Court in Yeshwant Singh Kothari1 *and K. Nagaraj2* and as stated in *K. Nagaraj2*, that while testing the validity of policy issues like the age of retirement, it is not proper to put the conflicting claims in a sensitive judicial scale and decide the issue by finding out which way the balance tilts. Such an exercise is within the domain of the Legislature. By the impugned provision, the Legislature, after balancing the competing interest of different groups, has sought to open avenues of employment for a large number of educated youth in the State. From the material placed on record it cannot be said that impugned provision has been enacted without any data and consideration of broad aspects of the question.

42. We are not impressed by the argument of the appellants that impugned provision is arbitrary not only from the point of view of the employees as a whole but also from the point of view of public interest since the public at large shall be deprived of the benefit of the mature experience of the senior government employees. If the State Government felt that it was not fair to deny the large number of educated youth in the State an opportunity of public employment because of existing provisions of retirement from public employment and accordingly decided to have the impugned provision enacted through the legislative process, we are afraid, in the guise of mature experience, such provision may not be held to against

public interest and arbitrary.

43. During the course of arguments, on behalf of the State a statement was submitted that indicated that 3098 employees retired from October 31, 2009 to December 31, 2009 on completion of 35 years of service although they had not completed the age of 60 years; of 3098 employees, 181 retired at the age of 53 years and 512 retired at the age of 54 years. The statement thus indicated that percentage of employees retiring at the age of 53 is 5.84 per cent and those retiring at the age of 54 years is 16.52 per cent during the aforesaid period. It further transpired therefrom that 145 employees joined service at the age of 9 to 17 years.

44. The aforesaid position, however, has been disputed by the appellants. According to them 4680 employees at different age retired upto March 31, 2010. The statement annexed with the written arguments on behalf of the appellants in this regard is as follows :

Age	Number	Percentage
Below 53	256	5.5
53	429	9.5
54	757	16
55	1167	24
Above 55	2071	45
Total	4690 (4680-sic)	

'The appellants' contention is that 31 per cent employees retired at the age of 54 and below which constitutes a substantial section of the total retirees and that also shows that the impugned enactment is arbitrary.

45. Insofar as factual aspect is concerned, we have no justifiable reason to disbelieve the statement submitted by the State Government indicating that 3098 employees retired on

completion of 35 years of service with effect from October 31, 2009 to December 31, 2009. There is variation because appellants have given the figures of the employees who retired upto March 31, 2010. Be that as it may, it appears that most of the employees retired at the age of 54 and above and the persons retiring at the age of 53 are only 5.84 per cent. The persons retiring at the age of 52 and below are those who joined the Government service at the age of 9 to 17 years. Merely because some employees had to retire from public employment on completion of 35 years of service although they have not completed 55 years of age does not lead to any conclusion that the impugned enactment is arbitrary, irrational, unfair and unconstitutional. The fact that provision such as the impugned provision that allows the retirement from public employment on completion of 35 years' service is not to be found in other States is of no relevance. As a matter of fact, retirement policy concerning public employment differs from State to State. Kerala retires employees from public employment at the age of 55 years. In any case there is nothing wrong if the legislation provides for retirement of the government employees based on maximum length of service or on attaining particular age, whichever is earlier, if the prescribed length of service or age is not irrational.

46. The appellants' contention that alternative method of retirement by way of length of service would result in different age of superannuation of employees holding the same post depending upon their age of entry into service and would be manifestly violative of Articles 14 and 16 of the Constitution is noted to be rejected. Suffice it to say that alternative mode of retirement provided in the impugned provision is applicable to all State Government employees. There is no discrimination. The impugned provision prescribes two rules of retirement, one by reference to age and the other by reference to maximum length of service. The classification is founded on valid reason. Pertinently, no uniformity in length of service can be maintained if the retirement from public employment is on account of age

since age of the government employees at the time of entry into service would not be same. Conversely, no uniformity in age could be possible if retirement rule prescribes maximum length of service. The age at the time of entry into service would always make such difference. In our view, challenge to the impugned provision based on the aforesaid ground must fail.

47. As regards judgment of the Gauhati High Court dated January 18, 1993, suffice it to say that the said judgment does not lay down the correct legal position. That judgment is in direct conflict with the judgment of this Court in *Yeshwant Singh Kothari*1 where this Court upheld the provision for retirement which was to the effect, 'an officer shall retire from the service of the Bank on attaining the age of 58 years or upon the completion of 30 years' service, whichever occurs first'. Unfortunately, the decision of this Court in *Yeshwant Singh Kothari*1 although earlier in point of time was not brought to the notice of Gauhati High Court. This might have happened because of short time gap between the two judgments; the judgment in *Yeshwant Singh Kothari*[1] was delivered by this Court on January 14, 1993 while Single Judge of the Gauhati High Court pronounced judgment on January 18, 1993. Had the judgment of this Court in *Yeshwant Singh Kothari*1 been shown, ought we know what would have been the view of the High Court. Be that as it may, the judgment of this Court in *Yeshwant Singh Kothari*[1] holds the field.

Conclusion

48. In the light of the foregoing considerations, we hold that a provision such as that at issue which prescribes retiring the persons from public employment in the State of Nagaland on completion of 35 years' service from the date of joining or until attaining the age of 60 years, whichever is earlier, does not suffer from the vice of arbitrariness or irrationality and is not violative of Articles 14 and 16 of the Constitution. The appeal has no merit and is dismissed with no order as to costs.

R.P. Appeal dismissed.

SHIVJEE SINGH
v.
NAGENDRA TIWARY AND ORS.
(Criminal Appeal No. 1158 of 2010)

JULY 6, 2010

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

Code of Criminal Procedure, 1973 – s.202(2), proviso– Interpretation of – Whether examination of all witnesses cited in the complaint is sine qua non for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions – Held, No – Even though in terms of the proviso to s.202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so – Examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to s.202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint – Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process.

Words and Phrases – "shall" – Meaning of – In context to proviso to s.202(2) CrPC.

The appellant's son was said to have been killed by respondent nos.1 to 4. After conducting investigation, the police submitted final form with the finding that they had

no clue about the culprits. Thereupon, the appellant filed a protest petition, which, at the instance of the Judicial Magistrate, was converted into a complaint.

The appellant examined himself and two out of the four witnesses cited in the protest petition-cum-complaint. After considering the statements of the appellant and the said two witnesses, the Judicial Magistrate took cognizance against respondent Nos.1 to 4 for offence under Section 302 read with Section 120B IPC and Section 27 of the Arms Act and directed issue of non-bailable warrants against them.

Respondents challenged the order of the Judicial Magistrate by filing petition under Section 482 CrPC. The High Court held that the Judicial Magistrate could not have taken cognizance against the respondents without requiring the appellant to examine all the four witnesses named by him and remitted the matter to the concerned court for passing appropriate order after making further inquiry in the light of proviso to Section 202(2) CrPC.

Before this Court, it was contended by the appellant that the proviso to s.202(2) Cr.P.C. is not mandatory in character and the High Court committed serious error by remitting the matter to the Judicial Magistrate for further enquiry only on the ground that all the witnesses named by the appellant had not been examined. The appellant contended that non-examination of two witnesses cited in the protest petition-cum-complaint did not preclude the Judicial Magistrate from taking cognizance against respondent nos.1 to 4 since he felt satisfied that a *prima facie* case was made out against them.

The question which thus arose for consideration in the present appeal was whether examination of all witnesses cited in the complaint is *sine qua non* for

taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions.

Allowing the appeal, the Court

HELD:1.1. By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word 'shall'. [Para 6] [676-D]

1.2. Chapter XIV of CrPC enumerates the conditions for initiation of proceedings. Chapters XV and XVI contain various procedural provisions which are required to be followed by the Magistrate for taking cognizance, issuing of process/summons, dismissal of the complaint, supply of copies of documents and statements to the accused and commitment of case to the Court of Sessions when the offence is triable exclusively by that Court. An analysis of Sections 200, 202, 203, 204, 207, 208 and 209 Cr.P.C. which form part of these Chapters shows that when a complaint is presented before a Magistrate, he can, after examining the complainant and his witnesses on oath, take cognizance of an offence. This procedure is not required to be followed when a written complaint is made by a public servant, acting or purporting to act in discharge of his official duties or when a Court has made the complaint or if the Magistrate makes over the case for inquiry/trial to another Magistrate under Section 192. Section 202(1) empowers the Magistrate to postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such

other person which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No.25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath [Paras 6, 7] [676-G-H; 681-G-H; 682-A-C]

1.3. The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a *prima facie* case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is *prima facie* satisfied that a case is made out against the person accused of committing an offence then he is required to issue process. Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can

dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is satisfied that there is sufficient ground for doing so. The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a *prima facie* case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. [Para 8] [683-E-H; 684-A-B]

1.4. The use of the word 'shall' in proviso to Section 202(2) is *prima facie* indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that *prima facie* case is made out for doing so. Significantly the word 'all' appearing in proviso to Section 202(2) is qualified by the word `his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a *prima facie* case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into

detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused. [Para 12] [685-H; 686-A-E]

1.5. Even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2). [Para 14] [692-A-D]

1.6. Examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint. In the present case, the High Court committed serious error in directing the Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202(2). Since the matter is more than 12 years old, the concerned Magistrate is directed to pass appropriate order in terms of Section 209. It is further directed that after committal of the case, the Sessions Judge, to whom the matter is assigned, shall conduct and complete the trial within a period of 9 months. [Paras 16 and 17] [692-G-H; 693-A-C]

Birendra K. Singh v. State of Bihar **(2000) 8 SCC 498, held inapplicable.**

Rosy v. State of Kerala **(2000) 2 SCC 230, explained**

R.C. Ruia v. State of Bombay **1958 SCR 618;** *Vadilal Panchal v. Duttatraya Dulaji Ghadigaonkar* **(1961) 1 SCR 1;** *Chandra Deo Singh v. Prokash Chandra Bose* **(1964) 1 SCR 639;** *Nirmaljit Singh Hoon v. State of West Bengal* **(1973) 3 SCC 753;** *Kewal Krishan v. Suraj Bhan* **(1980) Supp SCC 499;** *Mohinder Singh v. Gulwant Singh* **(1992) 2 SCC 213 and** *Chief Enforcement Officer v. Videocon International Ltd.* **(2008) 2 SCC 492, relied on.**

Ranjit Singh v. State of Pepsu **AIR 1959 SC 843;** *Moideenkutty Haji v. Kunhikoya* **(1987) 1 KLT 635;** *M. Govindaraja Pillai v. Thangavelu Pillai* **1983 Cri LJ 917 and** *Abdul Wahab Ansari v. State of Bihar* **(2000) 8 SCC 500, referred to.**

Case Law Reference:

(2000) 2 SCC 230	**explained**	**Para 5**
(2000) 8 SCC 498	**held inapplicable**	**Para 5**
1958 SCR 618	**relied on**	**Para 8**
(1961) 1 SCR 1	**relied on**	**Para 8**
(1964) 1 SCR 639	**relied on**	**Para 8**
(1973) 3 SCC 753	**relied on**	**Para 8**
(1980) Supp SCC 499	**relied on**	**Para 8**
(1992) 2 SCC 213	**relied on**	**Para 8**
(2008) 2 SCC 492	**relied on**	**Para 8**
AIR 1959 SC 843	**referred to**	**Para 13**

(1987) 1 KLT 635	**referred to**	**Para 13**
1983 Cri LJ 917	**referred to**	**Para 13**
(2000) 8 SCC 500	**referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1158 of 2010.

From the Judgment & Order dated 18.4.2007 of the High Court of Judicature at Patna in Crl. Misc. No. 1778 of 2007.

Gaurav Agrawal for the Appellant.

Gopal Singh, Akhilesh Kumar Pandey, Sudarsh Saran, Shalini Chandra, Swati Chandra for the Respondents.

The Judgment of the Court was delivered by

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

2. Whether examination of all witnesses cited in the complaint is *sine qua non* for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions is the question which arises for consideration in this appeal filed against order dated 18.4.2007 passed by the learned Single Judge of Patna High Court in Criminal Miscellaneous Petition No.1778 of 2007 whereby he remitted the case to Chief Judicial Magistrate, Saran with the direction to make further inquiry and pass appropriate order in the light of proviso to Section 202(2) of the Code of Criminal Procedure (Cr.P.C.).

3. The appellant's son, Ajay Kumar Singh is said to have been killed by respondent Nos.1 to 4 on 1/2.1.1997. The appellant lodged First Information Report on the same day at Police Station, Isuapur. After conducting investigation, the police submitted final form on 3.9.1998 with the finding that they had no clue about the culprits. Thereupon, the appellant filed a protest petition accusing the police of not conducting the investigation properly due to political pressure and prayed that

the accused persons be summoned and punished. By an order dated 3.9.2002, the learned Judicial Magistrate accepted the final form submitted by the police but, at the same time, directed that the protest petition be registered as a separate complaint. He also directed the complainant (appellant herein) to produce his witnesses. The appellant examined himself and two out of four witnesses cited in the protest petition-cum-complaint but gave up the remaining two witnesses because he thought that they had been won over by the accused. After considering the statements of the appellant and two witnesses, Chief Judicial Magistrate, Saran passed an order dated 13.12.2006 whereby he took cognizance against respondent Nos.1 to 4 for offence under Section 302 read with Section 120B Indian Penal Code and Section 27 of the Arms Act and directed issue of non bailable warrants against them.

4. The respondents challenged the order of the Chief Judicial Magistrate by filing a petition under Section 482 Cr.P.C. The learned Single Judge accepted their contention that the Chief Judicial Magistrate could not have taken cognizance against them without requiring the appellant to examine all the witnesses and remitted the matter to the concerned court for passing appropriate order after making further inquiry in the light of proviso to Section 202(2) Cr.P.C.

5. Shri Gaurav Agrawal, learned counsel for the appellant argued that proviso to Section 202(2) Cr.P.C. is not mandatory in character and the High Court committed serious error by remitting the matter to the Chief Judicial Magistrate for further inquiry only on the ground that all the witnesses named by the appellant had not been examined. Learned counsel further argued that non-examination of two witnesses cited in the protest petition-cum-complaint did not preclude the Chief Judicial Magistrate from taking cognizance against respondent Nos.1 to 4 because he felt satisfied that a prima facie case was made out against them. In support of his arguments, learned counsel relied upon the judgment of this Court in *Rosy v. State*

of Kerala (2000) 2 SCC 230. Shri Gopal Singh, learned counsel for the respondents argued that proviso to Section 202(2) Cr.P.C. is mandatory and the Chief Judicial Magistrate committed a serious error in taking cognizance against respondent Nos.1 to 4 and issuing non-bailable warrants against them without insisting on the examination of remaining two witnesses named in the complaint. He relied upon the observations made by Thomas, J. in *Rosy v. State of Kerala* (supra) and the judgment in *Birendra K. Singh v. State of Bihar* (2000) 8 SCC 498 in support of his submission that proviso to Section 202(2) Cr.P.C. is mandatory.

6. We have considered the respective submissions. By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word 'shall'. Chapter XIV of Cr.P.C. enumerates conditions for initiation of proceedings. Under Section 190, which forms part of the scheme of that chapter, a Magistrate can take cognizance of any offence either on receiving a complaint of facts which constitute an offence or a police report of such facts or upon receipt of information from any person other than a police officer or upon his own knowledge, that such an offence has been committed. Chapters XV and XVI contain various procedural provisions which are required to be followed by the Magistrate for taking cognizance, issuing of process/summons, dismissal of the complaint, supply of copies of documents and statements to the accused and commitment of case to the Court of Sessions when the offence is triable exclusively by that Court. Sections 200, 202, 203, 204, 207, 208 and 209 Cr.P.C. which form part of these chapters and which have bearing on the question raised in this appeal read as under:

"200. Examination of complainant.– A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses–

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.–(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made–

(a) where it appears to the Magistrate that the offence

complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.– If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall record his reasons for so doing.

204. Issue of process.– (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be–

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or

to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrates having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

207. Supply to the accused of copy of police report and other documents. – In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding there from any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session.– Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:–

(i) the statements recorded under section 200 or section 202, or all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such

document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

209. Commitment of case to Court of Session when offence is triable exclusively by it.–When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall–

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

7. An analysis of the above reproduced provisions shows that when a complaint is presented before a Magistrate, he can, after examining the complainant and his witnesses on oath, take cognizance of an offence. This procedure is not required to be followed when a written complaint is made by a public servant, acting or purporting to act in discharge of his official duties or when a Court has made the complaint or if the Magistrate makes over the case for inquiry/trial to another Magistrate under Section 192. Section 202(1) empowers the Magistrate to

postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No.25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath. Section 203 empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then he may issue summons for attendance of the accused in a summons-case. If it is a warrant-case, then the Magistrate can issue warrant for causing attendance of accused. Section 207 casts a duty on the Magistrate to supply to the accused, copies of the police report, the first information report recorded under Section 154, the statements recorded under Section 161(3), the confessions and statements, if any, recorded under Section 164 and any other document or

relevant extract thereof, which is forwarded to the Magistrate along with police report. Section 208 provides for supply of copies of statement and documents to accused in the cases triable by the Court of Sessions. It lays down that if the case, instituted otherwise than on a police report, is triable exclusively by the Court of Sessions, the Magistrate shall furnish to the accused, free of cost, copies of the statements recorded under Section 200 or Section 202, statements and confessions recorded under Section 161 or Section 164 and any other document on which prosecution proposes to rely. Section 209 speaks of commitment of case to the Court of Sessions when offence is triable exclusively by it. This section casts a duty on the Magistrate to commit the case to the Court of Sessions after complying with the provisions of Section 208. Once the case is committed, the trial is to be conducted by the Court of Sessions in accordance with the provisions contained in Chapter XVIII.

8. The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a prima facie case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence then he is required to issue process. Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is satisfied

that there is sufficient ground for doing so. The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a prima facie case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. This interpretation of the provisions contained in Chapters XV and XVI of Cr.P.C. finds adequate support from the judgments of this Court in *R.C. Ruia v. State of Bombay,* 1958 SCR 618, *Vadilal Panchal v. Duttatraya Dulaji Ghadigaonkar* (1961) 1 SCR 1, *Chandra Deo Singh v. Prokash Chandra Bose* (1964) 1 SCR 639, *Nirmaljit Singh Hoon v. State of West Bengal* (1973) 3 SCC 753, *Kewal Krishan v. Suraj Bhan* (1980) Supp SCC 499, *Mohinder Singh v. Gulwant Singh* (1992) 2 SCC 213 and *Chief Enforcement Officer v. Videocon International Ltd.* (2008) 2 SCC 492.

9. In *Chandra Deo Singh v. Prokash Chandra Bose* (supra), it was held that where there was prima facie evidence, the Magistrate was bound to issue process and even though the person charged of an offence in the complaint might have a defence, the matter has to be left to be decided by an appropriate forum at an appropriate stage. It was further held that the issue of process can be refused only when the Magistrate finds that the evidence led by the complainant is self contradictory or intrinsically untrustworthy.

10. In *Kewal Krishan v. Suraj Bhan* (supra), this Court examined the scheme of Sections 200 to 204 and held:

> "At the stage of Sections 203 and 204 of the Criminal Procedure Code in a case exclusively triable by the Court of Sessions, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202 of the Criminal Procedure Code, there is prima facie evidence in support of the charge leveled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding"

against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing charges."

11. The aforesaid view was reiterated in *Mohinder Singh v. Gulwant Singh* (supra) in the following words:

"The scope of enquiry under Section 202 is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should issue or not under Section 204 of the Code or whether the complaint should be dismissed by resorting to Section 203 of the Code on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the enquiry at that stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the Code calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, *the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of the enquiry contemplated under Section 202 of the Code.* To say in other words, during the course of the enquiry under Section 202 of the Code, the enquiry officer has to satisfy himself simply on the evidence adduced by the prosecution whether prima facie case has been made out so as to put the proposed accused on a regular trial and that no detailed enquiry is called for during the course of such enquiry."

(emphasis supplied)

12. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision

contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word `his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

13. We may now refer to the judgment in *Rosy v. State of Kerala* (supra) on which reliance has been placed by both the learned counsel. The factual matrix of that case reveals that the Excise Inspector filed a complaint before Judicial Magistrate, Thrissur for offences punishable under Section 57-A and 56(b) of the Kerala Abkari Act. As the offences were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions, Thrissur. After the prosecution examined witnesses, the accused were questioned under Section 313 Cr.P.C. The public prosecutor then filed an application for recalling two witnesses, who were

recalled and examined. Thereafter, further statements of the accused under Section 313 were recorded. The accused examined four witnesses. At that stage, an argument was raised that the committal order was bad because the Magistrate did not follow the procedure prescribed in the proviso to Section 202(2). The learned Sessions Judge opined that there was breach of the mandatory provision but made a reference to the High Court under Section 395(2) because he found it difficult to decide the course to be adopted in the matter. The High Court held that the order of committal was vitiated due to violation of the mandate of proviso to Section 202(2). Before this Court, the issue was considered by a two-Judge Bench. M.B. Shah, J., referred to Sections 200 and 202, the judgment of this Court in *Ranjit Singh v. State of Pepsu* AIR 1959 SC 843 and held:

> "Further, it is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made."

Shah, J. then referred to the ratio of the judgment in *Kewal Krishan v. Suraj Bhan* (supra) and observed:

> "In this view of the matter it is apparent that the High Court erred in holding that there was breach of the mandatory provisions of the proviso to Section 202(2) of the Code and the order of committal is vitiated and, therefore, requires to be set aside. The High Court failed to consider the proviso to Section 200, particularly proviso (*a*) to the said section and also the fact that inquiry under Section 202 is discretionary for deciding whether to issue process (under Section 204) or to dismiss the complaint (under Section 203). Under Section 200, on receipt of the complaint, the Magistrate can take cognizance and issue process to the accused. If the case is exclusively triable by the Sessions Court, he is required to commit the case to the Court of Session."

Shah, J. also referred to the judgment of the Full Bench of Kerala High Court in *Moideenkutty Haji v. Kunhikoya* (1987) 1 KLT 635 and of Madras High Court in *M. Govindaraja Pillai v. Thangavelu Pillai* 1983 Cri LJ 917, approved the ratio of the latter decision that Section 202 is an enabling provision and it is the discretion of the Magistrate depending upon the facts of each case, whether to issue process straightaway or to hold the inquiry and held:

> "We agree with the conclusion of the Madras High Court to the effect (*sic* extent) that Section 202 is an enabling provision and it is the discretion of the Magistrate depending upon the facts of each case, whether to issue process straight away or to hold the inquiry. *However, in case where inquiry is held, failure to comply with the statutory direction to examine all the witnesses would not vitiate further proceeding in all cases* for the reasons that
>
> (*a*) in a complaint filed by a public servant acting or

purporting to act in discharge of his official duties, the question of holding inquiry may not arise,

(*b*) whether to hold inquiry or not is the discretionary jurisdiction of the Magistrate,

(*c*) even if he has decided to hold an inquiry it is his further discretion to examine the witnesses on oath. If he decides to examine witnesses on oath in a case triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath,

(*d*) it would also depend upon the facts of each case depending upon the prejudice caused to the accused by non-compliance with the said proviso (Section 465), and

(*e*) that the objection with regard to non-compliance with the proviso should be taken at the earlier stage when the charge is framed by the Sessions Court."

(emphasis supplied)

K.T. Thomas, J. adopted a different approach regarding interpretation of Section 202. He referred to the scheme of Chapters XIV, XV and XVI Cr.P.C. and observed:

"Three categories of documents are mentioned in the aforesaid section the copies of which the Magistrate, who proceeds from the stage in Section 204, has to supply to the accused free of cost (in a complaint case involving an offence triable exclusively by a Court of Session). As the words used here are "shall furnish", it is almost a compelling duty on the Magistrate to supply the said documents to the accused. How can the Magistrate supply such documents? [In the present context the documents referred to in the third category mentioned in clause (*iii*) are not important.] The first category delineated in clause (*i*) of Section 208 consists of "statements recorded under Section 200 *or* Section 202, of all persons examined by

the Magistrate". (emphasis supplied) It is now important to note that the words "if any" have been used in the second category of documents which is delineated in clause (*ii*) of Section 208, but those words are absent while delineating the first category. In my view those two words have been thoughtfully avoided by Parliament in clause (*i*).

If a Magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate if the language used in the sub-section is of any indication) what is the manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused? The mere fact that the word "or" is employed in clause (*i*) of Section 208 is not to be understood as an indication that the Magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant under Section 200. A case can be visualised in which the complainant is the only eyewitness or in which all the eyewitnesses were also present when the complaint was filed and they were all examined as required in Section 200. In such a case the complainant, when asked to produce all his witnesses under Section 202 of the Code, is at liberty to report to the Magistrate that he has no other witness than those who were already examined under Section 200 of the Code. When such types of cases are borne in mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

If a case instituted on a complaint is committed to the Court of Session without complying with the requirements in clause (*i*) of Section 208 of the Code how is it possible for the Public Prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused? If no inquiry under Section 202 is to be conducted a

Magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Session, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the Public Prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of the accused". If the offence is of a serious nature or is of public importance the consequence then would be a miscarriage of justice."

Thomas, J. then referred to the recommendations made by the Law Commission in its 41st Report and held:

"Thus I have no doubt that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. *I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses.* Of course if the complainant requires the help of the court to summon such witnesses it is open to the Magistrate to issue such summons, for, there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses.

I reiterate that if the Magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings. If no objection is taken at the earlier stage regarding such omission the court can consider how far such omission would have led to a miscarriage of justice, when such objection is taken at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code."

(emphasis supplied)

14. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202(2) but there is no discord between them that non examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2).

15. In *Birendra K. Singh v. State of Bihar* (supra), the only question considered by this Court was whether non-compliance of Section 197 Cr.P.C. was fatal to the prosecution. While holding that an objection regarding non-compliance of Section 197 can be raised only after the case is committed to the Court of Sessions, this Court observed that it was not made aware of the fact whether process was issued after complying with the provisions of Section 202. Therefore, that judgment cannot be read as laying down a proposition of law on interpretation of proviso to Section 202(2). That apart, it is important to mention that in *Abdul Wahab Ansari v. State of Bihar* (2000) 8 SCC 500, a three-Judge Bench held that the decision in *Birendra K. Singh's* case does not lay down the correct law.

16. As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and

issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202(2).

17. In the result, the appeal is allowed and the impugned order is set aside. Since the matter is more than 12 years old, we direct the concerned Magistrate to pass appropriate order in terms of Section 209 within one month from the date of receipt/production of copy of this order. We further direct that after committal of the case, the Sessions Judge to whom the matter is assigned shall conduct and complete the trial within a period of 9 months. A copy of this order be forwarded to the Registrar General, Patna High Court, who shall place the same before Hon'ble the Chief Justice of that High Court.

B.B.B. Appeal allowed.

CENTRAL BANK OF INDIA
v.
M/S. ASIAN GLOBAL LTD. & ORS.
(Special Leave Petition (Crl.) No. 5093 of 2008)

JULY 6, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Negotiable Instruments Act, 1881:

ss. 138, 139 and 141 – Prosecution of companies and their Directors – Vicarious liability of Directors – HELD: Unless a specific averment has been made in the complaint that when the offence was committed, the person accused was in charge of and responsible for the conduct of business of the company, the requirements of s.141 would not be satisfied – Merely being a Director would not make a person vicariously liable – For launching prosecution u/s 138 r/w s.141 against Directors of a company, there has to be a specific allegation in the complaint as to the role played by them in the transaction in question – In the instant case, High Court has rightly held that in the absence of any specific charge against the accused, the complaint was liable to be quashed and they were entitled to be discharged – Code of Criminal Procedure, 1973 – ss.245(2) and 482.

Respondent no. 1-Company was availing packing credit facility and overdraft facility from the petitioner Bank. When the account of respondent no. 1 was alleged to have become irregular, respondent no. 3, a sister concern of respondent no. 1, gave corporate guarantee for due payment of the outstanding dues of respondent no. 1, and issued a cheque in its favour. When the cheque was presented for encashment, the same was dishonoured. The petitioner Bank filed a complaint against both the Companies, and their Directors as also

against the Joint Managing Director of respondent no.1, and some other persons alleging commission of the offences punishable u/ss 138 and 139 of the Negotiable Instruments Act, 1881 r/w ss. 120-B and 420 IPC. Summonses were issued to the accused, whereupon they filed an application u/s 245(2) CrPC praying for recall of the order issuing the summonses and for their consequent discharge from the criminal proceedings on the ground that there was no privity of contract between the petitioner Bank and respondent no. 3. The trial court rejected the application, but the High Court allowed the petition filed by the respondents u/s 482 CrPC. Aggrieved, the Bank filed the petitions for special leave to file the appeal.

Dismissing the petitions, the Court

HELD: 1.1. This Court in the case of *S.M.S. Pharmaceuticals Ltd.** **while interpreting the provisions of sub-s. (1) of s.141 of the Negotiable Instruments Act, 1881, made it very clear that unless a specific averment was made in the complaint that at the time when the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the Company, the requirements of s. 141 would not be satisfied. It was further held that while a Managing Director or a Joint Managing Director of the Company would be admittedly in charge of the Company and responsible to the Company for the conduct of its business, the same yardstick would not apply to a Director. In the case of** *N.K. Wahi**,* **while considering the question of vicarious liability of a Director of a Company, this Court held that merely being a Director would not make a person liable for an offence that may have been committed by the Company. For launching a prosecution against the Directors of a Company u/s 138 r/w s.141 of the 1881 Act, there had to be a specific allegation in the**

complaint in regard to the part played by them in the transaction in question. [para 13-14] [701-B-G]

S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.* **2005 (3) Suppl. SCR 371 = (2005) 8 SCC 89; ***N.K. Wahi vs. Shekhar Singh & Ors*. **2007 (3) SCR 883 = (2007) 9 SCC 481, relied on.**

1.2. In the instant case, save and except for the statement that the respondents 'RJ and 'SJ' and some of the other accused were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them nor has any other material been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action at the relevant time. The question of proving a fact which had not been mentioned in the complaint did not, therefore, arise in the facts of the case. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were entitled to be discharged. [para 15] [702-B-E]

Case Law Reference:

2005 (3) Suppl. SCR 371	**relied on**	**para 9**
2007 (3) SCR 883	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 5093 of 2008.

From the Judgment & Order dated 22.8.2007 of the High Court of Delhi at New Delhi in Crl. M.C. No. 5167 of 2003.

WITH

SLP (Crl) No. 5094, 5095 & 5096 of 2008.

Dharmendra Kumar Sinha for the Petitioner.

Manjula Gupta, Pradeep Jain, Gaurav Pachananadawith, Ashok Mathur, Renu Gupta, Sidhant Goel, Jaswinder Singh for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Special Leave Petition (Crl.) No.5093 of 2008, has been filed by the Central Bank of India against the judgment and order dated 22.8.2007 passed by the Delhi High Court in Crl. M.C. No.5167 of 2003 allowing the said petition under Section 482 Cr.P.C. filed by the Respondents and discharging them and quashing the complaint filed by the Petitioner Bank and the process issued thereupon. By the said judgment, three other petitions, being Crl. M.C. No.5161 of 2003, Crl. M.C. No.5162 of 2003 and Crl. M.C. No.2166 of 2003, were also disposed of in favour of the Respondent Nos.1 and 2, M/s Asian Global Ltd. and its Director, Mr. Rajiv Jain. Several other petitions filed by Sarla Jain, a Director of the Respondent No.1 Company, also challenging the complaint filed by the Petitioner Bank and praying for discharge therefrom and quashing thereof, were allowed by the aforesaid judgment. Consequently, the Bank has also filed SLP (Crl.) Nos.5094, 5095 and 5096 of 2008, which are also being heard along with SLP(Crl.)No.5093 of 2008.

2. The facts as disclosed indicate that in 1993 the Respondent No.1 had availed of various credit facilities from the Petitioner Bank, including packing credit facility and overdraft facility. For whatever reason, the account of the Respondent No.1 is alleged to have become irregular compelling the Bank to call upon the Respondent No.1 Company to regularize its packing credit account. It appears that corporate guarantee for due repayment of the outstanding dues of the Respondent No.1 Company was given by the Respondent No.3 Company which was allegedly a sister concern of the Respondent No.1 and the Respondent No.2

while being a Director of Respondent No.1 Company was a Joint Managing Director of the Respondent No.3 Company.

3. In order to discharge its liability to the Petitioner Bank, the Respondent No.3 Company issued Cheque No.255242 dated 16.5.1996, along with three other cheques, each for a sum of Rs.5 lakhs in favour of the Respondent No.1 Company which was deposited by the Respondent No.1 Company with the Petitioner Bank towards the outstanding dues of the Respondent No.1 Company. On being presented for encashment on 16.5.1996, the said cheques were returned to the Petitioner Bank with the remarks "funds insufficient". On the request made by the Respondents, the cheque was again presented for payment on 31.7.1996, but was again returned by the New Delhi Gulmohar Park Branch of the Petitioner Bank with the remark "since account closed". It is only thereafter that the Petitioner Bank filed a complaint against the Respondents under Sections 138 and 139 of the Negotiable Instruments Act, 1881, read with Section 120-B and 420 I.P.C., upon which cognizance was taken by the Additional Chief Metropolitan Magistrate, Patiala House, New Delhi, on 27.1.2001.

4. Aggrieved by the order issuing summons, the Respondent Nos.1 to 3 and other accused persons, being the Directors of the Respondent Nos.1 to 3 Companies, moved an application under Section 245(2) Cr.P.C. praying for recall of the order issuing summons and consequent discharge from the criminal proceedings initiated on the complaint filed by the Petitioner Bank on the ground that there was no privity of contract between the Petitioner Bank and the Respondent No.3, Asian Consolidated Industries Ltd. (ACIL). On the other hand, the Petitioner Bank took the stand that being a "holder in due course", the Bank was entitled to maintain its complaint.

5. By its order dated 28.7.2003 the Trial Court rejected the application filed by the Respondents for discharge upon holding that under Section 118(E) of the Negotiable Instruments Act, 1881, hereinafter referred to as "the 1881 Act", a "holder" of a

cheque is presumed to be a "holder in due course" unless and until the contrary is proved by the accused.

6. Being aggrieved by the said order dated 28.7.2003, the Respondent Nos.1 and 2 moved the Delhi High Court under Section 482 Cr.P.C. in Crl. M.C. No.5167 of 2003. As indicated hereinbefore, separate petitions were filed, being Crl. M.C. No.5161 of 2003, Crl. M.C. No.5162 of 2003 and Crl. M.C. No.2166 of 2003, which were heard and disposed of in favour of the Respondent Nos.1 and 2 by the learned Single Judge of the Delhi High Court by discharging the respondents and quashing the complaint and the orders issuing summons.

7. It is against the said order of the High Court that the present Special Leave Petitions have been filed by the Central Bank of India.

8. On behalf of the Petitioner Bank it was submitted that the High Court had misconstrued the provisions of Sub-Section (1) of Section 141 of the 1881 Act, which merely provide that if a person committing an offence under Section 138 is a Company, every person, who at the time when the offence was committed, was in charge of, and was responsible to the Company for the conduct of the business of the Company, as well as the Company, shall be deemed guilty of the offence. It was urged that the High Court had wrongly interpreted the provisions of Sub-section (1) of Section 141 of the aforesaid Act in their application to the statements made in paragraphs 12 and 21 of the complaint in arriving at a finding that the complaint had merely presumed that the Directors would be guilty because of holding a particular office since law would assume so. It was submitted that while correctly holding that to fasten liability on a Director it has to be proved that such Director was responsible to the Company and was in charge of its affairs and that such fact would have to be pleaded and proved, the High Court had erred in holding that the pleadings in paragraphs 12 and 21 of the complaint fell short of sufficient

averments required to be made in a complaint under Section 138 read with Section 141 of the 1881 Act.

9. It was submitted that the decision of this Court in *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.* [(2005) 8 SCC 89], did not affect the Bank's case, since it had been stated in the complaint in clear and unambiguous terms that the respondents as Directors of the Company were liable for its acts and that such an allegation could be proved by leading evidence, which stage was yet to arrive when the High Court quashed the complaint and discharged the accused. It was submitted that the impugned order of the High Court was liable to be set aside and the matter was liable to be remanded to the Trial Court for being proceeded with from the stage when the complaint was quashed.

10. Apart from the above submissions, a further submission was made on behalf of the Bank to the effect that since the cheques which were issued in favour of the Bank had been handed over by the Respondent No.1 for collection and had been dishonoured, the Bank had become the holder of the cheques in due course and were, therefore, entitled to proceed against the Respondent No.1.

11. The submissions made on behalf of the Petitioner Bank were strongly opposed on behalf of the respondents and it was submitted that having regard to the decision of this Court in *S.M.S. Pharmaceuticals Ltd.'s* case (supra) which was later followed in *N.K. Wahi vs. Shekhar Singh & Ors.* [(2007) 9 SCC 481], there was no scope to urge that the ingredients of a complaint against the respondents had been satisfied by the averments made in paragraphs 12 and 21 of the complaint.

12. As far as the second limb of the submissions made on behalf of the Bank was concerned, it was submitted that the same was an argument of desperation as the cheques in question had been drawn by the Respondent No.3 on its own Bank which had dishonoured the cheques. Except for

presenting the cheques to the Bank for collection, the Respondent No.1 had no other role to play in the dishonour thereof.

13. We have carefully considered the submissions made on behalf of the respective parties and we are unable to persuade ourselves to differ with the judgment and order of the High Court. The judgment in *S.M.S. Pharmaceuticals Ltd.'s* case (supra), which was relied upon by the High Court, while interpreting the provisions of sub-section (1) of Section 141 of the 1881 Act, made it very clear that unless a specific averment was made in the complaint that at the time when the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the Company, the requirements of Section 141 would not be satisfied. It was further held that while a Managing Director or a Joint Director of the Company would be admittedly in charge of the Company and responsible to the Company for the conduct of its business, the same yardstick would not apply to a Director. The position of a signatory to a cheque would be different in terms of Sub-section (2) of Section 141 of the 1881 Act. That, of course, is not the fact in this case.

14. The law as laid down in *S.M.S. Pharmaceuticals Ltd. 's* case (supra) has been consistently followed and as late as in 2007, this Court in the case of *N.K. Wahi's* case (supra), while considering the question of vicarious liability of a Director of a Company, reiterated the sentiments expressed in *S.M.S. Pharmaceuticals Ltd.'s* case (supra) that merely being a Director would not make a person liable for an offence that may have been committed by the Company. For launching a prosecution against the Directors of a Company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business

of the Company. This was done to discourage frivolous litigation and to prevent abuse of the process of Court and from embarking on a fishing expedition to try and unearth material against the Director concerned.

15. In this case, save and except for the statement that the Respondents, Mr. Rajiv Jain and Sarla Jain and some of the other accused, were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them. The question of proving a fact which had not been mentioned in the complaint did not, therefore, arise in the facts of this case. This has prompted the High Court to observe that the Bank had relied on the mistaken presumption that as Directors, Rajiv Jain, Sarla Jain and the other Directors were vicariously liable for the acts of the Company. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the Respondents, the complaint was liable to be quashed and the respondents were liable to be discharged.

16. As to the submission made on behalf of the Bank that they were holders in due course of the four cheques issued by the Respondent No.3 Company and that by presenting them to the Petitioner Bank for encashment, the Respondent No.1 Company had become liable for dishonour thereof, has been adequately dealt with and negated by the High Court and does not require any further elaboration.

17. The Special Leave Petitions filed by the Central Bank of India, therefore, fail and are dismissed.

R.P. Special Leave Petitions dismissed.

SINGAPAGU ANJAIAH
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 1166 of 2010)

JULY 6, 2010

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

Penal Code, 1860 – s.302 – Death due to assault on head with a crow bar – Conviction of accused-appellant u/s.302 – Justification of – Held: Justified – Appellant chose crow bar as the weapon of offence – He further chose a vital part of the body i.e. head for causing the injury which had caused multiple fractures of skull – This clearly shows the force with which appellant had used the weapon – The cumulative effect of all these factors irresistibly lead to the conclusion that appellant intended to cause death of the victim.

Eight accused including the appellant were put on trial for the offences of rioting, attempt to commit murder, murder and causing hurt. The offences were allegedly committed by the accused persons in view of their previous enmity with the prosecution party.

According to the prosecution, while PWs 1 to 5 sustained various injuries on their person, one person died when appellant-accused hit him with a crow bar on his head. In the opinion of the autopsy surgeon, death had occurred due to laceration over the vertex of the scalp and multiple skull fractures.

The trial Court sentenced all the accused for offence under Section 302/149. However, on appeal, the conviction of all the accused except the appellant under Section 302/149 IPC was set aside by the High Court.

Hence the present appeal.

Dismissing the appeal, the Court

HELD: In the present case, all the injured witnesses namely PWs 1 to 5 have consistently stated that the appellant assaulted the deceased with a crow bar on his head. As nobody can enter into the mind of the accused, its intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crow bar as the weapon of offence. He has further chosen a vital part of the body i.e. head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly lead to one and the only conclusion that the appellant intended to cause death of the deceased. [Paras 15, 16] [709-G-H; 710-A-C]

Gurmail Singh & others v. State of Punjab **(1982) 3 SCC 185;** *Jagtar Singh v. State of Punjab* **(1983) 2 SCC 342 and** *Gurmukh Singh v. State of Haryana* **(2009) 15 SCC 635, distinguished.**

Case Law Reference:

(1982) 3 SCC 185	**distinguished**	**Para 10**
(1983) 2 SCC 342	**distinguished**	**Para 11**
(2009) 15 SCC 635	**distinguished**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1166 of 2010.

From the Judgment & Order dated 31.3.2008 of the High Court of Judicature Andhra Pradesh at Hyderabad in Crl. Appeal No. 611 of 2006.

A.T.M. Rangaramanujam, Anu Gupta, Gouri K. Das, Rani Jethmalani for the Appellant.

D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. The sole petitioner, aggrieved by the judgment and order dated 31.03.2008 passed by the Division Bench of the Andhra Pradesh High Court in Criminal Appeal No.611 of 2006 affirming the judgment and order dated 6.4.2006 passed by the II Additional Sessions Judge (Fast Track Court), Mahabubnagar in Sessions Case No. 175 of 2003, has preferred this petition for grant of special leave to appeal.

2. Leave granted.

3. Altogether eight persons, including the appellant were put on trial for various offences punishable under Section 148, 307/149, 302, 302/149 and 324 of the Indian Penal Code.

4. The appellant, in particular, was charged for offences of rioting, attempt to commit murder of S. Ramulu (PW.1), murder of S. Ramalingam and causing hurt to S. Ramchandriah (PW.5), punishable under Section 148, 307, 302 and 324 of the Indian Penal Code respectively. The trial court acquitted all the accused persons for the offence under Section 307/149 of the Indian Penal Code but sentenced all of them for offence under Section 148, 324/149 and 302/149 and sentenced them to undergo imprisonment for life for the offence under Section 302/149 and rigorous imprisonment for nine months for the offence under Section 148 and 324/149 of the Indian Penal Code. On appeal, conviction of all the accused except the appellant under Section 302/149 of the Indian Penal Code was set aside. However, the conviction of other accused under other offences have been maintained to which we are not concerned in this appeal. Appellant's conviction and sentence under

Sections 148, 324 and 302 of the Indian Penal Code has been maintained.

5. Sole appellant has preferred this appeal against the order of conviction and sentence.

6. According to the prosecution, PWs. 1 to 5 and accused persons are close relatives and they are residents of village Tirumalairi. There was a dispute between the prosecution party and the accused persons over a pathway for which an altercation took place earlier between them and a case bearing Crime No.15 of 1997 was registered at the Police Station Balanagar under Section 324 of the Indian Penal Code. S. Ramulu (PW.1) and his brothers were prosecuted in the said case and ultimately they were found guilty and sentenced to pay a fine of Rs.100/-. According to the prosecution, accused persons were annoyed on account of their conviction and waiting for an opportunity to take revenge.

7. According to the prosecution, on 9.7.2002 at 7 A.M., S. Ramulu (PW.1)was on way to his newly constructed house situated at the end of the village. He noticed one of the accused and two other persons at the house of S. Thirumalaiah (PW.6). One of the persons at the house of PW.6 was Bichya Naik who happened to be the Chairman of Watershed Committee. One of the accused and said Bichya Naik requested PW.6 to provide chairs for the school to which S. Ramulu (PW.1) replied that the chairs purchased by the Sarpanch could be spared for the purpose. The said accused did not like that and abused PW.1 for which the later admonished him. At this, according to the prosecution, the said accused assaulted PW.1. In the meanwhile, according to the prosecution, the appellant herein came from behind, held his head and threw him down.

8. According to the prosecution, accused persons assaulted S. Ramulu (PW.1), S. Narsimha (PW.2), S. Nagaiah (PW.3), S. Anjaiah (PW.4) and S. Ramchandriah (PW.5,)and all of them have sustained various injuries on their person. The

present appellant, according to these injured persons, hit the deceased with a crow bar at his head causing serious injury. A report of the incident was given by PW.1-S.Ramula to PW.11-Rajender Kulkarni, the Station House Officer of Balanagar Police Station and on that basis, crime no. 147 of 2002 was registered. Rajender Kulkarni, Sub-Inspector of Police sent all the injured to the Government Hospital, Shadnagar but Ramalingam succumbed to the injuries on way to the hospital. All the injured witnesses, namely PW.1 to PW.5 were examined by Dr. Govind Waghmare (PW.9), Civil Assistant Surgeon who found several injuries on person of each of those witnesses. Dr. Govind Waghmare (PW.9) also held autopsy on the dead body of the deceased S. Ramalingam and he found presence of bleeding from left ear and laceration into bone deep over the vertex in the scalp. He further found multiple skull fractures on the person of the deceased and in his opinion, the death was caused due to the haematoma of the brain and multiple skull fractures.

9. The police, after usual investigations, submitted the charge-sheet and all the accused persons including the appellant were put on trial. They denied to have committed the offence and claimed to be tried. The prosecution, in support of its case, examined altogether 12 witnesses besides various documentary evidences were produced. The Trial Court as well as the Appellate Court relying on the evidence of the prosecution witnesses, convicted and sentenced the appellant as above.

10. Shri A.T.M. Ranga Ramanujam, learned Senior Counsel appearing on behalf of the appellant submits that even if the case of the prosecution is accepted in its entirety, no offence under Section 302 of the Indian Penal Code is made out. According to him, the allegation proved utmost makes out the case under Section 304 Part II of the Indian Penal Code and accordingly he submitted that conviction under Section 302 be altered to that of 304 Part II and appellant be sentenced to

the period already undergone by him. In support of the submission, he has placed reliance on a judgment of this Court in the case of *Gurmail Singh & others vs. State of Punjab* (1982) 3 SCC 185 and our attention has been drawn to the following passage from para 7 of the judgment :

> "7……We are of the opinion that in the facts found by the High court, it could not be said that accused 1 Gurmail Singh intended to cause that particular bodily injury which in fact was found to have been caused. May be, the injury inflicted may have been found to be sufficient in the ordinary course of nature to cause death. What ought to be found is that the injury found to be present was the injury that was intended to be inflicted. It is difficult to say with confidence in the present case keeping in view the facts found by the High court that accused 1 Gurmail Singh intended to cause that very injury which was found to be fatal."

11. Reliance has also been placed a decision of this Court in *Jagtar Singh vs. State of Punjab* (1983) 2 SCC 342 and our attention was drawn to para 8 of the judgment which reads as follows :

> "8. The next question is what offence the appellant is shown to have committed? In a trivial quarrel the appellant wielded a weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. Therefore, the appellant is shown to have committed an offence under Section 304 Part II of the IPC and a sentence of imprisonment for five year will meet the ends of justice."

12. Yet another decision relied on is in the case of *Gurmukh Singh vs. State of Haryana* (2009) 15 SCC 635 and our attention was drawn to para 21 and 22 of the judgment which read as follows :

> "21. In the instant case, the occurrence had taken place on the spur of the moment. Only the appellant Gurmukh Singh inflicted a single lathi-blow. The other accused have not indulged in any overt act. There was no intention or premeditation in the mind of the appellant to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature. On consideration of the entire evidence including the medical evidence, we are clearly of the view that the conviction of the appellant cannot be sustained under Section 302 IPC, but the appropriate section under which the appellant ought to be convicted is Section 304 Part II IPC.
>
> 22. Before we part with the case, we would like to clearly observe that we are not laying down that in no case of single blow or injury, the accused cannot be convicted under Section 302 IPC. In cases of single injury, the facts and circumstances of each case have to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under Section 302 IPC or under Section 304 Part II IPC."

13. Smt. D. Bharathi Reddy, learned counsel appeared on behalf of the State.

14. We do not find any substance in the submission of Shri Ramanujam and the decisions relied on are clearly distinguishable.

15. In view of the submissions made, we do not deem it expedient to narrate the entire evidence on record. Suffice it to say that all the injured witnesses namely P.W. 1 to 5 have consistently stated that the appellant assaulted the deceased

with a crow bar on his head. According to the autopsy surgeon, Dr. Govind Waghmare, death had occurred due to laceration over the vertex of the scalp and multiple skull fractures.

16. In our opinion, as nobody can enter into the mind of the accused, its intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crow bar as the weapon of offence. He has further chosen a vital part of the body i.e. head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly lead to one and the only conclusion that the appellant intended to cause death of the deceased.

17. Now referring to the decision of this Court in the case of *Gurmail Singh* (Supra), the same is clearly distinguishable. In the said case, on fact, it was found that the accused did not intend to cause the injury which in fact was found to have been caused and in the said background, it was held that the accused did not intend to cause death, which is not the situation here.

18. In the case of *Jagtar Singh* (Supra), the incident was preceded by a sudden and chance quarrel and in that background, the Court held the allegation proved to be under Section 304 Part II of the IPC.

19. In the case of *Gurmukh Singh* (Supra), the injury found on the deceased was only depression of skull bone and the occurrence had taken place in the spur of the moment. In the background of the aforesaid facts, infliction of single lathi blow was not found enough to infer the intention of the accused to cause death of the deceased. Here, as pointed out above, the three important factors enumerated above, clearly lead to the conclusion that appellant intended to cause death.

20. Hence, all these decisions are clearly distinguishable.

21. In the present case, as pointed out above, weapon used, the part of the body chosen for assault and the intensity with which the appellant assaulted the deceased clearly go to show that he intended to cause the death of the deceased.

22. We do not find any merit in this appeal. It is dismissed accordingly.

B.B.B Appeal dismissed.

K.K. RAMACHANDRAN MASTER

v.

M.V. SREYAMAKUMAR & ORS.

(Civil Appeal No. 638 of 2007)

JULY 06, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

Representation of the People Act, 1951:

ss.83, 86, 123(4), 123(5) and 123(6) – Election petition challenging election of returned candidate on the ground of corrupt practices – High Court dismissed the petition – On appeal, held: Averments made in election petition that returned candidate was responsible for printing, publication and distribution of statements in newspapers which materially affected the result of election – Averments sufficiently disclosed cause of action – High Court committed error in holding otherwise – Matter remitted to High Court for consideration afresh.

s.86 – Verification of the pleading – Defect in – Held: Is curable – Code of Civil Procedure, 1908.

Appellant filed election petition challenging the election of first respondent on the ground of corrupt practices under Sections 123(4), (5) and (6) of Representation of People Act. Appellant's case was that false, defamatory and baseless allegations were published in various newspapers and circulated by the first respondent in order to lower the dignity, reputation and personality of the appellant amongst the voters of his constituency.

High Court dismissed the petition holding that the petition was not properly verified in as much as the same

did not disclose the source of information on the basis of which the appellant had made the allegations of corrupt practices and the election petition did not state either the material facts or give the necessary particulars so as to disclose a complete cause of action justifying trial. Hence the appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1.1. Section 83 of the Representation of People Act mandates that an election petition must contain a concise statement of the material facts on which the petitioner relies and set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practices and the date and place of the commission of each such practice. It also requires that the petition be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of the pleadings. A petition that does not disclose material facts can be dismissed as one that does not disclose a cause of action. The dismissal of a petition on the ground of deficiency or non-disclosure of particulars of corrupt practice may be justified only if the election petitioner does not despite an opportunity given by the Court provide the particulars and thereby cure the defect. [Paras 4, 5] [719-F-H; 720-A-C]

Samant N. Balkrishna v. George Fernandez **(1969) 3 SCC 238;** *Raj Narain v. Indira Nehru Gandhi* **(1972) 3 SCC 850;** *H.D. Revanna v. G. Puttaswamy Gowda* **(1999) 2 SCC 217;** *V.S. Achuthanandan v. P.J. Francis* **(1999) 3 SCC 737;** *Mahendra Pal v. Ram Dass Malanger* **(2000) 1 SCC 261;** *Sardar Harcharan Singh Brar v. Sukh Darshan Singh* **(2004) 11 SCC 196;** *Harkirat Singh v. Amrinder Singh* **(2005) 13 SCC 511;** *Umesh Challiyil v. K.P. Rajendra* **(2008) 11 SCC**

740; *Virender Nath Gautam v. Satpal Singh* **(2007) 3 SCC 617, relied on.**

1.2. The defective verification or affidavit is curable. What consequences, if any, may flow from an allegedly defective affidavit, is required to be judged at the trial of an election petition but such election petition cannot be dismissed under Section 86(1) of the Act for any such defect. [Para 11] [723-H; 724-A-B]

F.A. Sapa v. Singora **(1991) 3 SCC 375, relied on.**

1.3. Section 123(4) of the Act makes publication of any statement of fact which is false, and which relates to the personal character or conduct of any candidate a corrupt practice if any such statement is reasonably calculated to prejudice the prospects of that candidate's election and if such publication has been made by a candidate or his election agent or by any other person with the consent of the candidate or his election agent. A reading of the averments made in the election petition would show that the same gave particulars of how the published materials were transported and distributed among various booths of the constituency on 28th April, 2006 by the first respondent, his election agent, polling agents, other agents, workers and campaigners with the consent and connivance of the first respondent. These averments not only gave the registration numbers of the vehicles in which the material was transported but also the names of the persons who actually distributed the said material amongst the voters of the constituency. The names of the persons who informed the appellant about the distribution of the printed material were also indicated in sufficient details. The details of the printed material at other booths in the constituency and other members relating to the distribution of the said material were set out in sufficient detail. In another publication on 29th April, 2006, the appellant was accused of demanding rupees

one lakh from a UD Clerk in the Primary Health Centre. The appellant further alleged that the publication of the baseless and false news item on the eve of the election scheduled to be held on 29th April, 2006 without affording an opportunity to explain the real facts to the public as well as to the affected voters was totally *mala fide* and was calculated to prejudicially affect his election prospects and cause irreparable loss to the appellant by creating confusion and doubts about his character, personality and dignity. [Paras 13,17-20] [724-E; 726-G-H; 727-A-C]

1.4. Section 123(5) of the Act makes hiring and securing of vehicles whether on payment or otherwise for the free conveyance of any elector to and from any polling station with the consent of a candidate or his election agent, a corrupt practice. The election petition specifically alleged that the first respondent, his election agent and other agents and workers had secured vehicles for transport of the voters to and fro polling stations contrary to Section 123(5) of the Act. The averments in the petition not only gave the registration numbers but also the names of the owners/drivers of the vehicles used for providing free transport of the voters of different booths. The averments made in the election petition constituted a statement of material facts required in terms of Section 83A of the Act. Although the particulars given therein gave rise to justify a trial yet if there were any deficiency in the disclosure of the particulars, the High Court could have directed the petitioner to furnish the said particulars. Dismissal of the petition on the ground that the averments did not constitute material facts and did not give rise to a complete cause of action was not a correct appreciation of the said averments. The same is true even in regard to the averments in the election petition in which the petitioner had alleged that the respondent No.1 had

committed a corrupt practice within the meaning of Section 123(6) of the Act by incurring or authorizing expenditure in contravention of Section 77 of the Act. The appellant had clearly alleged that the first respondent had spent an amount of Rs.78 lakhs for his election as against the outer limit of Rs.10 lakhs stipulated under Section 77 of the Act read with Rule 90 of the Election Rules, 1961. The averments disclosed in sufficient details the basis on which the said allegation was made. The averments made in the election petition thus sufficiently disclosed a cause of action. The averments set out the material facts and gave sufficient particulars that would justify the grant of an opportunity to the appellant to prove his allegations. In as much as the High Court, found otherwise, committed a mistake. At any rate, if there was any deficiency in the particulars required to be furnished in terms of Section 83(b) of the Act, the High Court could and indeed ought to have directed the petitioner to disclose and provide the same with a view to preventing any miscarriage of justice on account of non-disclosure of the same. Since the material facts were stated in the present case, the absence of particulars, if any, could not justify dismissal of the petition by the High Court. [Paras 21- 23] [730-D-H; 731-A-D; 730-A-C]

Case Law Reference:

(1969) 3 SCC 238	relied on	Para 6
(1972) 3 SCC 850	relied on	Para 7
(1999) 2 SCC 217	relied on	Para 8
(1999) 3 SCC 737	relied on	Para 8
(2000) 1 SCC 261	relied on	Para 8
(2004) 11 SCC 196	relied on	Paras 8, 11
(2005) 13 SCC 511	relied on	Para 9

(2008) 11 SCC 740	**relied on**	**Para 9**
(2007) 3 SCC 617	**relied on**	**Para 10**
(1991) 3 SCC 375	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 638 of 2007.

From the Judgment & Order dated 3.1.2007 of the High Court of Kerala at Ernakulam in El. Pet. No. 8 of 2006.

Romy Chacko, Jasaswini Mishra for the Appellant.

Rama Kumar, Seema Jain, Himinder Lal, Ranjith, K.C., for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Election to the Kerala State Legislative Assembly was held in April, 2006. Among other constituencies that went to poll on 29.4.2006 was 029 Kalpetta LA Constituency with as many as 11 candidates in the fray. The candidates included the appellant as a nominee of Indian National Congress (I) a constituent of the United Democratic Front ('UDF' for short). Janta Dal (S) a constituent of the Left Democratic Front had set up respondent No.1 as its candidate, while respondent No.2 was sponsored by Bhartiya Janata Party. Respondents No.3 and 4 were similarly contesting on the mandate of the Bahujan Samaj Party and All India Anna Dravid Munnetta Kazhakam respectively. The remaining candidates were all independent. The result of the election came on 11th of May, 2006, which declared the first respondent elected with a margin of 1841 votes over the appellant his nearest rival. Most of the other candidates in the fray lost their deposits.

2. Aggrieved by the election of respondent No.1 the appellant filed election petition No.8 of 2006 before the High Court of Kerala at Cochin alleging that the returned candidate had committed several corrupt practices that rendered his

election liable to be set aside. The petition was contested by the elected candidate inter alia on the ground that the same suffered from fatal defects that rendered it liable to be dismissed without a trial. The election petition did not, according to the respondent, state either the material facts or give the necessary particulars so as to disclose a complete cause of action justifying a trial. It was also alleged that the petition was not properly verified and was, therefore, liable to be dismissed on that additional ground as well. All these contentions urged on behalf of the respondent found favour with the High Court resulting in the dismissal of the petition by the order impugned in the present appeal. The High Court observed that the averments made in the petition were insufficient to disclose a complete cause of action or give rise to a triable issue. It found fault with the verification of the petition in as much as the same did not disclose the source of information on the basis of which the election petitioner had made allegations of corrupt practices against the respondent. The verification did not, according to the High Court, make any distinction between what was true to the knowledge of the petitioner and what he believed to be true on the basis of information received.

3. Section 86 of the Representation of People Act mandates that the High Court shall dismiss an election petition if the same does not comply with the provisions of Sections 81, 82 or 117 of the said Act. Sections 81, 82 and 117 of the Act deal with presentation of the petition, parties to the petition and security for costs. It is common ground that the election petition filed by the appellant in the instant case did not suffer from any defect relatable to any one of the said three provisions. Dismissal of the election petition by the order impugned in this appeal is, not therefore, referable to Section 86 of the Act, which implies that the High Court has dismissed the election petition on the premise that the averments made in the election petition alleging commission of corrupt practices do not disclose

material facts as required under Section 83 of the Act. Section 83 reads as under:-

"83. Contents of petition.—(1) An election petition—

(*a*) shall contain a concise statement of the material facts on which the petitioner relies;

(*b*) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(*c*) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(*2*) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]"

4. There is in the light of the above no gainsaying that an election petition must contain a concise statement of the material facts on which the petitioner relies and set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practices and the date and place of the commission of each such practice. It also requires that the petition be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of the pleadings.

5. The provisions of Section 83 (supra) have fallen for

interpretation in several cases leading to a long line of decisions that have understood the said provisions to mean that while an election petition must necessarily contain a statement of material facts, deficiency if any, in providing the particulars of a corrupt practice could be made up by the petitioner at any later stage. The provision has been interpreted to mean that while a petition that does not disclose material facts can be dismissed as one that does not disclose a cause of action, dismissal on the ground of deficiency or non-disclosure of particulars of corrupt practice may be justified only if the election petitioner does not despite an opportunity given by the Court provide the particulars and thereby cure the defect. We do not consider it necessary to refer to all the decisions delivered on the subject as reference to some only of such decisions should in our opinion suffice.

6. In *Samant N. Balkrishna v. George Fernandez,* (1969) 3 SCC 238 this Court held that Section 83 was mandatory and requires the election petition to contain a concise statement of material facts and the fullest possible particulars of the corrupt practices if any alleged. The use of word "material facts" observed by the Court shows that facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact could consequently lead to an incomplete cause of action. The function of particulars is however only to present a full picture of the cause of action with such further information in detail as is sufficient to make the opposite party understand the case he is called upon to meet. There may be some overlapping between material facts and particulars but the two are quite distinct, observed the court. Material facts will show the ground of corrupt practice and the complete cause of action while particulars will give necessary information to present a full picture of the same.

7. In *Raj Narian v. Indira Nehru Gandhi,* (1972) 3 SCC 850, this Court had another opportunity to interpret the provisions of Section 83 and to cull out the principles that would

determine whether an election petition complied with the requirement of the said provision. This Court cautioned that just because a corrupt practice has to be strictly proved did not mean that a pleading in an election proceedings should receive a strict construction. Even a defective charge, observed the Court, did not vitiate a criminal trial unless it was proved that the same had prejudiced the accused. If a pleading on a reasonable construction could sustain the action, the court should accept that construction and be slow in dismissing an election petition lest it frustrates an action only on technical grounds. The court also observed that a charge of corrupt practice is no doubt a very serious charge but the court has to consider whether the petitioner should be refused an opportunity to prove the allegations made by him merely because the petition was drafted clumsily. The following passages from the decision in *Raj Narain's* case (supra) are apposite in this regard:

> "While a corrupt practice has got to be strictly proved but from that it does not follow that a pleading in an election proceeding should receive a strict construction. This Court has held that even a defective charge does not vitiate a criminal trial unless it is proved that the same has prejudiced the accused. If a pleading on a reasonable construction could sustain the action, the court should accept that construction. The courts are reluctant to frustrate an action on technical grounds.
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> The charge of corrupt practice in an election is a very serious charge. Purity of election is the very essence of real democracy. The charge in question has been denied by the respondent. It has yet to be proved. It may or may not be proved. The allegations made by the appellant may ultimately be proved to be wholly devoid of truth. But the question is whether the appellant should be refused an opportunity to prove his allegations? Should the court refuse to enquire into those allegations merely because the appellant or someone who prepared his brief did not know the language of the law. We have no hesitation in answering those questions in the negative.
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> If the allegations made regarding a corrupt practice do not disclose the constituent parts of the corrupt practice alleged, the same will not be allowed to be proved and further those allegations cannot be amended after the period of limitation for filing an election petition; but the court may allow particulars of any corrupt practice alleged in the petition to be amended or amplified.
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> Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed a rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the court to ascertain that principle and implement it."

8. The above principles have been reiterated by this Court in *H.D. Revanna v. G. Puttaswamy Gowda,* (1999) 2 SCC 217; *V.S. Achuthanandan v. P.J. Francis,* (1999) 3 SCC 737; *Mahendra Pal v. Ram Dass Malanger,* (2000) 1 SCC 261 and *Sardar Harcharan Singh Brar v. Sukh Darshan Singh,* (2004) 11 SCC 196.

9. Reference may also be made to *Harkirat Singh v. Amrinder Singh,* (2005) 13 SCC 511, where this Court reiterated the distinction between material facts and particulars and held that while material facts are primary and basic facts which must be pleaded by the plaintiff, particulars are details in support of such material facts. They simply amplify, refine and embellish the material facts by giving distinctive touch to the

basic contours of a picture already drawn so as to make it more clear and informative. Particulars thus ensure conduct of a fair trial so that the opposite party is not taken by surprise. To the same effect is the decision of this Court in *Umesh Challiyil v. K.P. Rajendra,* (2008) 11 SCC 740, where the Court held that even if the respondents raised an objection in his counter affidavit and the appellant had despite the opportunity to cure the defect pointed out by the respondent did not do so yet an election petition cannot be dismissed on the ground that the petitioner had not cured any such defects. The petitioner was entitled to bona fide believe that the petition is in all respects complete and if the High Court found it otherwise it would give an opportunity to him to amend or cure the defect. This court also held that while dealing with election petitions the Court should not adopt a technical approach only to dismiss the election petitions on the threshold.

10. In *Virender Nath Gautam v. Satpal Singh,* (2007) 3 SCC 617, this Court made a distinction between the need for supporting material facts and the means by which such facts are proved by the party alleging the same:

> "There is distinction between facta probanda (the facts required to be proved i.e. material facts) and facts probantia (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. The material facts on which the party relies for his claim are called facts probanda and they must be stated in the pleadings. But the facts or facts by means of which facta probanda (material facts) are proved and which are in the nature of facta probantia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue."

11. The question whether a defect in the verification of the pleading is fatal is also no longer res integra in the light of the

decision in *F.A. Sapa v. Singora,* (1991) 3 SCC 375 and *Sardar Harcharan Singh Brar's* case (supra) where this Court held that defective verification or affidavit is curable. What consequences, if any, may flow from an allegedly defective affidavit, is required to be judged at the trial of an election petition but such election petition cannot be dismissed under Section 86(1) of the Act for any such defect.

12. Coming then to the facts of the case at hand the appellant had challenged the election of respondent No. 1 on the ground that the latter had committed corrupt practices within the meaning of Section 123(1)(A), 123(4), 123 (5) and 123(6) apart from violating the provisions of Section 127A and 133 of the Representation of People Act and Rules 86 and 90 of the Conduct of Election Rules, 1961. In the course of the hearing before us, however, the appellant confined his challenge to the election on the grounds referable to Section 123(4), 123(5) and 123(6) of the Act only.

13. Section 123(4) of the Act makes publication of any statement of fact which is false, and which relates to the personal character or conduct of any candidate a corrupt practice if any such statement is reasonably calculated to prejudice the prospects of that candidate's election and if such publication has been made by a candidate or his election agent or by any other person with the consent of the candidate or his election agent.

14. The appellant's case as set out in the election petition is that a notice in the form of a newspaper under the title 'Janasabdam' was printed, published and circulated by the first respondent and his election agent containing totally false, defamatory, incorrect and baseless allegations, deliberately intended to lower the dignity, status, reputation and personality of the petitioner amongst the voters of his constituency. According to the averments made by the appellant in paragraph 6 of the election petition, the said notice/newspaper was published at the Mathrubhumi Press, Kozhikode in the name

of one Rasheed whose age and address is not known to the appellant but who according to the publication was said to be the Joint Secretary, Media Trust, Sulthan Bathey. The averments made by the appellant in the election petition further state that one Mr. M.P. Veerendrakumar, the father of the respondent No.1 is the Managing Director of "Mathurbhumi" Daily in whose press the aforementioned notice/newspaper titled 'Janasabdam' was published. It is also the case of the appellant that although only 35 thousand copies of the notice are said to have been printed but actually as many as 1,20,000 copies were printed, published and distributed from door to door in all the nooks and corners of the constituency by the first respondent, his election agent and other agents and active workers. The election petition finds fault with the publication of the said notice/newspaper on several counts. Firstly, it is alleged that the notice/newspaper carried a news item under the title "The Health Minister directly do priest hood for bribe" in which the appellant was accused of bribery in connection with the appointment of part time sweepers in Health Service Department in Wynad District. The news item read that the appellant had demanded Rs.25,000 to Rs.50,000 for providing appointments and another amount of Rs.25,000 to Rs.50,000 for regularizing such appointments. The news item alleged that the appellant had entrusted his Additional Private Secretary with the duty of collecting the bribe amount from the candidates. The statements made in the newspaper were, according to the appellant, totally baseless and deliberately cooked up with a view to lowering the dignity and status of the appellant in the estimation of the electorate by tarnishing the image of the appellant and thereby with a view to gaining undue advantage for respondent No.1 in the election process.

15. Secondly, it finds fault with the publication aforementioned in as much as the same carried a news item under the heading 'The representative of people who brought shame to Wynad' under which caption it was alleged that the Kerala Lok Ayukta had prima facie found a case against the

appellant and issued a notice to him. According to the appellant, the Lok Ayukta had found a prima facie case against the appellant but the same was in utter violation of the principles of natural justice and without affording any opportunity of being heard to the petitioner. The Division Bench of the High Court of Kerala had, therefore, stayed the finding of the Lok Ayukta which stay order was in force even on the date of the filing of the petition. The appellant alleged that the publication of the news item in 'Janasabdam' referred to above created a strong impression in the mind of an average person that the appellant was a very corrupt, wicked and crooked person, not committed to the welfare of the people.

16. Thirdly, the appellant found fault with the publication of a news item in the very same newspaper/notice under the title 'The phone call that trapped the Minister'. The appellant alleged that he never sought any assistance or issued any direction to the DMO at any juncture and that he had never threatened or coerced the officer over the mobile phone as was alleged in the said news item. So also the news item under the caption 'Be aware! Bigger than bitten is in the hole' and 'The game has to be played is not the game already played' were highly defamatory and deliberately made to tarnish the dignity and status of the appellant in the minds of the voters and to prejudicially affect the prospects of his election schedule to be held on 29th April, 2006.

17. A reading of the averments made in paragraphs 13 to 23 of the election petition would show that the same gave particulars of how the published material was transported from Kozikode to the residential house of the first respondent at Puliyarmala in Kalpetta by 11.30 p.m. on 26th April, 2006 and how the same were split into small bundles consisting of 80 to 100 copies per bundle and how 8 to 12 bundles each were distributed among 143 booths of the constituency on 28th April, 2006 between 8.00 a.m. to 5.15 p.m. by the first respondent, his election agent, polling agents, other agents, workers and

campaigners with the consent and connivance of the first respondent. The averments in these paragraphs not only give the registration numbers of the vehicles in which the material was transported but also the names of the persons who actually distributed the said material amongst the voters of the constituency. The names of the persons who informed the appellant about the distribution of the printed material have also been indicated by the appellant in sufficient details. For instance, according to the averments made in paragraph 14 of the petition at booth no.120 of the constituency, the printed material referred to earlier was distributed to various houses by one Mr. Ealias son of Ouseph, Kunnathukudy House, Trikkaipatta, Meppady, Wynad District and by others named in the said paragraph. This distribution work was, according to the appellant, with the consent and connivance of respondent No.1. So also details of the printed material at other booths in the constituency and other members relating to the distribution of the said material have been set out in sufficient detail in paragraphs 15 to 23. The election petition specifically alleges that the printing, publication and distribution of the material by the first respondent, his election agent and other agents, workers and campaigners was with his consent and connivance which materially affected the result of the election in so far as the same concerned the appellant and the returned candidate.

18. Apart from the publication of the notice titled ''Janasabdam" the election petition also refers to publication of an incorrect, baseless and false news item in 'Mathrubhumi Daily' dated 28th April, 2006 at the instance of the respondent by Shri M.P. Veerendrakumar, the father of the said respondent under the caption 'MLA cancels the consented works'. Paragraph 29 of the election petition specifically alleged that the said publication was at the instance of the first respondent in which it was falsely alleged that the appellant had cancelled the sanction granted for effecting improvements to four roads, under the Special Development Fund. The petition alleged that the four roads mentioned passed through more

than 10 booths of the constituency of Kalpetta Legislative Constituency of which 14000 people of the constituency were regular beneficiaries/users. The appellant alleged that the publication of the baseless and false news item on the eve of the election scheduled to be held on 29th April, 2006 without affording an opportunity to explain the real facts to the public as well as to the affected voters was totally mala fide and was calculated to prejudicially affect his election prospects. Another publication made in Mathrubhumi Daily issue dated 29th April, 2006 under the caption 'Allegations by Priest against former Minister Ramachandran' were also, according to the appellant, false and made at the instance of the first respondent. In the said news item the appellant had been accused of demanding rupees one lakh from a UD Clerk in the Primary Health Centre also working as Priest of Moolamattom St. George Orthodox Church. The petition alleged that the allegation that the appellant had demanded bribe from the said person who was suspended from service by the Health Services Authorities upon inspection, was totally false, baseless and cooked up at the instance of the first respondent and published in the Mathrubhumi at his instance. The appellant alleged that the publication of such a damaging news item which was totally false, baseless and motivated on the eve of the election was intended to cause irreparable loss to the appellant by creating confusion and doubts about his character, personality and dignity in the minds of the electorate city those belonging to Christian faith. The petition also refers to the publication of a photograph of Fr. George Vakkanampadam in the cassock to create emotional distress for the Christian electorate by giving an impression as though the appellant had not only illegally suspended but also demanded bribe from the said Mr. Vakkanampadam and delayed completion of the disciplinary proceedings against him. The appellant alleged that publication of the news item was mala fide and intended to prejudice his electoral prospects.

19. The election petition further alleged that another news

item published in the 'Deshabhimani Daily dated 6th April, 2006 with the title 'What is happening at the Kalpetta is the people's trial against corruption – Sreyamskumar' in which the first respondent is alleged to have accused the appellant of indulging in corrupt practices throughout. The election petition alleged that the publication of the said news item was mala fide and with intention to cause prejudice and harassment to the petitioner and to secure undue advantage to the first respondent.

20. Apart from the publication mentioned above the appellant also accused the first respondent of making a false statement in a public speech delivered by him on 27th April, 2006 in which the first respondent delivered a talk at Kalpetta near the bus stand attended by 500 persons at 4.30 p.m. alleging that the Lok Ayukta had issued a direction to arrest and produce the appellant on 6th June, 2006 and his arrest was delayed due only to the ensuing election. The election petition also alleged that a similar talk was delivered by Mr. U.A. Khader, Councillor, Kalpetta Municipality, who was actively supporting the first respondent and by Shri V.P. Varkey son of Paily, Vattathody House, Vazhavatta P.O., Wynad who was functioning as the District President of Kisan Janata of Wynad for and on behalf of the first respondent, as duly authorized by the first respondent. The election petition also referred to a talk delivered by Shri K.K. Hamsa, who is the State General Secretary of Janata Dal (S) at Meppady town on 27th April, 2006 alleging that Lok Ayukta had issued an arrest warrant against the appellant. The persons who informed the appellant about the said talks allegedly containing accusations against the appellant have also been set out in the election petition.

21. We do not consider it necessary to refer in further details to the specific averments made by the appellant in support of the charge that respondent No.1 had committed corrupt practices within the meaning of Section 123(4) of the Representation of People Act. All that we need to say is that

the averments made in the election petition sufficiently disclose a cause of action. The averments set out the material facts & give sufficient particulars that would justify the grant of an opportunity to the appellant to prove his allegations. In as much as the High Court found otherwise, it in our opinion, committed a mistake. At any rate if there was any deficiency in the particulars required to be furnished in terms of Section 83(b) of the Act the High Court could and indeed ought to have directed the petitioner to disclose and provide the same with a view to preventing any miscarriage of justice on account of non-disclosure of the same. So long the material facts had been stated, which were stated in the present case, the absence of particulars, if any, could not justify dismissal of the petition by the High Court.

22. What is stated above is true even in regard to the averments made by the appellant in paragraphs 25 and 26 of the election petition wherein the appellant had accused the first respondent of committing a corrupt practice within the meaning of Section 123(5) of the Act. Section 123(5) makes hiring and securing of vehicles whether on payment or otherwise for the free conveyance of any elector to and from any polling station with the consent of a candidate or his election agent, a corrupt practice. Paragraph 25 and 26 of the election petition specifically allege that the first respondent, his election agent and other agents and workers had secured vehicles for transport of the voters to and fro polling stations contrary to Section 123(5) of the Act. The averments made in the said paragraphs not only give the registration numbers but also the names of the owners/drivers of the vehicles used for providing free transport of the voters of different booths indicated in the said paragraphs. The averments made in the paragraphs 25 and 26 of the election petition constitute a statement of material facts required in terms of Section 83A of the Act. Although the particulars given in the said paragraphs, in our opinion, give rise to justify a trial yet if there were any deficiency in the disclosure of the particulars the High Court could direct the

petitioner to furnish the said particulars. Dismissal of the petition on the ground that the averments did not constitute material facts and did not give rise to a complete cause of action was not a correct appreciation of the said averments.

23. The same is true even in regard to the averments made in paragraph 35 of the election petition in which the petitioner had alleged that the respondent No.1 had committed a corrupt practice within the meaning of Section 123(6) of the Act by incurring or authorizing expenditure in contravention of Section 77. In paragraph 35 of the election petition the appellant had clearly alleged that the first respondent had spent an amount of Rs.78 lakhs for his election as against the outer limit of Rs.10 lakhs stipulated under Section 77 of the Act read with Rule 90 of the Election Rules, 1961. The averments disclosed in sufficient details the basis on which the said allegation was made.

24. In the result, we allow this appeal, set aside the impugned order of the High Court and remand the matter back to the High Court for disposal of the election petition in accordance with the law keeping in view the observations made hereinabove. We make it clear that anything said by us in the foregoing paras of this judgment shall not be understood as expression of any final opinion on the merits of the case set up by the appellant or the defense set up by the respondent No.1. The observations made hereinabove are limited to the determination of the question whether the High Court was justified in dismissing the election petition at the threshold as it did. The parties are directed to appear before the High Court for further directions on 6th September, 2010. No costs.

D.G. Appeal allowed.

MD. RAISUL ISLAM AND ORS.

v.

GOKUL MOHAN HAZARIKA AND ORS.

(Special Leave Petition (C) No. 19188 of 2007)

JULY 06, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Assam Civil Services (Class-I) Rules, 1960: rr.4, 19 – Selection/Seniority – Selection process started on the basis of the existing Service Rules – Held: Existing rules would continue to govern the selection process, notwithstanding any amendment to the said Rules in the meantime – Seniority would thus be governed by the existing rule – Assam Civil Services (Class-I) Amendment Rules, 1986 – Service law – Seniority.

An advertisement was published on 22.5.1984 for filling up 30 posts in each category of ACS Class-I and ACS Class-II Officers in terms of unamended rule 4 of the Assam Civil Services (Class-I) Rules, 1960. Written test was conducted and the result was declared on 22.2.1986. Interview was conducted by APSC in respect of candidates successful in written examination. A list of recommended candidates was submitted by the APSC to the Government on 22.6.1986. The amendment to rule 4 came subsequently on 21.7.1986 by the Assam Civil Services (Class-I) Amendment Rules, 1986 whereby the number of persons to be promoted from ACS Class-II to ACS Class-I was left to be decided by the Governor and the earlier quota of 50% for promotion was discontinued.

129 ACS Class-II Officers, including the petitioners, were regularly promoted as ACS Class-I officers on 11.9.1986. Thereafter on 22.10.1986, ACS Class-I Officers, including the respondents, were appointed by way of

direct recruitment on the basis of the recommendations made by the APSC. On 1.1.1993, a draft seniority list was prepared wherein all 129 Officers promoted on 11.9.1986 were shown as senior to 45 ACS Class-I Officers who were appointed by direct recruitment on various dates in the month of October 1986.

Respondents 1 to 8 challenged the draft seniority list. High Court held that the seniority of the direct recruits and promotees would be governed by the unamended rules as the selection process was initiated prior to the 1986 amendment. Hence the Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1. Once a process of selection is started on the basis of the existing Rules of recruitment, the said Rules would continue to govern the selection process, notwithstanding any amendment which may have been effected to the said Rules in the meantime. Accordingly, the seniority of members of the service would, no doubt, be governed under Rule 19 of Assam Civil Services (Class-I) Rules, 1960 but the selection process has to be completed under Rule 4 in order to attract the provisions of Rule 19. The High Court was right in directing that the vacancies for which the advertisement was published in 1984 be filled up on the basis of the unamended Rule 4 which provided for quota between promotees and direct recruits and in placing 45 of the direct recruits immediately below the first 45 promotees out of the list of 129 promotees in keeping with the said quota system for the year 1986. [Paras 27, 28] [747-B-C; 746-G-H; 747-A]

Dr. K. Ramulu & Anr. v. Dr. S. Suryaprakash Rao & Ors. **(1997) 3 SCC 59, Distinguished.**

Suraj Parkash Gupta & Ors. v. State of J & K and Ors. **(2000) 7 SCC 561;** *State of Uttaranchal & Anr. v. Dinesh*

Kumar Sharma **(2007) 1 SCC 683;** *Uttaranchal Forest Rangers' Assn. (Direct Recruit) v. State of U.P.* **(2006) 10 SCC 346;** *N.T. Devin Katti v. Karnataka Public Service Commission* **(1990) 3 SCC 157, referred to.**

Case Law Reference:

(2000) 7 SCC 561	**referred to**	**Para 18**
(2007) 1 SCC 683	**referred to**	**Para 18**
(2006) 10 SCC 346	**referred to**	**Para 21**
(1990) 3 SCC 157	**referred to**	**Para 22**
(1997) 3 SCC 59	**Distinguished**	**Paras 24, 25, 26**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 19188 of 2007.

From the Judgment & Order dated 23.5.2007 of the High Court of Gauhati in Writ Appeal No. 5 of 2004.

Vijay Hansaria, Sneha Kalita, Shankar Divate for the Petitioner.

Parthiv Goswami, A. Henry, Rajiv Mehta, J.R. Luwang, Riku Sharma (for Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. On the request of the Government of Assam to select candidates by way of direct recruitment for filling up 30 posts in each category of ACS Class-I and ACS Class-II, the Assam Public Service Commission, hereinafter referred to as 'the ASPC', published an advertisement on 22nd May, 1984, for the aforesaid purpose in terms of Rule 4 of the Assam Civil Services (Class-I) Rules, 1960. Subsequently, the Government of Assam informed the APSC on 24th November, 1984, that a decision had been taken to relax the upper age limit by two years. Accordingly, a revised advertisement was

published by APSC on 28th November, 1984, incorporating the decision to relax the upper age limit by two years. Pursuant to the said advertisement, a written test was conducted by the APSC, as required under the aforesaid Rules, hereinafter referred to as 'the 1960 Rules', between 5th June, 1984, to 1st August, 1985, and the results of the said written examination were declared on 22nd February, 1986. Vive voce test was thereafter conducted by the APSC from 25th April, 1986, to 30th May, 1986, in respect of those candidates who had qualified in the written examination. Thereafter, the APSC sent its list of recommended candidates to the Government on 27th June, 1986, for appointment to ACS Class-I and ACS Class-II category officers.

2. On 21st July, 1986, vide Notification of even date, the Government of Assam amended the proviso to Rule 4(1) and Rule 4(1)(b) of the 1960 Rules whereby the number of persons to be promoted from ACS Class-II to ACS Class I was left to be determined by the Governor and the earlier quota of 50 per cent for promotion was discontinued.

3. At this stage, reference may be made to Rule 4 of the 1960 Rules, as it stood prior to the amendment of 21st July, 1986, namely,

> "Rule 4(1). Recruitment to the service after the commencement of these Rules, shall be by the following methods, namely:
>
> (a) by competitive examination conducted by Commission;
>
> (b) by promotion of confirmed members of the ACS (Class-II) who have passed the prescribed departmental examination and successfully completed the prescribed training under Sub-Rule(3)of Rule 14 of ACS (Class-II) Rules, 1962; and

> (c) by selection, in special cases from among persons, other than members of the Assam Civil Service (Class-II) service in connection with the affairs of the Government;
>
> Provided that the number of persons recruited under Clause (b) shall be 50 per cent of the total number of vacancies to be filled in a year and the persons recruited under Clause (c) shall not in any year exceed two; provided further that the persons recruited under Clause (c) shall not at any time exceed 5 per cent of the total strength of the cadre".

4. As will be apparent from the above, under the unamended Rules, the number of persons to be recruited by way of promotion would be 50 per cent of the total number of vacancies to be filled in a year and the number of persons to be selected under clause (c) in said cases was not to exceed 5 per cent of the total strength of the cadre at any time.

5. While the aforesaid process of filling up the vacancies was being undertaken, the State Government as indicated hereinabove, amended some of the provisions of the 1960 Rules by the Assam Civil Service (Class-I) (Amendment) Rules, 1986, hereinafter referred to as 'the 1986 Amendment Rules', which were directed to come into force at once and were, therefore, given prospective operation. The amendment with which we are directly concerned in this case is Rule 2 of the Amendment Rules, which reads as follows :-

> "2. In the Principal Rules, in Rule 4 –
>
> (a) for clause (b) of sub-rule (1), the following shall be substituted, namely:-
>
> "(b) by promotion from amongst the ACS (Class-II) officers who have completed 5 years of continuous service in ACS (Class-II) on the first day of January of the year in which recruitment is made"

(b) for the proviso to sub-rule (1), the following shall be substituted, namely:-

"provided that the number of persons recruited under Clause (b) in any calendar year shall be such as may be determined by the Governor. Provided further that the persons recruited under Clause (c) shall not in any year exceed two and shall not, at any time exceed 5 per cent of the total strength of the cadre."

6. The amended provisions of Rule 4, do away with the quota of 50 per cent reservation for promotees and the number of persons to be recruited in such manner in any calendar year would after the amendment be such as might be determined by the Governor. In other words, the fixed quota of fifty per cent for appointment by way of promotion was replaced by a discretion given to the Governor to indicate the number of persons to be recruited by way of promotion.

7. Pursuant to the aforesaid selection process, 129 ACS Class-II Officers, including the petitioners, were regularly promoted as ACS Class-I Officers on 11th September, 1986. Thereafter, on 22nd October, 1986, 45 ACS Class-I Officers, including the Respondents, were appointed by way of direct recruitment on the basis of the recommendation made by the APSC. On 16th December, 1989, as a matter of policy, the State Government merged the ACS Class-II Officers with ACS Class-I Officers in order to eliminate the ACS Class-II category. Pursuant thereto, on 1st January, 1993, a draft gradation list of ACS Class-I Officers was published by the State Government inviting objections thereto. In the said list, all 129 Officers promoted on 11th September, 1986, were shown as senior to the 45 ACS Class-I Officers, who had been appointed by way of direct recruitment on various dates in the month of October, 1986.

8. Aggrieved by the above, the Respondent Nos.1 to 8 herein filed a Writ Petition challenging the draft seniority list

dated 1st January, 1993, and the amendments effected to Rule 4 of the 1960 Rules on 21st July, 1986. It may not be out of place to take note at this stage of the fact that the appointments of the petitioners and other similarly situated promotees made vide notification dated 11th September, 1986, were not challenged in the Writ Petition, nor was the notice of the Writ Petition served on them, although, they were made parties to the proceedings. During the pendency of the Writ Petition, the State Government published the final seniority list of ACS Class-I Officers in which all the 129 promotees were shown to be senior to the 45 direct recruits. It is the petitioners' case that the said seniority list was never challenged and had attained finality long ago.

9. On 26th June, 2003, the learned Single Judge of the High Court dismissed the Writ Petition holding that although the process of selection had been initiated long before the amendment of 1986, the Government had decided not to make any appointments till the Rules were amended. The Respondent Nos.1 to 8 thereupon filed a Writ Appeal before the Division Bench of the High Court which was allowed on 26th August, 2006, upon the finding that the seniority of direct recruits and promotees would be governed by the unamended Rules as the selection process was initiated prior to the 1986 amendments. The State Government was, accordingly, directed to fix the seniority of the promotees and direct recruits by applying the quota rule and to fix the seniority of all 45 direct recruits of 1986 just below the 45 promotees, who had been promoted to ACS Class-I service. It is the petitioners' case that they had no knowledge about the Writ Appeal as they were not served with notice thereof. Review Petitions Nos.92 and 93 of 2006 were filed on 9th November, 2006, by 12 of the promotees/ petitioners herein on the ground that they had not been served with notice of the Writ Appeal. Thereupon, the Division Bench on 13th September, 2006, issued notice on the Review Petitions and stayed the operation of the judgment and order passed on 26th August, 2006. Subsequently, on 25th

September, 2006, the Division Bench modified its earlier order dated 13th September, 2006 and directed that posting of officers, if any, pursuant to the interim order, would be only with the leave of the Court.

10. On 13th November, 2006, the State Government filed its counter affidavit in the matter and on being satisfied that notice of the Writ Appeal had not been served on the Review Petitioners, the Division Bench permitted them to file their affidavit in the Writ Appeal and the same was re-heard along with the Review Petitions on merit. It is on a re-hearing of the Writ Appeal and the Review Petitions that the order impugned in Special Leave Petition (Civil) No.19188 of 2007 came to be passed on 23rd May, 2007.

11. In its counter affidavit filed in the Writ Appeal, the State Government opposed the Writ Appeal contending that seniority, upon merger of the ACS Class-I and ACS Class-II Officers, had been rightly fixed by the State. After considering the submissions made on behalf of the parties, the Division Bench, while allowing the Writ Appeal, directed the authorities to ascertain the vacancies available in the year 1986 for recruitment from each source in terms of the quota fixed by Rule 4 of the 1960 Rules and to recast their seniority by rotating the vacancies following the quota and rota rules. The said order of the Division Bench being impugned in this Petition, this Court issued notice to the parties on 12th November, 2007, and directed status-quo to be maintained.

12. Appearing in support of the Special Leave Petition, Mr. Vijay Hansaria, learned Senior counsel, firstly referred to Rule 19 of the 1960 Rules dealing with seniority, which reads as follows :

> *"Seniority:* (1) The seniority of members of the service shall be determined according to the order of merit in the lists prepared under sub-rule (5) of Rule 5 or approved under

> Rule 8, if the members join their appointments within 15 days of the receipt of the order of appointment.
>
> Provided that in case a member is prevented from joining within the said period of 15 days by circumstances of a public nature or for reasons beyond his control, the Governor may extend it for a further period of 15 days. If the period is not so extended and the member of the service joins within the period extended under sub-rule (2) of Rule 15, his seniority shall be determined in accordance with the date of joining.
>
> Provided further that the members of the service recruited in a year under clause (b) and (c) of Rule 4 shall be senior to members recruited in the same year and in the same batch under clause (a) of Rule 4."

13. What is important for our purpose is the second proviso which indicates that the number of promotees in a year under Clauses (b) and (c) of Rule 4 would be senior to members recruited by direct recruitment in the same year and in the same batch under Clause (a) of Rule 4. The language of the second proviso to Rule 19 is clear and unambiguous that in a year candidates promoted to the higher post under Rule 4 would be senior to candidates recruited in the same year and in the same batch under Clause (a) of Rule 4 of the 1960 Rules.

14. Mr. Hansaria then drew our attention to Rule 26, which provides that "the seniority of members of the service promoted to the senior grade time scale, shall be in the order in which their names are arranged by the Selection Board under Sub-Rule (2) of Rule 25 for the purpose of promotion to that grade." Learned counsel also referred to Rule 27, wherein the Governor of the State was also empowered to dispense with or relax any Rule on being satisfied that the operation of any of the Rules caused undue hardship in any particular case. Mr. Hansaria submitted that after the Amendment Act was enacted on 21st July, 1986, whereby Rule 4 was also amended, the Governor

was given the power to determine the number of ACS Class-II officers to be promoted as a result whereof, the quota system in relation to recruitment of ACS Class-I Officers was discontinued. According to Mr. Hansaria, the quota system had broken down, necessitating the amendment.

15. Mr. Hansaria contended that the direct recruits had been appointed long after the appointment by promotion of the Petitioners under the Rules and could not, therefore, be given seniority over the promotees. Mr. Hansaria submitted that in this petition what was of utmost importance was not the question of recruitment, but how seniority was to be determined *inter se* with those who had been promoted earlier. The question posed is: Would the rules relating to seniority which were applicable at the time of recruitment also determine seniority even if the Rules were subsequently altered?

16. Mr. Hansaria submitted that since the quota and rota rule had not been followed over the years, the same was discontinued by virtue of the amendments to the 1960 Rules which became effective from 21st July, 1986. Although, the said amendments were challenged by the respondents, such challenge was later given up. Despite the above, the High Court quite erroneously relied on the unamended Rules in arriving at a final decision in the appeal. Mr. Hansaria urged that when the Rules relating to quota had been discontinued by the 1986 Amendment, the High Court erred in not following the Amended Rules which came into effect on 21st July, 1986, after the recruitment of both the petitioners as well as the respondents herein. Mr. Hansaria contended that even if the quota Rule is held to be applicable, the same had broken down on account of not having been followed for a long period of time, seniority had to be fixed by applying the amended Rules.

17. Mr. Hansaria then urged that it was a well-settled principle that direct recruits cannot claim appointment from the date on which the vacancy in the quota for direct recruitment occurred before their selection, which principle had been

incorporated in the proviso to Rule 4(b) of the 1960 Rules, as amended.

18. In this regard, Mr. Hansaria referred to the decision of this Court in *Suraj Parkash Gupta & Ors. vs. State of J & K and Ors.* [(2000) 7 SCC 561], wherein the very same question fell for consideration and this Court observed that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment and not from the date when he was not even born in the service. Reference was also made to the decision of this Court in *State of Uttaranchal & Anr. vs. Dinesh Kumar Sharma* [(2007) 1 SCC 683], where the earlier decision in *Suraj Parkash Gupta's* case (supra) was reiterated and it was re-emphasized that a person appointed on promotion cannot get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Several decisions were also cited by Mr. Hansaria on the same lines, to which reference will be made, if necessary.

19. Mr. Hansaria contended that the High Court had committed an error in relying upon the unamended provisions of Rule 4 of the 1960 Rules, instead of relying upon the amended Rules which were relevant to the case of the respondents since the quota Rules had broken down when the process of recording seniority had been commenced.

20. Mr. Parthiv Goswami, learned Advocate, representing the Respondent Nos.1 to 8 pointed out that Rule 4(1) provided the method of recruitment to the service and the proviso to the said Rule provided that 50% of the total vacancies in a given year was to be filled up by promotion of confirmed members of the Assam Civil Service (Class-II). Furthermore, Rule 19(1) provided that the promotees would be senior to direct recruits in case of appointment in the same year and in the same batch. Mr. Goswami contended that the State Government on 21st July, 1986, amended Rule 4 and the Governor was authorized thereunder to determine the number of promotees to be accommodated, but as rightly pointed out by the Division

Bench, the amended Rules would not apply to the direct recruits whose selection process had commenced under the unamended Rules.

21. Mr. Goswami submitted that promotees appointed in excess of the quota reserved for them could only be described as ad hoc and seniority could not be given to such promotees on the basis of such ad hoc promotions. In support of his submissions Mr. Goswami referred to the decision of this Court in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) vs. State of U.P.* [(2006) 10 SCC 346], wherein the said proposition was approved and it was further held that promotees who were appointed in 1991 could not claim seniority over direct recruits who were substantively appointed at a prior point of time in 1990.

22. Reference was also made to the decision of this Court in *N.T. Devin Katti vs. Karnataka Public Service Commission* [(1990) 3 SCC 157], wherein it was held that appointment made in terms of an advertisement published prior to amendments effected to the Rule or Order would normally not be affected by the amendment. In other words, where the selection process is initiated by issuing an advertisement inviting applications, selection normally should be regulated by the Rule or Order then prevailing. Several other decisions were also referred to where the same principles have been explained. Mr. Goswami submitted that the process of selection in the instant case had commenced before the amendments came into force and since it was held that only prospective operation could be given to the amended Rules, the process of selection started under the unamended Rules would have to be continued and completed thereunder. Mr. Goswami submitted that the submissions made on behalf of the petitioners that the selection would be in accordance with the amended Rules was contrary to the law as established and was, therefore, liable to be rejected.

23. We have carefully considered the submissions made

on behalf of the respective parties and the decisions cited by them. The point at issue in this SLP is confined to the question as to whether the 1960 Rules as amended would govern the seniority of the persons recruited in the process of selection commenced earlier to the amendment. It is not disputed that an advertisement was published on 22nd May, 1984, for filling up 30 posts in each category of ACS Class-I and ACS Class-II Officers in terms of unamended Rule 4 of the 1960 Rules and that a written test was conducted by the APSC under the said Rules between 5th June, 1984 and 1st August, 1985 and the result of the said written examination was declared on 22nd February, 1986. Viva-voce test was conducted by the APSC from 25th April, 1986, to 30th May, 1986, in respect of those candidates who had qualified in the written examination. A list of recommended candidates was thereafter submitted by the APSC to the Government on 22nd June, 1986. It is also not disputed that soon thereafter on 21st July, 1986, the proviso to Rule 4(1) and Rule 4(1)(b) of the 1960 Rules were amended whereby the quota system was sought to be discarded and discretion was given to the Governor to determine the number of appointments to be made by way of promotion in a given case.

24. It is evident from the chronological list of events that the process of selection for filling up the 30 posts in each category of ACS Class-I and ACS Class-II Officers commenced with the publication of the advertisement inviting applications which was published on 22nd May, 1984. Pursuant thereto, written examinations were also held and the result of the written examinations was declared on 22nd February, 1986, and after completion of the viva-voce test, a list of recommended candidates was submitted by the APSC to the Government on 22nd June, 1986. The amendment to Rule 4 came subsequently on 21st July, 1986. The submission advanced on behalf of the Respondent Nos.1 to 8 herein is that once the process had commenced under the unamended Rules, appointments would have also to be completed under the said Rules, even though

the Rules were amended in the meantime. The Division Bench of the High Court, while re-hearing the Writ Appeal and the Review Petitions, reiterated the views expressed earlier on 26th August, 2006, holding that the seniority of direct recruits and promotees would be governed by the unamended Rules as the selection process was initiated prior to the 1986 amendments. Consequently, the Division Bench also held that the seniority between the promotees and direct recruits was to be determined on the basis of the quota fixed for recruitment from each source under Rule 4 of the 1960 Rules on the basis of the vacancies available in the calendar year, by applying quota and rota selectees to the extent of the vacancies in their quota as envisaged in the proviso to Rule 4(1) of the Rules as they stood prior to the 1986 amendments. The Division Bench, accordingly, amended its earlier judgment dated 24th August, 2006 and set aside the provisional seniority list of ACS Class-I Officers with the aforesaid modification and directed the authorities to recast the seniority in accordance with the said directions. While arriving at the aforesaid decision, the Division Bench had occasion to refer to the decision of this Court in *Dr. K. Ramulu & Anr. vs. Dr. S. Suryaprakash Rao & Ors.* [(1997) 3 SCC 59], wherein the question which fell for consideration was whether the Government was entitled to take a decision not to fill up existing vacancies on the relevant date unless the process of amendment was completed. This Court, after taking into consideration Rule 4 of the A.P. Subordinate Service Rules, held that the object of the said Rule was that all eligible candidates should be considered in accordance with the Rules. This Court held that the Government was entitled to take a conscious decision not to fill up any of the vacancies before the proposed amendment to the Rules was effected.

25. While at first glance the decision in *K. Ramulu's* case (supra) may appear to be at par with the facts of the instant case, there is yet a distinction which cannot be ignored. While in the present case a process of selection had been set in motion under the existing Rules and a list of selected

candidates had also been recommended by the APSC, in *K. Ramulu's* case (supra) the Government had merely taken a decision not to fill up the vacancies until the amended Rules came into force. In *K. Ramulu's* case (supra) no process had been initiated for the purpose of filling up any of the vacancies. In such circumstances, where no candidate had either been invited or interviewed or selected for appointment, as has been done in the instant case, this Court rightly held that the Government was competent to take a decision not to fill up the vacancies.

26. There can be no dispute that as a matter of policy the Government may take a conscious decision not to fill up vacancies for justifiable reasons, but at the same time, having started a process of selection under the unamended Rules, it cannot take the stand that it still was entitled not to make appointments of persons from amongst the candidates selected in terms of the process initiated under the old Rules. In fact, in the instant case, the recommendation made by the APSC was submitted to the Government on 22nd June, 1986, before the amended Rules came into operation on 21st July, 1986 whereby the quota system was discarded. In such a situation, in our view, the decision in *K. Ramulu's* case (supra) cannot be applied to the facts of this case.

27. We are unable to agree with Mr. Hansaria that the High Court had committed an error in relying on the unamended Rules since the law has been well settled that the process of selection commenced on the basis of the Rules then in existence would continue under the said Rules, even though the Rules may have been amended in the meantime. Accordingly, the seniority of members of the service would, no doubt, be governed under Rule 19, but the selection process has to be completed under Rule 4 in order to attract the provisions of Rule 19. The vacancies for which the advertisement had been published in 1984 were directed to be filled up by the High Court on the basis of the unamended Rule 4 which provided

for quota between promotees and direct recruits and, accordingly, placed 45 of the direct recruits immediately below the first 45 promotees out of the list of 129 promotees in keeping with the said quota system for the year 1986.

28. We agree with the view taken by the High Court which has been reiterated by Mr. Goswami in keeping with the well-established principle that once a process of selection is started on the basis of the existing Rules of recruitment, the said Rules will continue to govern the selection process, notwithstanding any amendment which may have been effected to the said Rules in the meantime.

29. The decision of the High Court does not, therefore, warrant any interference and the Special Leave Petition is, accordingly, dismissed, but, without any order as to costs.

D.G. Special Leave Petition dismissed.

C.I.T., MUMBAI

v.

M/S. WALFORT SHARE & STOCK BROKERS P. LTD.

(Civil Appeal No. 4927 of 2010)

JULY 06, 2010

[S.H. KAPADIA, CJI AND SWATANTER KUMAR, J.]

Income Tax Act, 1961:

ss. 10(33), 14A and 94(7) – Dividend stripping transaction – Cases prior to 1.4.2002 – Loss on sale of units – Exemption from income – Held: Losses pertaining to exempted income, cannot be disallowed – After, 01.04.2002, losses over and above the amount of dividend received would still be allowed – It will not be ignored u/s. 94(7) – Parliament has not treated the dividend stripping transaction as sham or bogus – It has not treated the entire loss as fictitious or only a fiscal loss.

ss. 14A and 94(7) – Reconciliation of ss. 14A with ss. 94 (7) – Held: ss. 14A and 94 (7) operate in different fields – Section 14A comes in when there is claim for deduction of expenditure whereas s. 94 (7) comes in when there is claim for allowance for the business loss.

Accounting Standard AS-13 Para 12 – Applicability of – Units bought at the ruling Net Asset Value with a right to receive dividend as and when declared in future – Held: AS-13 not applicable.

The respondent-assessee is engaged in trading of shares. During the assessment year 2000-01, the assessee purchased some units of Mutual Funds on the record date-24.03.2000 and earned dividend income. Thereafter, the NAV (net asset value) of the units got

reduced and the assessee sold these units at a lesser price and incurred losses. The assessee claimed the dividend received as exempt from tax under section 10(33) of the Income Tax Act, 1961 and also claimed setoff as loss incurred on the sale of units. The Assessing Authority did not allow the claim of loss on the ground that the dividend stripping transaction was not business transaction. The CIT (A) upheld the order of the Assessing Officer. The tribunal allowed the appeal holding that the assesee was entitled to set off the said loss from the said transactions against its other income chargeable to tax. The High Court upheld the order of the tribunal. Hence, these appeals.

Dismissing the appeals, the Court

HELD: 1.1.The insertion of section 14A of the Income Tax Act, 1961 with retrospective effect is the serious attempt on the part of the Parliament not to allow deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act against the taxable income (Circular No. 14 of 2001 dated 22.11.2001). Section 14A clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income. The mandate of section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for insertion of section 14A is that certain incomes are not includible

while computing total income as these are exempt under certain provisions of the Act. [Para 14] [769-H; 770-A-E]

1.2. One needs to read the words 'expenditure incurred' in section 14A in the context of the scheme of the Act and, if so read, it is clear that it disallows certain expenditures incurred to earn exempt income from being deducted from other income which is includible in the "total income" for the purpose of chargeability to tax. The scheme of sections 30 to 37 is that profits and gains must be computed subject to certain allowances for deductions/ expenditure. The charge is not on gross receipts, it is on profits and gains. Profits have to be computed after deducting losses and expenses incurred for business. A deduction for expenditure or loss which is not within the prohibition must be allowed if it is on the facts of the case a proper Debit Item to be charged against the oncomings of the business in ascertaining the true profits. A return of investment or a pay-back is not such a Debit Item, hence, it is not 'expenditure incurred' in terms of section 14A. Expenditure is a pay-out. It relates to disbursement. A pay-back is not an expenditure in the scheme of section 14A. For attracting section 14A, there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income. Pay-back or return of investment is not such proximate cause, hence, section 14A is not applicable in the instant case. Thus, in the absence of such proximate cause for disallowance, section 14A cannot be invoked. Return of investment cannot be construed to mean "expenditure" and if it is construed to mean "expenditure" in the sense of physical spending still the expenditure was not such as could be claimed as an "allowance" against the profits of the relevant accounting year under sections 30 to 37 of the Act and, therefore, section 14A cannot be invoked. Hence, the two asset theory is not applicable as there is no expenditure

incurred in terms of section 14A. [Para 14] [771-G-H; 772-A-E]

1.3. The AO disallowed the loss of Rs. 1,82,12,862 on the sale of 40% tax-free units of the mutual fund. The Department submitted that the assessee is getting tax-free dividend; that at the same time it is claiming loss on the sale of the units; that the assessee had purposely and in a planned manner entered into a pre-meditated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, loss on sale was not genuine and disallowed the loss, cannot be accepted. The instant case is with regard to the assessment years prior to insertion of section 94(7) vide Finance Act, 2001 w.e.f. 1.4.2002. The AO had erred in disallowing the loss. [Paras 15, 16 and 17] [772-G-H; 773-E-F; B-C]

1.4. On facts, it is established that there was a "sale". The sale-price was received by the assessee. That, the assessee did receive dividend. The fact that the dividend received was tax-free is the position recognized under section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction. [Para 17] [773-G-H; 774-A]

Vijaya Bank v. Additional Commissioner of Income Tax **(1991) 187 ITR 541;** *McDowell & Co. Ltd. v. Commercial Tax Officer* **154 ITR 148(SC);** *Union of India v. Azadi Bachao Andolan* **263 ITR 706(SC), referred to.**

1.5. In the cases arising before 1.4.2002, losses pertaining to exempted income cannot be disallowed. However, after 1.4.2002, such losses to the extent of

dividend received by the assessee could be ignored by the AO in view of section 94(7). The object of section 94(7) is to curb the short term losses. Applying section 94(7) in a case for the assessment year(s) falling after 1.4.2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of the dividend received would still be allowed from which it follows that the Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. After 1.4.2002, losses over and above the dividend received will not be ignored under section 94(7). If the argument of the Department is to be accepted, it would mean that before 1.4.2002 the entire loss would be disallowed as not genuine but, after 1.4.2002, a part of it would be allowable under section 94(7) which cannot be the object of section 94(7) which is inserted to curb tax avoidance by certain types of transactions in securities. [Para 17] [774-C-G]

1.6. Sections 14A and 94(7) were simultaneously inserted by the same Finance Act, 2001. Section 14A was inserted w.e.f. 1.4.1962 whereas section 94(7) was inserted w.e.f. 1.4.2002. The Parliament realized that several public sector undertakings and public sector enterprises had invested huge amounts over last couple of years in the impugned dividend stripping transactions so also declaration of dividends by mutual fund are being vetted and regulated by SEBI for last couple of years. If section 94(7) would have been brought into effect from 1.4.1962, as in the case of section 14A, it would have resulted in reversal of large number of transactions. This could be one reason why the Parliament intended to give effect to section 94(7) only w.e.f. 1.4.2002. However, it is the duty of the court to examine the circumstances and reasons why section 14A inserted by Finance Act 2001 stood inserted w.e.f.

1.4.1962 while section 94(7) inserted by the same Finance Act as brought into force w.e.f. 1.4.2002. [Para 17] [774-G-H; 775-A-C]

1.7. Sections 14A and 94(7) operate in different fields. Section 14A deals with disallowance of expenditure incurred in earning tax-free income against the profits of the accounting year under sections 30 to 37 of the Act. On the other hand, section 94(7) refers to disallowance of the loss on the acquisition of an asset which situation is not there in cases falling under section 14A. Under section 94(7), the dividend goes to reduce the loss. It applies to cases where the loss is more than the dividend. Section 14A applies to cases where the assessee incurs expenditure to earn tax free income but where there is no acquisition of an asset. In cases falling under section 94(7), there is acquisition of an asset and existence of the loss which arises at a point of time subsequent to the purchase of units and receipt of exempt income. It occurs only when the sale takes place. Section 14A comes in when there is claim for deduction of an expenditure whereas section 94(7) comes in when there is claim for allowance for the business loss. One must keep in mind the conceptual difference between loss, expenditure, cost of acquisition, etc. while interpreting the scheme of the Act. [Para 18] [775-D-G]

1.8. Para 12 of the Accounting Standard AS-13 indicates that interest/ dividends received on investments are generally regarded as return on investment and not return of investment. It is only in certain circumstances where the purchase price includes the right to receive crystallized and accrued dividends/ interest, that have already accrued and become due for payment before the date of purchase of the units, that the same has got to be reduced from the purchase cost of the investment. A mere receipt of dividend subsequent to purchase of units, on the basis of a person holding units at the time

of declaration of dividend on the record date, cannot go to offset the cost of acquisition of the units. Therefore, AS-13 has no application to the facts of the instant cases where units are bought at the ruling NAV with a right to receive dividend as and when declared in future and did not carry any vested right to claim dividends which had already accrued prior to the purchase. [Para 19] [775-H; 776-A-D]

Rajasthan State Warehousing Corporation v. Commissioner of Income-Tax **242 ITR 450;** *Commissioner of Income-Tax, Madras v. Indian Bank Limited* **56 ITR 77, referred to.**

Case Law Reference:

242 ITR 450	**Referred to.**	**Para 9**
56 ITR 77	**Referred to.**	**Para 9**
(1991) 187 ITR 541	**Referred to.**	**Para 16**
154 ITR 148(SC)	**Referred to.**	**Para 17**
263 ITR 706(SC)	**Referred to.**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4927 of 2010.

From the Judgment and Order dated 8.8.2008 of the High Court of Judicature at Bombay in Income Tax Appeal No. 18 of 2006.

C.A. No. 4928 of 2010

C.A. No. 4929 of 2010

C.A. No. 4930 of 2010

C.A. No. 4931 of 2010

C.A. No. 4932 of 2010

C.A. No. 4933 of 2010

C.A. No. 4934 of 2010

C.A. No. 4935 of 2010

C.A. No. 4936 of 2010

C.A. No. 4937 of 2010

C.A. No. 4938 of 2010

C.A. No. 4939 of 2010

C.A. No. 4940 of 2010

C.A. No. 4941 of 2010

C.A. No. 4942 of 2010

C.A. No. 4943 of 2010

C.A. No. 4944 of 2010

C.A. No. 4945 of 2010

C.A. No. 4954 of 2010

C.A. No. 4946 of 2010

C.A. No. 4947 of 2010

C.A. No. 4948 of 2010

C.A. No. 4949 of 2010

C.A. No. 4950 of 2010

C.A. No. 4951 of 2010

C.A. No. 4952 of 2010

C.A. No. 4953 of 2010

Parag P. Tripathi, ASG., Preetesh Kapoor, C.V. Subba Rao, Arijit Prasad, Kunal Bahri, B.M. Chatterjee, Varun Sarin, Farrukh Rashid, Vikas Malhotra, Fuzail A. Ayyubi, Amey Nargolkar, Satyakam, Balaji, B.V. Balaram Das for the Appellant.

Soli E. Dastur, C.S. Aggarwal, R. Murlidhar, Rustom B. Hathikhanawala, B.S. Banthia, Jitendra Jain, Ankur Saigal Bina Gupta, Gaurav Singh, Ashok Kumar Sharma, T.N. Chopra, Debasis Misra, Jatin Zaveri, Rajeev Wagle, Rukhsana Choudhury, Sridevi Pannikar, Vijay Kumar, Bharat L. Gandhi, R. Chandrachud, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, Ajay Vohra, Kavita Jha, Sandeep S. Karhail, Rashmikumar Manilal Vithlani and Gaurav Agrawal for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, CJI. 1. Delay condoned.

2. Leave granted.

3. Whether the loss arising in the course of dividend stripping transaction taking place prior to 1.4.2002 was disallowable on the ground that such loss was artificial as the dividend stripping transaction was not a business transaction, is the question which arises for determination in this batch of Civil Appeals; the lead matter of which is *C.I.T., Mumbai v. M/s. Walfort Share & Stock Brokers Pvt. Ltd.*

4. The facts in the lead matter are as follows:

The assessee is a member of Bombay Stock Exchange and it earns income mainly from share trading and brokerage. During the financial year 1999-2000, relevant to the assessment year 2000-01, the Chola Freedom Technology Mutual Fund came out with an advertisement stating that tax free dividend income of 40% could be earned if investments were made before the record date, i.e., 24.3.2000. The assessee by virtue

of its purchase on 24.3.2000 became entitled to the dividend on the units at the rate of Rs. 4/- per unit and earned a dividend of Rs. 1,82,12,862.80. As a result of the dividend payout, the NAV of the said mutual fund which was Rs. 17.23 per unit on 24.3.2000, at which rate it was purchased, stood reduced to Rs. 13.23 per unit on 27.3.2000, which was the succeeding working day in the stock exchange. This fall in the NAV was equal to the amount of the dividend payout. The assessee sold all the units on 27.3.2000 at the NAV of Rs. 13.23 per unit and collected an amount of Rs. 5,90,55,207.75. The assessee also received an incentive of Rs. 23,76,778/- in respect of the said transaction. Thus, the assessee thereby received back Rs. 7,96,44,847 (Rs. 1,82,12,862.80 + Rs. 5,90,55,207.75 + Rs. 23,76,778) against the initial payout of Rs. 8,00,00,000/-. For the income tax purposes, the assessee, in its return, claimed the dividend received of Rs. 1,82,12,862.80 as exempt from tax under Section 10(33) of the Income Tax Act, 1961 ("the Act" for short) and also claimed a set-off of Rs. 2,09,44,793 as loss incurred on the sale of the units thereby seeking to reduce its overall tax liability.

The AO in his assessment order dated 21.3.2003 accepted that the dividend income amounting to Rs. 1,82,12,862.80 was exempt under Section 10(33) of the Act. However, the AO disallowed the loss of Rs. 2,09,44,793 claimed by the assessee inter alia on the ground that a dividend stripping transaction was not a business transaction and since such a transaction was primarily for the purpose of tax avoidance, the loss so-called was an artificial loss created by a pre-designed set of transaction. Accordingly, the AO deducted the incentive income of Rs. 23,76,778 received by the assessee + transaction charges from the loss of Rs. 2,09,44,793 and added back the reduced loss of Rs. 1,82,12,862.80 to the repurchase price/ redemption value amounting to Rs. 5,90,55,207.75. (See page 77 of the SLP Paper Book)

Being aggrieved by the disallowance of the reduced loss of Rs. 1,82,12,862.80, the assessee filed an appeal before CIT(A) who by his order dated 12.12.2003 confirmed the order of the AO saying that the loss of Rs. 1,82,12,862.80 incurred by the assessee on the sale of units should be totally ignored and that the same should not be allowed to be set-off or carried forward. Thus, the Department disallowed the reduced loss of Rs. 1,82,12,862.80 which amount was equal to the dividend, on the units declared by the mutual fund, of Rs. 1,82,12,862.80. In other words, by the impugned orders passed by the AO, the Department sought to tax the dividend income of the assessee during the relevant assessment year of Rs. 1,82,12,862.80.

To complete the chronology of events, it may be stated that the assessee moved the tribunal against the order dated 12.12.2003. The disallowance stood deleted by the Special Bench of the Tribunal vide its impugned order dated 15.7.2005 by holding that the assessee was entitled to set-off the said loss from the impugned transactions against its other income chargeable to tax. This view of the tribunal has been affirmed by the High Court vide its impugned judgment dated 8.8.2008, hence this civil appeal.

5. According to Shri Parag P. Tripathi, learned Additional Solicitor General and Shri Preetesh Kapur, learned counsel for the Department, the amount received by the assessee as "dividend", in fact and in law, constitutes a "return of investment" in the hands of the assessee and, therefore, it follows that the said amount is required to be adjusted against the cost of purchase of the original units and once that is done there is in fact no loss suffered by the assessee on subsequent sale/ redemption. Alternatively, if the so-called "dividend" did not constitute a return of investment, then since the price of units necessarily included the price of dividend as an identifiable element embedded therein to which a definite value could be assigned at the time of the purchase, the "dividend" is in effect "paid for". In such circumstances that part of the price of units

which clearly represented the cost of the dividend, is the expenditure incurred for obtaining exempt income and if that is the case then Section 14A requires that such expenditure should be netted against the receipt of dividend. Before us, it was also submitted that in any event "loss" is a commercial concept under the Act, if a transaction is such that a "tax loss" is created or contrived without suffering any corresponding financial / commercial loss inasmuch as the money has in fact been recouped in some other form (such as dividend), then such a loss needs to be ignored for tax purposes, only to the extent that the loss has in fact been recouped in another form. This is because such a loss, not being a "commercial loss", was never intended to be allowed under the Act. As a corollary, it was submitted that introduction of Section 94(7) prospectively w.e.f. 1.4.2002 does not obliterate the aforementioned last submission since a prospective amendment, by its very definition, did not alter the existing law in respect of the past transactions. Moreover, Section 94(7) specifically adopts the above principle of tax avoidance and modifies it for the purpose of dealing with what is called as "dividend stripping transactions".

6. On facts it was submitted that the assessee had the option to buy three different kinds of assets. Option was available to the assessee to buy either the unit (ex-dividend) or the unit and the dividend (cum-dividend) or only the dividend. As far as the first two assets, there was no issue. If an assessee wanted to buy a unit after declaration of the dividend, then he can buy the ex-dividend unit as soon as possible after the record date so that he pays only for the NAV relatable to ex-dividend unit, after declaration of the dividend, without being affected by market fluctuations. Similarly, if an assessee wants to buy an asset consisting of the dividend and the unit, he can buy cum-dividend unit at any point of time after the declaration of the dividend but before the record date. According to the Department, the problem arises in cases where an assessee is desirous of buying only the dividend. In order to do so, he

buys the cum-dividend unit, after declaration of dividend but as close as possible to the record date (so as to isolate himself from market fluctuations), whereby he becomes entitled to receive the dividend payout on the record date and immediately after the record date is able to sell the ex-dividend unit. Consequently, by a series of fiscal transactions, the assessee ends up buying the dividend. Therefore, if 'x' is the price/ expenditure associated with the purchase of dividend, 'y' is the price/ expenditure associated with the unit without dividend then, 'x' + 'y' would be the price of cum-dividend unit. Then price may be called 'z' in which event, the equation is:

'x' + 'y' = 'z'

There is no dispute as to the identity of 'z', which is the price/ expenditure for purchasing cum-dividend unit, i.e., Rs. 17.23. In that event, 'y' would represent the sale price of ex-dividend unit, i.e., Rs. 13.23. Thus, 'x' can be found by the simple mathematical formula:

'x' = 'z' – 'y'

'x' is equal to Rs. 17.23 ('z') – Rs. 13.23 ('y') = Rs. 4

7. According to the Department, therefore, in the present case, Rs. 4 will be expenditure, attributable towards earning tax free dividend income which is disallowable under Section 14A of the Act. That, the newspaper advertisements issued by the Mutual Fund in the present case as on March 8, March 18 and March 22 amounted to an offer by Mutual Fund to the target buyers, i.e., a buyer who wants to claim losses in the trade of shares and securities so as to set it off against his other income. The effect of the newspaper advertisements is to segregate the unit into two assets, namely, the asset of the tax free dividend and the ex-dividend unit which will have an NAV reduced by the amount of the dividend payout per unit. Since there are two assets which are sold to the buyer of the cum-dividend units, it follows that the difference between the

purchase and sale price of the unit, is nothing but the expenditure incurred for purchasing the asset of tax free dividend. In this connection, reliance is placed on the Explanatory Memorandum accompanying the Finance Bill of 2001 reported in 248 ITR 195 (St.).

8. In conclusion, it was submitted before us that the tax free dividend income was really in essence a cost recovery mechanism which finds an independent support in Accounting Standard No. 13, i.e., to the effect that such a return should go to reduce the cost of acquisition as such a return is really a return of investment and not return on investment.

9. On behalf of assessee(s), Shri S.E. Dastur, learned senior counsel, Shri Ajay Vohra, learned counsel and Shri O.S. Bajpai, learned senior counsel, submitted that the basic submission of the Department to the effect that the amount received by the assessee as "dividend", in fact and in law, constitutes "return of investment" is fallacious for several reasons. Firstly, the question whether an amount is a "cost return" depends on the terms of the contract. Secondly, the argument of the Department runs counter to Section 94(7). That sub-section clearly accepts that payment by way of dividend is a revenue receipt but it is exempt from tax under Section 10(33). According to the assessee, if the argument of the Department is to be accepted that the amount represents "return of investment" then it would constitute a capital receipt and not a revenue receipt. Thirdly, if the dividend of Rs. 4 per unit is treated as "expenditure" covered by Section 14A and not as "dividend" as required by Section 94(7), it would mean that for the assessment years 2000-01 and 2001-02 the assessee would be in a worse position because for the relevant assessment years based on the "fiscality principle" the entire loss of Rs. 1,85,68,015 would be disallowed whereas for the subsequent years after insertion of Section 94(7) w.e.f. 1.4.2002 only loss to the extent of the "dividend" amounting to Rs. 1,82,12,862 would stand disallowed leaving Rs. 3,55,153/-

as loss allowable. That was never the intention of the Parliament for inserting Section 94(7). The said sub-section was not intended to be beneficial. Fourthly, the fact that Section 94(7) allows loss in excess of dividend means that it accepts that the transaction is genuine and in course of business. If the transaction was a nullity, the entire loss would have been disallowed and not only to the extent of the dividend. Moreover, if losses could be disallowed on fiscality/ first principles then Section 94(7) is redundant. Fifthly, Section 14A is enacted for non-deduction of expenditure whereas Section 94(7) is enacted to curb creation of short-term losses. Lastly, there is nothing to show that the NAV fell on the next trading date after the record date on account of the dividend payout. In this connection, it was submitted that fall or increase in NAV depended upon the value of the underlying assets and not on the basis of the dividend payout. On interpretation of Sections 14A and 94(7) it was submitted that Section 14A deals with expenditure in relation to income whereas Section 94(7) deals with acquisition and sale of securities or units and provides for a consequence where the purchase and sale take place within a specified time period. Each provision operates in its own field. When Section 14A refers to disallowance of expenditure in relation to non-taxable income for computing the total income, what is meant is that such expenditure should be taken into account only for determining the quantum of the non-taxable income. This would result in the exempt dividend being reduced by the alleged expenditure. The only impact on the exempting provision of Section 10(33) for unit income is by Section 94(7) and one cannot interpret Section 14A as leading to the same conclusion as then Section 94(7) will be rendered nugatory. In other words, the two provisions operate in different time and space zones. In support of the above contention, the assessee (s) has relied on the Memorandum as well as Circular No. 14 which clearly states that losses referred to in Section 94(7) are allowable from the assessment year 2002-03 subject to reduction of the actual computed loss to the extent of the dividend. If Section 14A is also to apply simultaneously then Section 94(7) will

become nugatory. Whereas Section 14A applies to expenditure incurred to earn tax free income from the inception of the Act, Section 94(7) seeks to reduce the quantum of the loss with reference to the dividend earned from the assessment year 2002-03. The two terms "expenditure" and "loss" are conceptually different. Section 94(7) is a provision to set at naught "avoidance of tax". If Sections 14A and 94(7) are applied to the same transaction, it will result in Section 94(7) being a "tax levying provision" and not an "avoidance of tax provision". The effect of accepting the submission of the Department is that in the present case the sum of Rs. 1,82,12,862 would have to be considered twice, once, by way of expenditure to earn the dividend income and the second time by way of ignoring the loss to the extent it does not exceed the dividend income of Rs. 1,82,12,862. According to the assessee (s), the embargo in Section 14A on the deductibility of expenditure applies where admittedly an expenditure has been incurred and a deduction is claimed specifically in respect thereof. In this connection, reliance was placed on the word "allowed" in the said Section. In the present case, the assessee (s) has not made any claim for deduction of Rs. 1,82,12,862 and, therefore, the question of the said sum being disallowed did not arise. On the other hand, Section 94(7) proceeds on the footing that the entire dividend income falls within Section 10(33) and the only adjustment is that the loss which has arisen and would otherwise be allowable shall be ignored to the extent it does not exceed the Section 10(33) income. Therefore, according to the assessee (s), in applying Section 94(7) there is no question of making a deduction at the stage of Section 14A as suggested by the learned Solicitor General Shri Gopal Subramanium. According to the assessee (s), under Section 94(7) the dividend should go to reduce the loss already worked out which implies that the loss is more than the dividend income because it is only then that the question of reducing the loss to some extent would arise. In this connection, the assessee(s) submitted that for the assessment year 2002-03 the loss was Rs. 1,85,68,015 which exceeded the dividend of Rs.

1,82,12,862 and, therefore, the loss allowable applying Section 94(7) stood at Rs. 3,55,153. Therefore, in order to reconcile Section 14A with Section 94(7) it was suggested on behalf of the assessee(s) that Section 14A should be confined to a case where there is expenditure on earning tax free income but where there is no acquisition of an asset and Section 94(7) should be confined to a case where there is acquisition of an asset thereby indicating a distinction between a claim for deduction of an expenditure and a claim for allowance of a business loss. Section 14A deals with disallowance of expenditure per se and not with a disallowance of a loss which arises at a point of time subsequent to the purchase of units and the receipt of exempt income and occurring only when there is a sale of the purchased units. Section 14A is not concerned with a purchase and subsequent sale of an asset which is dealt with in Section 94(7) alone. In other words, Section 14A does not apply to the case of a claim for set off of a loss which is dealt with only in Section 94(7) and that too from assessment year 2002-03. Section 14A was inserted to meet cases where deductions have been claimed in respect of expenditure for earning exempt income like dividend income and the said Section was never intended and does not apply to the case of a claim for set off of a loss which as stated above is dealt with in Section 94(7) alone and that too with effect from the assessment year 2002-03. Thus, whereas Section 14A was designed to overcome the problem created by certain decisions of this Court in *Rajasthan State Warehousing Corporation v. Commissioner of Income-Tax* [242 ITR 450] and in the case of *Commissioner of Income-Tax, Madras v. Indian Bank Limited* [56 ITR 77], Section 94(7) had no such object. The two, therefore, operate in different fields and they have different objects and because the two provisions operated in two different fact situations Section 14A was made effective from assessment year 1962-63 whereas Section 94(7) is made effective from the assessment year 2002-03. Thus, the Parliament has treated both the sections as dealing with separate circumstances and, therefore, one must confine

Section 14A to expenditure of the type referred to in Sections 30 to 43B of the Act which relates to expenditure which does not result in acquisition of an asset. It is clear that where the asset so acquired is sold and results in a loss Section 94(7) steps in.

10. According to the learned Solicitor General of India, Section 14A was inserted by Finance Act 2001 with effect from 1.4.1962. According to him, the fundamental principle underlying Section 14A is that income which is not taxable or exempt falls in a separate stream distinct from income taxable under the Act. That, expenditure which is incurred in relation to income subject to tax would be admissible under Sections 30 to 43B whereas expenditure incurred to earn exempt income would be extraneous in the computation of taxable income under the Act. Thus, only that expenditure is deductible which is incurred in relation to business or profession. Expenditure producing non-taxable income would not be permitted to be claimed as admissible expenditure. Thus, in all cases where the assessee has some exempt income, his total expenditure has got to be apportioned between taxable income and exempt income and the latter would have to be disallowed. The only event that triggers Section 14A is that the assessee has both taxable and exempt income and, therefore, one need not go by the "two asset" theory. According to the learned SGI, Section 14A is not concerned with whether the assessee makes a profit or a loss. According to the learned SGI, application of Section 94(7) will not rule out Section 14A. It was submitted that both the provisions can apply simultaneously. In this connection, it was urged that in the first stage Section 14A can be applied to determine the expenditure to be excluded. After excluding such expenditure from the cost of purchase, what remains may be called as adjusted purchase cost. If units are bought and sold within 3/9 months period, then, the adjusted purchase cost must be deducted from the sale. If this leads to a profit then Section 94(7) will not apply. However, if there is a loss, such loss will have to be ignored to the extent of the dividend

received. This was the suggested mode for reconciling Section 14A with Section 94(7) by the learned SGI, which according to the assessee(s) would result in double counting of the dividend amount of Rs. 1,82,12,862, one as dividend and the other as a loss.

11. In this batch of cases, we are required to decide three distinct points which are as follows:

(i) Whether "return of investment" or "cost recovery" would fall within the expression "expenditure incurred" in Section 14A?

(ii) Impact of Section 94(7) w.e.f. 1.4.2002 on the impugned transactions.

(iii) Reconciliation of Section 14A with Section 94(7) of the Act.

12. To answer the above, we need to reproduce hereinbelow Sections 10(33), 14A, 94(7) and the relevant paras of Circular No. 14 of 2001 issued by the CBDT:

Section 10 - Incomes not included in total income

In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

(33) any income by way of -

(i) dividends referred to in section 115-O; or

(ii) income received in respect of units from the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963); or

(iii) income received in respect of the units of a mutual fund specified under clause (23D):

Provided that this clause shall not apply to any income arising from transfer of units of the Unit Trust of India or of a mutual fund, as the case may be.

Section 14A - Expenditure incurred in relation to income not includible in total income

For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.

Chapter : X - SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX

Section 94 - Avoidance of tax by certain transactions in securities

(7) Where –

(a) any person buys or acquires any securities or unit within a period of three months prior to the record date ;

(b) such person sells or transfers such securities or within a period of three months after such date;

(c) the dividend or income on such securities or unit received or receivable by such person is exempt,

then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such

loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.

Circular No. 14 of 2001

56. Measures to curb creation of short-term losses by certain transactions in securities and units

56.1 Under the existing provisions contained in Section 94, where the owner of any securities enters into transactions of sale and repurchase of those securities which result in the interest or dividend in respect of such securities being received by a person other than such owner, the transactions are to be ignored and the interest or dividend from such securities is required to be included in the total income of the owner.

56.2 The existing provisions did not cover a case where a person buys securities (including units of a mutual fund) shortly before the record date fixed for declaration of dividends, and sells the same shortly after the record date. Since the cum-dividend price at which the securities are purchased would normally be higher than the ex-dividend price at which they are sold, such transactions would result in a loss which could be set off against other income of the year. At the same time, the dividends received would be exempt from tax under Section 10(33). The net result would be the creation of a tax loss, without any actual outgoings.

56.3 With a view to curb the creation of such short-term losses, the Act has inserted a new Sub-section (7) in the section to provide that where any person buys or acquires securities or units within a period of three months prior to the record date fixed for declaration of dividend or distribution of income in respect of the securities or units,

and sells or transfers the same within a period of three months after such record date, and the dividend or income received or receivable is exempt, then, the loss, if any, arising from such purchase or sale shall be ignored to the extent such loss does not exceed the amount of such dividend or interest, in the computation of the income chargeable to tax of such person.

56.4 Definitions of the terms "record date" and "unit" have also been provided in the Explanation after sub-section (7) of section 94.

56.5 This amendment will take effect from 1st April, 2002, and will accordingly, apply in relation to the assessment year 2002-2003 and subsequent years.

13. The main issue involved in this batch of cases is – whether in dividend stripping transaction (alleged to be colourable device by the Department) the loss on sale of units could be considered as expenditure in relation to earning of dividend income exempt under Section 10(33), disallowable under Section 14A of the Act? According to the Department, the differential amount between the purchase and sale price of the units constituted "expenditure incurred" by the assessee for earning tax-free income, hence, liable to be disallowed under Section 14A. As a result of the dividend pay-out, according to the Department, the NAV of the mutual fund, which was Rs. 17.23 per unit on the record date, fell to Rs. 13.23 on 27.3.2000 (the next trading date) and, thus, Rs. 4/- per unit, according to the Department, constituted "expenditure incurred" in terms of Section 14A of the Act. In its return, the assessee, thus, claimed the dividend received as exempt under Section 10(33) and also claimed set-off for the loss against its taxable income, thereby seeking to reduce its tax liability and gain tax advantage.

14. The insertion of Section 14A with retrospective effect is the serious attempt on the part of the Parliament not to allow

deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act against the taxable income (see Circular No. 14 of 2001 dated 22.11.2001). In other words, Section 14A clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of Section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income. The mandate of Section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for insertion of Section 14A is that certain incomes are not includible while computing total income as these are exempt under certain provisions of the Act. In the past, there have been cases in which deduction has been sought in respect of such incomes which in effect would mean that tax incentives to certain incomes was being used to reduce the tax payable on the non-exempt income by debiting the expenses, incurred to earn the exempt income, against taxable income. The basic principle of taxation is to tax the net income, i.e., gross income minus the expenditure. On the same analogy the exemption is also in respect of net income. Expenses allowed can only be in respect of earning of taxable income. This is the purport of Section 14A. In Section 14A, the first phrase is "for the purposes of computing the total income under this Chapter" which makes it clear that various heads of income as prescribed under Chapter IV would fall within Section 14A. The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of Section 14A. Further, Section 14 specifies five heads of income which are

chargeable to tax. In order to be chargeable, an income has to be brought under one of the five heads. Sections 15 to 59 lay down the rules for computing income for the purpose of chargeability to tax under those heads. Sections 15 to 59 quantify the total income chargeable to tax. The permissible deductions enumerated in Sections 15 to 59 are now to be allowed only with reference to income which is brought under one of the above heads and is chargeable to tax. If an income like dividend income is not a part of the total income, the expenditure/ deduction though of the nature specified in Sections 15 to 59 but related to the income not forming part of total income could not be allowed against other income includible in the total income for the purpose of chargeability to tax. The theory of apportionment of expenditures between taxable and non-taxable has, in principle, been now widened under Section 14A. Reading Section 14 in juxtaposition with Sections 15 to 59, it is clear that the words "expenditure incurred" in Section 14A refers to expenditure on rent, taxes, salaries, interest, etc. in respect of which allowances are provided for (see Sections 30 to 37). Every pay-out is not entitled to allowances for deduction. These allowances are admissible to qualified deductions. These deductions are for debits in the real sense. A pay-back does not constitute an "expenditure incurred" in terms of Section 14A. Even applying the principles of accountancy, a pay-back in the strict sense does not constitute an "expenditure" as it does not impact the Profit & Loss Account. Pay-back or return of investment will impact the balance-sheet whereas return on investment will impact the Profit & Loss Account. Cost of acquisition of an asset impacts the balance sheet. Return of investment brings down the cost. It will not increase the expenditure. Hence, expenditure, return on investment, return of investment and cost of acquisition are distinct concepts. Therefore, one needs to read the words "expenditure incurred" in Section 14A in the context of the scheme of the Act and, if so read, it is clear that it disallows certain expenditures incurred to earn exempt income from being deducted from other income which is

includible in the "total income" for the purpose of chargeability to tax. As stated above, the scheme of Sections 30 to 37 is that profits and gains must be computed subject to certain allowances for deductions/ expenditure. The charge is not on gross receipts, it is on profits and gains. Profits have to be computed after deducting losses and expenses incurred for business. A deduction for expenditure or loss which is not within the prohibition must be allowed if it is on the facts of the case a proper Debit Item to be charged against the Incomings of the business in ascertaining the true profits. A return of investment or a pay-back is not such a Debit Item as explained above, hence, it is not "expenditure incurred" in terms of Section 14A. Expenditure is a pay-out. It relates to disbursement. A pay-back is not an expenditure in the scheme of Section 14A. For attracting Section 14A, there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income. Pay-back or return of investment is not such proximate cause, hence, Section 14A is not applicable in the present case. Thus, in the absence of such proximate cause for disallowance, Section 14A cannot be invoked. In our view, return of investment cannot be construed to mean "expenditure" and if it is construed to mean "expenditure" in the sense of physical spending still the expenditure was not such as could be claimed as an "allowance" against the profits of the relevant accounting year under Sections 30 to 37 of the Act and, therefore, Section 14A cannot be invoked. Hence, the two asset theory is not applicable in this case as there is no expenditure incurred in terms of Section 14A.

15. The next point which arises for determination is whether the "loss" pertaining to exempted income was deductible against the chargeable income. In other words, whether the loss in the sale of units could be disallowed on the ground that the impugned transaction was a transaction of dividend stripping. The AO in the present case has disallowed the loss of Rs. 1,82,12,862 on the sale of 40% tax-free units of the mutual fund. The AO held that the assessee had purposely and in a planned

manner entered into a pre-meditated transaction of buying and selling units yielding exempted income with the full knowledge about the guaranteed fall in the market value of the units and the payment of tax-free dividend, hence, disallowance of the loss.

16. In the lead case, we are concerned with the assessment years prior to insertion of Section 94(7) vide Finance Act, 2001 w.e.f. 1.4.2002. We are of the view that the AO had erred in disallowing the loss. In the case of *Vijaya Bank v. Additional Commissioner of Income Tax* [1991] 187 ITR 541, it was held by this Court that where the assessee buys securities at a price determined with reference to their actual value as well as interest accrued thereon till the date of purchase the entire price paid would be in the nature of capital outlay and no part of it can be set off as expenditure against income accruing on those securities.

17. The real objection of the Department appears to be that the assessee is getting tax-free dividend; that at the same time it is claiming loss on the sale of the units; that the assessee had purposely and in a planned manner entered into a pre-meditated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, loss on sale was not genuine. We find no merit in the above argument of the Department. At the outset, we may state that we have two sets of cases before us. The lead matter covers assessment years before insertion of Section 94(7) vide Finance Act, 2001 w.e.f. 1.4.2002. With regard to such cases we may state that on facts it is established that there was a "sale". The sale-price was received by the assessee. That, the assessee did receive dividend. The fact that the dividend received was tax-free is the position recognized under Section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there

is nothing to impeach the genuineness of the transaction. With regard to the ruling in *McDowell & Co. Ltd. v. Commercial Tax Officer* [154 ITR 148(SC)], it may be stated that in the later decision of this Court in *Union of India v. Azadi Bachao Andolan* [263 ITR 706(SC)] it has been held that a citizen is free to carry on its business within the four corners of the law. That, mere tax planning, without any motive to evade taxes through colourable devices is not frowned upon even by the judgment of this Court in *McDowell & Co. Ltd.'s* case (supra). Hence, in the cases arising before 1.4.2002, losses pertaining to exempted income cannot be disallowed. However, after 1.4.2002, such losses to the extent of dividend received by the assessee could be ignored by the AO in view of Section 94(7). The object of Section 94(7) is to curb the short term losses. Applying Section 94(7) in a case for the assessment year(s) falling after 1.4.2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of the dividend received would still be allowed from which it follows that the Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. After 1.4.2002, losses over and above the dividend received will not be ignored under Section 94(7). If the argument of the Department is to be accepted, it would mean that before 1.4.2002 the entire loss would be disallowed as not genuine but, after 1.4.2002, a part of it would be allowable under Section 94(7) which cannot be the object of Section 94(7) which is inserted to curb tax avoidance by certain types of transactions in securities. There is one more way of answering this point. Sections 14A and 94(7) were simultaneously inserted by the same Finance Act, 2001. As stated above, Section 14A was inserted w.e.f. 1.4.1962 whereas Section 94(7) was inserted w.e.f. 1.4.2002. The reason is obvious. Parliament realized that several public sector undertakings and public sector enterprises had invested huge amounts over last couple of years in the impugned dividend stripping transactions so also declaration of dividends by mutual fund are being vetted and

regulated by SEBI for last couple of years. If Section 94(7) would have been brought into effect from 1.4.1962, as in the case of Section 14A, it would have resulted in reversal of large number of transactions. This could be one reason why the Parliament intended to give effect to Section 94(7) only w.e.f. 1.4.2002. It is important to clarify that this last reasoning has nothing to do with the interpretations given by us to Sections 14A and 94(7). However, it is the duty of the court to examine the circumstances and reasons why Section 14A inserted by Finance Act 2001 stood inserted w.e.f. 1.4.1962 while Section 94(7) inserted by the same Finance Act as brought into force w.e.f. 1.4.2002.

18. The next question which we need to decide is about reconciliation of Sections 14A and 94(7). In our view, the two operate in different fields. As stated above, Section 14A deals with disallowance of expenditure incurred in earning tax-free income against the profits of the accounting year under Sections 30 to 37 of the Act. On the other hand, Section 94(7) refers to disallowance of the loss on the acquisition of an asset which situation is not there in cases falling under Section 14A. Under Section 94(7) the dividend goes to reduce the loss. It applies to cases where the loss is more than the dividend. Section 14A applies to cases where the assessee incurs expenditure to earn tax free income but where there is no acquisition of an asset. In cases falling under Section 94(7), there is acquisition of an asset and existence of the loss which arises at a point of time subsequent to the purchase of units and receipt of exempt income. It occurs only when the sale takes place. Section 14A comes in when there is claim for deduction of an expenditure whereas Section 94(7) comes in when there is claim for allowance for the business loss. We may reiterate that one must keep in mind the conceptual difference between loss, expenditure, cost of acquisition, etc. while interpreting the scheme of the Act.

19. Before concluding, one aspect concerning Para 12 of

Accounting Standard AS-13 relied upon by the Revenue needs to be highlighted. Para 12 indicates that interest/ dividends received on investments are generally regarded as return on investment and not return of investment. It is only in certain circumstances where the purchase price includes the right to receive crystallized and accrued dividends/ interest, that have already accrued and become due for payment before the date of purchase of the units, that the same has got to be reduced from the purchase cost of the investment. A mere receipt of dividend subsequent to purchase of units, on the basis of a person holding units at the time of declaration of dividend on the record date, cannot go to offset the cost of acquisition of the units. Therefore, AS-13 has no application to the facts of the present cases where units are bought at the ruling NAV with a right to receive dividend as and when declared in future and did not carry any vested right to claim dividends which had already accrued prior to the purchase.

20. For the above reasons, we find no infirmity in the impugned judgment of the High Court and, accordingly, these Civil Appeals filed by the Department are dismissed with no order as to costs.

N.J. Appeals dismissed.

UNION OF INDIA & OTHERS
v.
AJAY WAHI
(Civil Appeal No. 1002 of 2006)

JULY 6, 2010

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

Service Law:

Armed Forces – Army – Disability pension – Commissioned Officer in Army Medical Corps – Sought voluntary retirement on medical ground – Claim for disability pension – HELD: An Officer is entitled to disability pension only when he is invalided out of service on account of disability attributable to military service or aggravated thereby and not when his prayer for voluntary retirement is granted – However, the decision denying invalidation from service despite disability attributable to military service would be subject to judicial review – In the instant case, the officer has not been invalided out of service on account of disability attributable to or aggravated by military service nor his disability has been determined under the Rules in Appendix-II and, therefore, he shall not be entitled to disability pension – Army Pension Regulations – Regulations 48 and 50.

Constitution of India, 1950:

Articles 14 and 16 – Constitutional validity of Regulation 50 of Army Regulations – HELD: Officers who are invalided out of service on account of disability attributable to or aggravated by military service constitute a class in itself and officers who retire voluntarily on medical ground constitute a different class – Article 14 frowns on discrimination, but permits reasonable classification – Thus, Regulation 50 prescribing that an officer retiring voluntarily shall not be

eligible for disability pension cannot be said to be discriminatory, nor ultra vires Article 14 – Army Pension Regulations – Regulation 50.

The respondent, a Lt. Colonel in the Army Medical Corps, was admitted to the Command Hospital for treatment of Bronchial Asthma and lower backache. The respondent sought premature retirement on medical ground. The prayer of the respondent for premature retirement was granted, but, his claim for disability pension was not accepted. He filed a writ petition, *inter alia,* contending that Regulation 50 of the Army Pension Regulations prescribing that an officer who retired voluntarily, would not be entitled to disability pension, was discriminatory and violative of Article 14 of the Constitution of India. The single Judge of the High Court dismissed the writ petition, but the Division Bench, relying upon *Lt. Col. B.R. Malhotra's* case[1] allowed the prayer. Aggrieved, the employers filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. An officer is entitled to disability pension only when he is invalided out of service on account of disability attributable to military service or aggravated thereby and shall not be entitled to disability pension in case of voluntary retirement, unless it is found and held that the officer deserved to be invalided out of service on account of disability attributable to military service but the same was not granted to him for unjustified reasons and he was forced to seek voluntary retirement. [para 18] [789-B-C]

1.2. Undisputedly, the writ petitioner has not been invalided out of service on account of any disability attributable to or aggravated by military service and further, his disability has not been determined in

1. *Lt. Col. B.R. Malhotra vs. U.O.I. & Ors.* 71 (1998) Delhi law Times 498.

accordance with the Rules in Appendix II. He had sought voluntary retirement on medical ground which was granted. In the face of the language of Regulation 50, there is no escape from the conclusion that an officer retiring voluntarily shall not be eligible for disability pension. [para 12] [786-G-H; 787-A]

2.1. A provision of a Statute can be declared *ultra vires* only when it patently violates some provision of the Constitution. The Regulation under challenge does not suffer from any such error. [para 14] [788-B]

2.2. Regulation 48 of the Regulations provides for disability pension to officers who are invalided out of service on account of disability attributable to the military service and, therefore, such officers constitute a class in itself. Officers who retire voluntarily constitute a different class altogether and, therefore, the plea that when an officer is invalided on the ground of disability attributable to the military service, there is no reason to deny such disability pension to an officer who seeks voluntary retirement does not hold ground as both constitute different and distinct classes. Voluntary retirement can be sought and granted on many grounds, whereas an officer under Regulation 48 of the Regulations can be invalided out of service on account of disability attributable to military service. It is to be borne in mind that if the employer, despite disability attributable to military service, has not invalided an officer out of service, he continues in service with all the benefits. It is not the case of the writ petitioner that he was asked to seek voluntary retirement on the threat of being invalided out of service. In fact, he had chosen to seek voluntary retirement on health ground which was granted. [para 14] [787-B-G]

Lt. Col. B.R. Malhotra vs. U.O.I. & Ors. **71(1998) Delhi Law Times 498, disapproved.**

2.3. Sufficient internal safeguard and remedy have been provided under Appendix II to the Regulations. Besides, in case an officer is denied invalidation from service despite disability attributable to military service, the same shall be subject to judicial review. [para 15] [788-C-D]

Mahavir Singh Narwal vs. Union of India and another **111 (2004) Delhi Law Times 550, held inapplicable.**

Case Law Reference:

71(1998) Delhi Law Times 498	**disapproved**	**para 4**
111(2004) Delhi Law Times 550	**held inapplicable**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1002 of 2006.

From the Judgment & Order dated 28.11.2003 of the High Court of Rajasthan at Jaipur in DB Civil Appeal No. 1461 of 1997.

P.P. Malhotra, ASG, M. Khairati, Anil Katiyar for the Appellants.

Amita Duggal, Rajiv Mehta, A. Henry for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. Union of India and its functionaries, aggrieved by the order dated 28th November, 2003 passed by the Division Bench of the Rajasthan High Court (Jaipur Bench) in DB Civil Special Appeal No.1461 of 1997, have preferred this appeal by special leave of the Court.

2. Shorn of unnecessary details, facts giving rise to this appeal are that the writ petitioner-respondent, Lt.Col.Ajay Wahi (hereinafter referred to as the 'writ petitioner') was

commissioned in the Army Medical Corps on 27th February, 1977. While in service and holding the rank of Major he was admitted to Command Hospital on 3rd October, 1988 for management and treatment of Bronchial Asthma and low back ache. Medical Board proceeding dated 6th October, 1988 does not indicate that the disability i.e. Bronchial Asthma or low back ache was directly attributable to military service. However, the Medical Board certified that it is aggravated by stress and strain of exposure to hostile terrain and weather. The writ petitioner was later on examined on 9th June, 1990 by Col. T.R.S. Bedi, Senior Adviser of Base Hospital who recommended for his posting at dry temperate climate area and not at high altitude. While writ petitioner was holding the rank of Lieutenant Colonel, by letter dated 27th December, 1993, he sought premature retirement, *inter alia*, stating that his "falling health is affecting" his performance. On his prayer for premature retirement the Commanding Officer recommended for consideration of his case for "invalidment/premature retirement after obtaining the opinion of a Senior Adviser". He was neither called upon to appear before the Medical Board nor invalided on medical ground. However, by order dated 26th July, 1994, writ petitioner's prayer for premature retirement was approved and he was allowed to leave the unit on 20th October, 1994. Writ petitioner made claim for grant of disability pension. His prayer was considered and by letter dated 30th March, 1995, he was informed that he is neither entitled for service pension nor disability pension. Writ petitioner wrote to the Director General of Medical Services(Army) to make him available the copy of the Medical Board proceedings, inter alia, alleging that he underwent a Release Medical Board prior to retirement. It is assertion of the writ petitioner that he ought to have been granted premature retirement on medical ground and sought voluntary retirement under pressure and, therefore, entitled to disability pension.

3. Aggrieved by the denial of disability pension he filed writ petition before the Rajasthan High Court, inter alia, contending

that Regulation 50 of the Pension Regulations providing that an officer who retires voluntarily shall not be eligible for disability pension is discriminatory and violative of Article 14 of the Constitution of India. It was emphasized that when an officer is invalided out of service on account of disability attributable to the military service is granted disability pension, there is no rationale basis to deny the same to an officer who has been granted voluntary retirement on medical ground. The aforesaid submission did not find favour with the learned Single Judge and he dismissed the writ petition by order dated 15th May, 1997 *inter alia* observing as follows :

> "Regulations 48 and 50 are contained in Section III which deals with the disability pensionary award. Regulation 50 clearly provides that an officer who retires voluntarily shall not be eligible for any disability pensionary award on account of any disability. Since the petitioner has sought voluntary retirement, he is not entitled to any disability pension award. Regulation 48 is not applicable to the case of the petitioner because the Regulation 48 applies only when an officer is retired from military service on account of the disability or attaining the superannuation age. The petitioner was voluntarily retired and, therefore, under Regulation 50, he is not entitled to any pensionary award.
>
> I do not think that the Regulation 50 is violative of Article 14 of the Constitution of India. The class of officers who retire voluntarily is quite distinguishable from the class of officers who are retired on account of disability or attaining the superannuation age. The classification of both the said classes of officers is obviously founded on an intelligible differentia which distinguishes persons of one class from another class and the differentia does have a rational relation to the object sought to be achieved by regulations 48 and 50 in relation to the disability pensionary

awards. In my opinion, the regulation 50 cannot be said to be ultra vires."

4. On appeal, the Division Bench of the High Court set aside the order of the learned Single Judge and directed for payment of disability pension and while doing so it relied on a Judgment of the Delhi High Court in the case of *Lt. Col. B.R. Malhotra vs. U.O.I. & Ors.* [71(1998) Delhi Law Times 498] relevant portion whereof reads as follows:

"I find no justification to deprive an officer his disability pension simply on the ground that he sought voluntary retirement. If on account of disability Army can invalidate an Officer and thrown him out of the service then why an Officer is denied disability pension when he seeks voluntary retirement. I find no reason for this discrimination. People who become disable due to Military service are a class apart, they cannot be discriminated nor denied disability pension on the ground of voluntary retirement. I see no justification nor any nexus in depriving this class of Officers the disability pension merely because they sought voluntary retirement, the disability does not cease on voluntary retirement. Hence, to my mind, Rule 50 of the Pension Regulation is discriminatory. It cannot stands the test being arbitrary and bad in law."

5. Ultimately, the Division Bench directed for grant of disability pension to the writ petitioner and while doing so observed as follows :

"*Considering the view and object behind the provision for allowing the disability pension, when admittedly the officer has become disabled and cannot remain in service, whether he has been voluntary retired or compulsorily retired that is immaterial for the purpose of pension to the person who become disabled during service."*

6. Union of India and its officers, aggrieved by the aforesaid order, are before us by grant of special leave to appeal.

7. Mr. P.P. Malhotra, learned Additional Solicitor General contends that writ petitioner sought voluntary retirement on medical ground and, therefore, cannot be said to be invalided out of service on account of disability attributable to or aggravated by military service. He points out that a comprehensive procedure is prescribed in Appendix II of Pension Regulations to determine as to whether a disability is attributable to or aggravated by military service. He points out that disability of the petitioner was not determined under the Rules in Appendix II and the writ petitioner sought voluntary retirement claiming ill health, hence, it cannot be said that he was invalided out of service on account of disability attributable to or aggravated by military service. He submits that in view of Regulation 50 of Pension Regulations, writ petitioner having retired voluntarily shall not be eligible for award of pension on account of any disability.

8. Mrs. Amita Duggal, however, appearing on behalf of the writ petitioner-respondent submits that the writ petitioner sought voluntary retirement on medical ground and though he was not invalided out of service on account of disability, no distinction can be made between officer who has been invalided on account of a disability attributable or aggravated by military service and an officer who retired voluntarily and, therefore, the action of the respondent in denying the disability pension is illegal. She points out that Regulation 50 which provides that an officer retiring voluntarily shall not be eligible for award of disability pension is discriminatory and, therefore, violative of Article 14 of the Constitution of India. She referred to the decision of the Delhi High Court in the case of *Lt.Col.B.R. Malhotra* (supra) relied on in the impugned order. She points out that the Union of India having not challenged the aforesaid judgment of the Delhi High Court, it has attained finality and,

therefore, action of the Union of India in denying the writ petitioner disability pension is discriminatory.

9. Mrs. Duggal has also placed reliance on a Division Bench Judgment of the Delhi High Court in the case of *Mahavir Singh Narwal vs. Union of India and another* [111(2004] Delhi Law Times 550] and she had drawn our attention to the following passage from paragraph 7 of the judgment, which reads as follows :

> "Merely because a person has attained discharge on compassionate ground although his disability has been acquired on account of stress and strain of military service will not be a ground to reject the claim of disability pension, it has been invalidated act in terms of Appendix II of Rule 173. We allow the writ petition and direct the respondent to grant disability pension to the petitioner on the basis of assessment of 30% disability as opined by the Release Medical Board in the year 1979 upto date. For future disability pension the respondent may conduct another medical board to assess the percentage of disability of the petitioner. Arrears of disability pension be paid to the petitioner within a period of 8 weeks. If the same are not paid within 8 weeks the petitioner shall be entitled to the interest at the rate of 9% on the amount of arrears. With these directions the writ petition is allowed."

10. Rival submission necessitates examination of the scheme of the Pension Regulation. Section III of the Pension Regulations (hereinafter referred to as the "Regulations") applies to all commissioned officers of the Army. Regulation 48 of the Regulations which forms part of Section-III, provides for grant of disability pension to an officer who is invalided out of service on account of disability attributable to or aggravated by military service and Appendix II provides for the procedure for determination of the disability, the same reads as follows:

> "48(a) Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an officer who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casuality cases and is assessed at 30 percent or more.
>
> (b)The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II."

11. Regulation 50 of the Regulations provides that an officer who retires voluntarily shall not be eligible for any award of disability pension, same reads as follows:

> "50. An officer who retires voluntarily shall not be eligible for any award on account of any disability.
>
> Provided that officer who is due for retirement on completion of tenure, or on completion of service limits or on completion of the terms of engagement or on attaining the prescribed age of retirement, and who seeks pre-mature retirement for the purpose of getting higher commutation value of pension, shall remain eligible for disability element."

12. From a plain reading of Regulation 48 of the Regulations it is evident that unless otherwise specifically provided a disability pension shall be granted to an officer who is invalided out of service on account of disability attributable to or aggravated by military service, whereas Regulation 50 in no uncertain terms provides that an officer who retires voluntarily shall not be eligible for any award on account of any disability. Undisputedly, writ petitioner has not been invalided out of service on account of any disability attributable or aggravated by military service and further his disability has not been determined under the Rules in Appendix II. Writ petitioner had sought voluntary retirement on medical ground which was granted. In face of the language of Regulation 50 there is no

escape from the conclusion that an officer retiring voluntarily shall not be eligible for disability pension.

13. Faced with this situation, writ petitioner contends that Regulation 50 of the Regulations is discriminatory and thus violative of Article 14 of the Constitution of India.

14. Regulation 48 of the Regulations provides for disability pension to officers who are invalided out of service on account of disability attributable to the military service and, therefore, such officers constitute a class in itself. Officers who retire voluntarily constitute a different class altogether and, therefore, the plea that when an officer is invalided on the ground of disability attributable to the military service, there is no reason to deny such disability pension to an officer who seeks voluntary retirement does not appeal to us as in our opinion both constitute different and distinct classes. Article 14 of the Constitution frowns on discrimination but it permits reasonable classification. An officer who retires voluntarily and another who is invalided out of service on account of disability attributable to military service constitute different and distinct classes. Undisputedly, writ petition has not been invalided out of service on account of disability which is attributable to military service but retired voluntarily. Voluntary retirement can be sought and granted on many grounds, whereas an officer under Regulation 48 of the Regulations can be invalided out of service on account of disability attributable to military service. It is to be borne in mind that if employer despite disability attributable to Military Service does not invalided an officer out of service, he continues in service with all the benefits and nobody can make issue of that. It is not the case of the writ petitioner that he was asked to seek voluntary retirement on the threat of being invalided out of service. In fact, he had chosen to seek voluntary retirement on health ground which was granted and it was not the act of the employer to invalided him out of service. We are of the opinion that the observation of the High Court that an officer cannot be denied disability pension on the ground of

voluntary retirement suffers from fundamental error. Officers invalided out of service and seeking voluntary retirement, which can be on umpteen grounds, constitute different and distinct class than invalidation from service on the ground of disability attributable or aggravated by Military Service. It needs no discussion that a provision of the Statute can be declared *ultravires* only when it patently violates some provision of the Constitution. Regulation under challenge, in our opinion, does not suffer from any such error.

15. We would like here to add that sufficient internal safeguard and remedy have been provided under Appendix II of the Regulation. We hasten to add that in case an officer is denied invalidation from service despite disability attributable to military service, the same shall be subject to judicial review. There may be a case in which an officer had suffered disability attributable to or aggravated by military service and he has not been invalided out of service only to deny him the disability pension, his remedy is to challenge the order by which prayer for invalidating out of service is denied. In case it is found that an officer is entitled for invalidation out of service has wrongly been denied the same, he shall be entitled for disability pension. Here no such challenge is made and the only plea of the writ petitioner is that Regulation 50 of the Regulations providing that an officer retiring voluntarily shall not be eligible for disability pension is discriminatory and thus ultra vires of the Article 14 of the Constitution of India.

16. True it is that the judgment of the Delhi High Court in the case of *Lt.Col.B.R. Malhotra* (Supra) supports the contention of the writ petitioner but from what we have pointed above, its observation that "people who become disable due to military service are a class apart, they cannot be discriminated nor denied disability pension on the ground of voluntary retirement" is patently fallacious.

17. In the present case it has not been determined in accordance with Appendix II of the Regulations that writ

petitioner's voluntary retirement was accepted on the ground of disability attributable to or aggravated by military service and, therefore, he shall not be entitled for disability pension. In view of the aforesaid the judgment of the Delhi High Court in the case of *Mahavir Singh Narwal* (Supra) has no bearing at all.

18. We are of the opinion that an officer is entitled for disability pension only when he is invalided out of service on account of disability attributable to military service or aggravated thereby and shall not be entitled for disability pension in case of voluntary retirement, unless it is found and held that the officer deserved to be invalided out of service on account of disability attributable to military service but the same was not granted to him for unjustified reasons and forced to seek voluntary retirement.

19. In the result, the appeal is allowed, the impugned judgment of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No costs.

R.P. Appeal allowed.

MUMBAI INTERNATIONAL AIRPORT PVT. LTD.

v.

REGENCY CONVENTION CENTRE & HOTELS PVT. LTD. & ORS.

(Civil Appeal No. 4900 of 2010)

JULY 6, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Code of Civil Procedure, 1908 – O. I r. 10(2) – Striking out or adding parties at any stage of a proceeding –Work of modernisation and upgradation of Airport – Grant of lease of premises of airport by Airport authority to appellant – Part of airport land not included in lease deed in view of a pending suit for performance filed by first respondent against Airport Authority – Said land could become part of Airport premises subject to decision by court – Application for impleadment by appellant as additional defendant – Dismissal of, by courts below – Interference with – Held: Not called for – Person who expects to get lease from defendant in suit for specific performance in the event of suit being dismissed, cannot be said to be a person having some semblance of title, in the property in dispute – Appellant is neither a necessary party nor a proper party – He is neither purchaser nor lessee of suit property – He has no right, title or interest therein nor is claiming any right or remedy against first respondent and first respondent is also not claiming any right or remedy against appellant in the suit against Airport authority.

The Airport Authority of India(AAI)-second respondent initiated a competitive bidding process for modernisation and upgradation of International Airport, Mumbai. The said work was handed over to the appellant. AAI leased out the Mumbai airport to the appellant. Certain land which was part of the airport was not made a part of the lease deed in view of a pending

case. The said premises could become part of the demised premises subject to the decision by the court. The appellant filed an application seeking impleadment as an additional defendant in the pending suit for specific performance filed by the first respondent against AAI. It was submitted that his interest was likely to be directly affected if any relief is granted to the first respondent in the suit. The Single Judge as also the Division Bench of High Court dismissed the application. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis,* may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure, 1908 which provides for impleadment of proper or necessary parties. [Para 8] [799-H; 800-A-B]

1.2. Order I Rule 10 (2) makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. The court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at

all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance. [Para 8] [800-E-H; 801-A-C]

1.3. The two decisions-**Sumtibai's* **case and *****Kasturi's* **case were dealing with different situations requiring application of different facets of sub-rule (2) of Rule 10 of Order I. There is no conflict between the two decisions. This is made clear in ****Sumtibai* **itself. Every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and that judicial utterances are made in the setting of the facts of a particular case. [Paras 11 and 13] [803-B-D; 805-H; 806-A-C]**

*****Sumtibai v. Paras Finance Co*. **2007 (10) SCC 82;** ***Kasturi v. Iyyamperumal* **2005 (6) SCC 733;** ***Ramesh*** *Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* **1992 (2) SCC 524;** *Anil Kumar Singh v. Shivnath Mishra* **1995 (3) SCC 147, referred to.**

1.4. Order I of Rule 10(2) CPC is not about the *right* of a non-party to be impleaded as a party, but about the *judicial discretion* of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either *suo moto* or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice. [Para 12] [803-E-H]

Ramji Dayawala and Sons (P) Ltd. vs. *Invest Import* **1981 (1) SCC 80 – referred to.**

R. vs. *Wilkes* **1770 (98) ER 327, referred to.**

2.1 On a careful examination of the facts of the case, it is found that the appellant is neither a necessary party nor a proper party. The appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. First respondent - plaintiff in the suit has not sought any relief against the appellant. The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance. Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the first respondent-plaintiff against AAI. A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title, in the property in dispute. [Para 14] [806-D-F]

2.2. The submission that in view of section 12A of the Airports Authority of India Act, 1994 when AAI granted a lease of the premises of an airport, to carry out any of its functions enumerated in section 12 of the said Act, the lessee who has been so assigned any function of AAI, shall have the powers of AAI, necessary for the performance of such functions in terms of the lease; and that in view of this provision, it should be deemed that the appellant has stepped into the shoes of AAI so far as the Airport premises are concerned, cannot be accepted. The appellant as lessee may certainly have the powers of AAI necessary for performance of the functions that have been assigned to them. What has been assigned is the function of operation, management and development agreement *with reference to the area that been demised*. Obviously the appellant as lessee of the Airport cannot step into the shoes of AAI for performance of any functions with reference to an area which has not been demised or leased to it. [Para 15] [806-G-H; 807-A-B]

2.3 The submission that Mumbai airport being one of the premier airports in India with a very high and ever increasing passenger traffic, needs to modernise and develop every inch of the airport land; that the suit land was a part of the airport land and that for the pendency of first respondent's suit within an interim order, AAI would have included the suit land also in the lease in its favour; that therefore a note was made in the lease that the land measuring 31000 sq.m. was not being made a part of the lease but may become part of the demised premises subject to the court verdict, does not in any way help the appellant to claim a right to be impleaded. If the interim order in the suit filed by the first respondent came in the way of granting the lease of the suit land, it is clear that the suit land was not leased to appellant. The fact that if AAI succeeded in the suit, the suit land may also be leased to the appellant is not sufficient to hold that the

appellant has any right, interest or a semblance of right or interest in the suit property. When appellant is neither claiming any right or remedy against the first respondent and when first respondent is not claiming any right or remedy against the appellant, in a suit for specific performance by the first respondent against AAI, the appellant cannot be a party. The allegation that the land is crucial for a premier airport or in public interest, are not relevant to the issue. [Para 16] [807-C-G]

Case Law Reference:

2007 (10) SCC 82	**Referred to.**	**Para 9, 10, 11, 13**
2005 (6) SCC 733	**Referred to.**	**Para 10**
1992 (2) SCC 524	**Referred to.**	**Para 11**
1995 (3) SCC 147	**Referred to.**	**Para 11**
1981 (1) SCC 80	**Referred to.**	**Para 12**
1770 (98) ER 327	**Referred to.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4900 of 2010.

From the Judgment and Order dated 25.08.2008 of the High Court of Judicature at Bombay in Appeal No. 273 of 2008 in chamber summons No. 170 of 2008 in Suit No. 6864 of 1999.

Dr. A.M. Singhvi and Harish N. Salve, Amar Dave, Ashish Jha and Meenakshi Chatterjee (for "Coac") for the Appellant.

Mukul Rohatgi, S.V. Mehta, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel, Praveen Jain, Mukesh Kumar and Padma Priya (for M.V. Kini & Associates) for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. Heard the learned counsel.

2. The Airport Authority of India (second respondent herein, AAI for short) established under the Airports Authority of India Act, 1994 ('Act' for short) to be responsible for the development, operation and maintenance of airports in India. The Government of India took a policy decision to amend the Act by Amendment Act 43 of 2003 enabling the AAI to lease the airport premises, to private operators with prior approval of the Central Government and assign its functions to its lessees except air traffic services and watch and ward. In pursuance of the policy of the government in this behalf, the AAI decided to entrust the work of modernisation and upgradation of the Mumbai Airport to a private operator, to serve the sharply increasing volume of passengers and for better utilisation of the Airport. AAI initiated a competitive bidding process in that behalf. In the information memorandum that was issued to the prospective bidders it was represented that the entire airport premises will be included in the transaction including all encroached land but excluding only the following areas : (i) New ATC tower; (ii) AAI staff colony; (iii) Hotel Leela Venture, and (iv) All retail fuel outlets outside the airport operational boundary.

3. Pursuant to the competitive bidding process, the Chhtrapati Shivaji International Airport, Mumbai was handed over to the appellant for operation, maintenance, development and expansion into a world class airport under an agreement dated 4.4.2006. In pursuance of it, AAI entered into a lease deed dated 26.4.2006 leasing the Mumbai airport to the appellant on "as is where is" basis for a period of 30 years. The subject matter of the lease was described as "all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in Schedule I hereto, other than (i) any lands (along with any buildings, constructions or immovable assets, if any, thereon) granted to any third party under any existing lease(s),

constituting the Airport on the date hereof; and (ii) any and all of the carved out assets". Schedule I to the lease deed, instead of giving a detailed description of the demised property, referred to the map demarcating the demised premises annexed to the lease deed by way of description of the demised premises. The map annexed as Schedule I was the "plan showing the demised premises, indicating carved out assets and lands vested with IAF and Navy". The carved out assets were : (1) new ATC tower; (2) & (2A) the NAD staff colony of AAI; (3) land leased to Hotel Leela Venture; (4) all retail fuel outlets which were outside the airport operational boundary; and (5) convention centre. The map also contains a note below the list of carved out assets, reading as under: "A : The parcel of land measuring 31,000 sq.mts. is currently not made a part of the lease deed but may become part of the demised premises subject to the court verdict".

4. According to the appellant the said parcel measuring 31,000 sq.m. was also part of the airport that was to be handed over by AAI to appellant but it could not be included in view of a pending case (Suit No.6846 of 1999 on the file of the Bombay High Court) filed by the first respondent wherein the High Court had made an interim order dated 2.5.2001, relevant portion of which is extracted below :

"The Defendant Airport Authority should also separately demarcate an area of 31000 sq. meters for which the plaintiff is making a claim in this suit. After the land is so demarcated, a copy of the plan would be handed over to the Plaintiff through their advocate. The learned Counsel further states that *the land admeasuring 31000 sq. meters, which would be separately demarcated will not be alienated, sold and transferred and no third party interest in that land would be created by the Defendants Airport Authority without seeking leave of this Court*. He further states that the Defendant No.1 would use the 31,000 sq. meters of land only for its own purpose as far as possible without raising any permanent construction on that land,

and if it becomes necessary for the Defendant No.1 to raise any permanent construction on that land, the work of construction would not be started without giving two weeks notice to the Plaintiff, after the building plan is finally sanction by the Planning Authority."

(emphasis supplied)

5. In pursuance of the lease of the airport in its favour, the appellant claims to have undertaken several developmental activities to make it a world class airport. The appellant alleges that it was expecting that the litigation initiated by the first respondent would end and it would be able to get the said 31,000 sq.m. land also as it was in dire need of land for developing the airport. According to the appellant, the Mumbai airport is surrounded by developed (constructed) areas with very limited opportunities to acquire any land and the site constraints limit the possibilities for development and therefore it was necessary to make optimum use of the existing land in the airport for the purpose of modernisation and upgradation; and therefore, the disputed land which was lying idle, was required for modernisation. It therefore filed an application seeking impleadment as an additional defendant in the pending suit filed by the first respondent against AAI, contending that its interest was likely to be directly affected if any relief is granted to the first respondent-plaintiff in the suit. The appellant alleged that the Information Memorandum proposing to privatise the management did not exclude the area which was the subject-matter of the suit; and that the suit plot could not however be leased to the appellant in view of the interim order in the pending suit of the first respondent. The appellant therefore claimed that it had, or would have, an interest in the suit land; and at all events, it was interested in acquiring it by lease depending upon the decision in the suit and therefore it was a necessary party and in any event a proper party.

6. The said application was resisted by the first respondent inter alia on the ground that the appellant did not have any

interest in the suit property and therefore the appellant was neither a necessary party nor a proper party to the suit. It was also contended that AAI itself being a substantial shareholder, having 26% share in the appellant company, would protect the interest of the appellant by contesting the suit and therefore appellant was not a necessary party. AAI has also filed a response to appellant's application for impleadment raising two contentions : (i) any impleadment at that stage of the suit would delay the recording of evidence and final hearing thereby seriously affecting the interests of AAI; and (ii) the suit plot measuring 31000 sq.m. was not leased to the appellant.

7. A learned Single Judge dismissed the appellant's application by order dated 1.4.2008. The learned Single Judge was of the view that as the appellant was yet to acquire any interest in the suit land and as the pending suit by the first respondent was for specific performance of an agreement which was a distinct earlier transaction between the first respondent and AAI to which the appellant was not a party, and as the first respondent was not a party to the arrangement between AAI and the appellant, the court cannot permit impleadment of appellant with reference to some future right which may accrue in future, after the decision in the suit. The appeal filed by the appellant was also dismissed by a Division Bench by order dated 25.8.2008. The Division Bench held that the appellant did not make out that he was a necessary party and the application merely disclosed that he was only claiming to be a proper party; that the appellant's claim was not based on a present demise but a future expectation based on *spes successionis;* and that therefore, the impleadment of appellant either as a necessary party or proper party or formal party was not warranted. The said order is challenged in this appeal by special leave. The question for consideration is whether the appellant is a necessary or proper party to the suit for specific performance filed by the first respondent.

8. The general rule in regard to impleadment of parties is

that the plaintiff in a suit, being *dominus litis,* may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"*Court may strike out or add parties*.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party,

is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

9. The learned counsel for the appellants relied upon the following observations of a two-Judge Bench of this Court in *Sumtibai v. Paras Finance Co*. [2007 (10) SCC 82] to contend that a person need not have any subsisting right or interest in the suit property for being impleaded as a defendant, and that even a person who is likely to acquire an interest therein in future, in appropriate cases, is entitled to be impleaded as a party:

"Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in *Kasturi v. Iyyamperuma* [2005(6) SCC 733]. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance *if he has no semblance of title in the property in dispute*. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute……It cannot be laid down as an absolute proposition that whenever a suit for specific performance is

filed by A against B, a third party C can never be impleaded in that suit. If C can show a fair semblance of title or interest he can certainly file an application for impleadment."

10. The learned counsel for the first respondent on the other hand submitted that the decision in *Sumtibai* is not be good law in view of an earlier decision of a three-Judge Bench decision of this Court in *Kasturi v. Iyyamperumal* [2005 (6) SCC 733]. In *Kasturi*, this Court reiterated the position that necessary parties and proper parties can alone seek to be impleaded as parties to a suit for specific performance. This Court held that necessary parties are those persons in whose absence no decree can be passed by the court or those persons against whom there is a right to some relief in respect of the controversy involved in the proceedings; and that proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person. Referring to suits for specific performance, this Court held that the following persons are to be considered as necessary parties: (i) the parties to the contract which is sought to be enforced or their legal representatives; (ii) a transferee of the property which is the subject matter of the contract. This Court also explained that a person who has a direct interest in the subject matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party, on his application under Order 1 Rule 10 CPC. This Court concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant-vendor will not be a necessary party. The first respondent contended that *Kasturi* held that a person claiming a title adverse to the title of defendant-vendor, could not be impleaded, but effect of *Sumtibai* would be that such a person

could be impleaded; and that therefore, the decision in *Sumtibai* is contrary to the larger bench decision in *Kasturi*.

11. On a careful consideration, we find that there is no conflict between the two decisions. The two decisions were dealing with different situations requiring application of different facets of sub-rule (2) of Rule 10 of Order 1. This is made clear in *Sumtibai* itself. It was observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The decisions in *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* [1992 (2) SCC 524] and *Anil Kumar Singh v. Shivnath Mishra* [1995 (3) SCC 147] also explain in what circumstances persons may be added as parties.

12. Let us consider the scope and ambit of Order I of Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the *right* of a non-party to be impleaded as a party, but about the *judicial discretion* of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either *suo moto* or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice. This Court in *Ramji Dayawala & Sons (P) Ltd*.

vs. *Invest Import* – 1981 (1) SCC 80, reiterated the classic definition of 'discretion' by Lord Mansfield in *R*. vs. *Wilkes* – 1770 (98) ER 327, that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. We may now give some illustrations regarding exercise of discretion under the said Sub-Rule.

12.1) If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order I. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party.

12.2) If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party. But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant in possession, then the tenant will be a necessary party in so far as the prayer for actual possession.

12.3) If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

12.4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonfides etc., the court will normally implead him, if he is found to be a proper

party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if 'D' claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of 'P' representing that he is the co-owner with half share, and 'P' files a suit for specific performance of the said agreement of sale in respect of the undivided half share, the court may permit the other co-owner who contends that 'D' has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the vendor-defendant to be decided in an independent proceeding by the other co-owner, or the plaintiff; alternatively the court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject matter of the suit for specific performance, and that it will decide in the suit, only the issues relating to specific performance, that is whether the defendant executed the agreement/contract and whether such contract should be specifically enforced. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party.

13. If the principles relating to impleadment, are kept in

view, then the purported divergence in the two decisions will be found to be non-existent. The observations in *Kasturi* and *Sumtibai* are with reference to the facts and circumstances of the respective case. In *Kasturi*, this Court held that in suits for specific performance, only the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In *Sumtibai*, this Court held that a person having semblance of a title can be considered as a proper party. *Sumtibai* did not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did *Kasturi* lay down that no one, other than the parties to the contract and their legal representatives/transferees, can be impleaded even as a proper party.

14. On a careful examination of the facts of this case, we find that the appellant is neither a necessary party nor a proper party. As noticed above, the appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. First respondent - plaintiff in the suit has not sought any relief against the appellant. The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance. Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the first respondent-plaintiff against AAI. A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title, in the property in dispute.

15. Learned counsel for the appellants contended that in view of section 12A of the Act when AAI granted a lease of the premises of an airport, to carry out any of its functions enumerated in section 12 of the said Act, the lessee who has been so assigned any function of AAI, shall have the powers of AAI, necessary for the performance of such functions in terms of the lease. Learned counsel for the appellant submitted that in view of this provision, it should be deemed that the

appellant has stepped into the shoes of AAI so far as the Airport premises are concerned. This contention has no merit. The appellant as lessee may certainly have the powers of AAI necessary for performance of the functions that have been assigned to them. What has been assigned is the function of operation, management and development agreement *with reference to the area that been demised*. Obviously the appellant as lessee of the Airport cannot step into the shoes of AAI for performance of any functions with reference to an area which has not been demised or leased to it.

16. Learned counsel for the appellant contended that Mumbai airport being one of the premier airports in India with a very high and ever increasing passenger traffic, needs to modernise and develop every inch of the airport land; that the suit land was a part of the airport land and that for the pendency of first respondent's suit within an interim order, AAI would have included the suit land also in the lease in its favour. It was submitted that therefore a note was made in the lease that the land measuring 31000 sq.m. was not being made a part of the lease but may become part of the demised premises subject to the court verdict. This does not in any way help the appellant to claim a right to be impleaded. If the interim order in the suit filed by the first respondent came in the way of granting the lease of the suit land, it is clear that the suit land was not leased to appellant. The fact that if AAI succeeded in the suit, the suit land may also be leased to the appellant is not sufficient to hold that the appellant has any right, interest or a semblance of right or interest in the suit property. When appellant is neither claiming any right or remedy against the first respondent and when first respondent is not claiming any right or remedy against the appellant, in a suit for specific performance by the first respondent against AAI, the appellant cannot be a party. The allegation that the land is crucial for a premier airport or in public interest, are not relevant to the issue.

17. In the result, the appeal is dismissed.

N.J. Appeal dismissed.

COMMISSIONER OF CENTRAL EXCISE, DELHI
v.
M/S. PEARL DRINKS LTD.
(Civil Appeal Nos. 2059-2060 of 2003)

JULY 6, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

Central Excises Act, 1944 – s. 4 – Levy of excise duty – Claim of deductions under eight heads – Disallowed under two heads and allowed under the remaining six heads – Appeal by assessee – Order disallowing deductions under two heads upheld by tribunal and Supreme Court – Appeal by Revenue challenging deductions under the six heads – Tribunal holding that order under challenge had merged in the earlier order passed by tribunal in company's appeal whereby disallowance of two of the eight deductions had been upheld – Sustainability of – Held: Not sustainable – Doctrine of merger not applicable – Subject matter of appeal by assessee against adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by assessee – Tribunal had no occasion to examine admissibility of deductions under the remaining six heads because assessee did not question the same – Admissibility of the said deductions could have been raised only by Revenue who had lost its case qua *those deductions before adjudicating authority and tribunal failed to notice this – Doctrines.*

Doctrines – Doctrine of Merger – Applicability of – Explained.

The respondent-company is engaged in the manufacture and sale of aerated water. It claimed deductions under eight heads before arriving at the assessable value u/s. 4 of the Central Excises and Salt

Act, 1944. The Commissioner of Central Excise disallowed deductions under the two heads and allowed deductions under the remaining six heads. The respondent company filed an appeal. The tribunal dismissed the same holding that the disallowance of deductions under the two heads was in order. The Supreme Court also dismissed the appeal. Thereafter, the Central Board of Excise and Customs reviewed the order of the Commissioner and held that the deductions under the six heads was not justified. The Commissioner of Central Excise filed an appeal. The tribunal dismissed the appeal holding that the order under challenge had merged in the earlier order passed by the tribunal in the company's appeal whereby disallowance of two of the eight deductions had been upheld. Hence the appeals.

Allowing the appeals, the Court

HELD: 1.1 The order passed by the tribunal dismissing the appeal by the Revenue on the doctrine of merger is erroneous and unsustainable. The order passed by the tribunal is set aside and the matter is remanded back to the tribunal for a fresh disposal in accordance with law. [Para 15] [819-F]

1.2 The doctrine of merger has its origin in common law. It has its application not only in the realm of judicial orders but also in the realm of estates. In its application two orders passed by judicial and quasi-judicial courts and authorities it implies that the order passed by a lower authority would lose its finality and efficacy in favour of an order passed by a higher authority before whom correctness of such an order may have been assailed in appeal or revision. The doctrine applies regardless whether the higher court or authority affirms or modifies the order passed by the lower court or authority. [Para 11] [816-F-G]

Commissioner of Income Tax, Bombay v. Amritlal Bhogilal and Co. **AIR 1958 SC 868;** *State of Madras v. Madurai Mills Co. Ltd.* **AIR 1967 SC 681;** *Gojer Bros. (Pvt.) Ltd. v. Ratan Lal Singh* **(1974) 2 SCC 453;** *S.S. Rathore v. State of Madhya Pradesh* **(1989) 4 SCC 582;** *Kunhayammed and Ors. v. State of Kerala and Anr.* **(2000) 6 SCC 359;** *Mauria Udyog Ltd. v. Commissioner of Central Excise,* ***Delhi II*** **(2003) 9 SCC 139 – relied on.**

1.3. The doctrine of merger will depend largely on the nature of the jurisdiction exercised by the superior court and the content or the subject matter of challenge laid or capable of being laid before it. Applying the said test to the instant case, the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. [Para 13 & 14] [818-C-E]

1.4. The tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case *qua* those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the tribunal. That

being so, the proceedings instituted by the Commissioner, Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue's case. The tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the right of the party who is aggrieved of the other part of this order. If the doctrine of merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the court or authority had not examined the correctness of that part of the order. [Para 14] [818-E-H; 819-A-E]

Case Law Reference:

AIR 1958 SC 868	**Relied on.**	**Para 11**
AIR 1967 SC 681	**Relied on.**	**Para 12**
(1974) 2 SCC 453	**Relied on.**	**Para 12**
(1989) 4 SCC 582	**Relied on.**	**Para 12**
(2000) 6 SCC 359	**Relied on.**	**Para 12**
(2003) 9 SCC 139	**Relied on.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 2059-2060 of 2003.

From the Judgment & Order dated 22.07.2002 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Misc. Order No. 51 of 2002-A and Final Order No. 316 of 2002-A.

Gourab Banerjee, ASG, K, Swami, Sunita Rani Singh, B.K. Prasad, Anil Katiyar for the Appellant.

Radha Rangaswamy, Rahul Gupta for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals have been filed under Section 35(L)(b) of the Central Excise Act, 1944. They are directed against an order dated 22nd July, 2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, whereby an appeal preferred by the Revenue against an order passed by the Commissioner of Central Excise has been dismissed on the principle of merger. The Tribunal has held that the order passed by the Excise Commissioner had merged in that passed by the former in an earlier appeal filed by the assessee against the very same order. The fact that the said appeal was limited to only two of the eight deductions that formed the subject matter of controversy between the parties, according to the Tribunal made no difference.

2. The respondent-company is engaged in the manufacture and sale of aerated water falling under heading 22.01 and 22.02 of Chapter 22 of the Schedule to the Central Excise Tariff Act, 1985. In the course of scrutiny of records the excise authorities noticed that the respondent-company had not affected any sale of aerated water to any wholesale buyer at its factory gate. It had instead been clearing the manufactured product in glass

bottles after making payment of the duty and removing them to a duty paid godown situated at B-42, Lawrence Road Industrial Area, Delhi, adjacent to the factory. The duty paid stocks so removed were then sent to the customers in lorries owned by the respondent or taken on hire by them on long term basis from other parties. The driver-cum-salesman employed for that purpose would deliver the goods to the customers/dealers at a higher price and issue cash memos to them, while unsold stocks and empties were brought back to the company's duty paid godown.

3. In the declarations filed by the respondent-company from time to time it had while disclosing the wholesale price/ assessable value for various sizes and flavours claimed deductions towards excise duty, sales tax, transportation charges, container service charges and other service charges including trade discounts etc. before arriving at the assessable value under Section 4 of the Central Excise & Salt Act, 1944. Being of the view that such deductions were not legally admissible, the adjudicating authority issued a notice dated 3rd November, 1995 calling upon the respondents to show cause why the deductions claimed under the following eight heads be not denied to them:

"1. Mazdoor and cartage expenses on account of bringing of breakdown vehicles.

2. Service charges including handling.

3. Establishment cost of sale and Shipping Department.

4. Shell Repair Cost.

5. Interest on Containers.

6. Deduction claimed on account of loss of beverages in duty paid godown and transporting the goods from the duty paid godown to the customers.

7. Trade discount given to the privileged customers.

8. Other trade discount by way of one or more bottles free of cost to customers."

4. The respondent filed a reply to the notice aforementioned upon consideration whereof the Principal Commissioner of Central Excise, Delhi passed an order in original dated 14th March, 2001 disallowing deductions to the extent of Rs.13,42,924/- on account of loss of beverages in the duty paid godown and a sum of Rs.27,50,072/- on account of loss in transit from the said godown to the customers and discount made on account of free supply of bottles of aerated water. Insofar as the remaining six heads under which deductions were claimed by the company the order in original accepted the said claim.

5. Aggrieved by the order aforementioned the respondent-company filed an appeal under Section 35(E)(1) of the Central Excise before the CEGAT who by a reasoned order dismissed the same, holding that the disallowance of deductions under the two heads referred to above was perfectly in order. A further appeal filed by the assessee before this Court was also dismissed on 23rd September, 2002 thereby finally settling in favour of the Revenue the controversy as regards the admissibility of deductions under the two heads referred to above are concerned.

6. As regards the admissibility of deductions under the remaining six heads which the adjudicating authority allowed to the company, the Central Board of Excise and Customs (for short 'CBEC') appears to have reviewed the order of the Commissioner Excise under Section 35(E)(1) of the Central Excise Act and come to the conclusion that the grant of deductions under the said six heads was unjustified. The Board accordingly directed the Commissioner of Central Excise to approach the CEGAT for a correct determination of the following points:

"(i) Whether the Commissioner was right in allowing the deductions claimed by the party without first verifying whether these were included in the wholesale price and if so, whether the same were included as a part of transportation cost only as claimed by the party and allowed by them.

(ii) Whether the Commissioner was right in allowing the deduction of Rs.6975/-, Rs.24,00,000/-, Rs.62,12,578/-, Rs.7,66,662, Rs.2,27,329/- and Rs.91,000/- from the wholesale price, which do not appear to be admissible.

(iii) Whether the Commissioner was right in not imposing the penalty as proposed in the SCN."

7. It is noteworthy that the Board while passing the above order referred to the disallowance of similar deductions claimed by the respondent for the period immediately preceding the period relevant to the show cause notice in question. The Board noted that the CEGAT had by its order dated 2nd March, 2001 (reported in (2002) 150 ELT 661) affirmed the said disallowance except for two items. The effect of the said disallowance had not according to the Board been taken into consideration by the adjudicating authority while granting the deductions claimed by the respondent-company.

8. In compliance with the order passed by the CBEC the Commissioner of Central Excise preferred an appeal under Section 35E(4) of the Act which was dismissed by the CEGAT by its order dated 22nd of July, 2002 holding that the order under challenge had merged in the earlier order dated 24th January, 2002 passed by the Tribunal in the company's appeal whereby disallowance of two of the eight deductions in dispute had been upheld. The present appeal questions the correctness of the said order as noticed earlier.

9. Appearing for the appellant Mr. Gourab Banerjee,

learned Additional Solicitor General argued that the Tribunal had fallen in a palpable error in applying the doctrine of merger and dismissing the appeal filed by the Revenue. It was submitted that the doctrine of merger had no application to a case like the one at hand where the content and the subject matter of challenge in the two proceedings, namely, the appeal filed by the assessee and that filed by the Revenue were totally different. Reliance in support was placed by the learned counsel upon the decision of this Court in *Kunhayammed & Ors. v. State of Kerala & Anr.* (2000) 6 SCC 359. Reliance was also placed upon the decision of this Court in *Mauria Udyog Ltd. v. Commissioner of Central Excise,* Delhi II (2003) 9 SCC 139 to contend that the doctrine of merger is not a doctrine of universal application and that the difference in the subject matter or the content of the proceedings could take a decision inter se parties out of the purview of the said doctrine.

10. On behalf of the respondent-company it was per contra argued that the order passed by the adjudicating authority could not be split into two and that the doctrine of merger applied no matter the issue which arose for determination in the two appeals were distinctly different.

11. The doctrine of merger has its origin in common law. It has its application not only in the realm of judicial orders but also in the realm of estates. In its application two orders passed by judicial & quasi-judicial courts and authorities it implies that the order passed by a lower authority would lose its finality and efficacy in favour of an order passed by a higher authority before whom correctness of such an order may have been assailed in appeal or revision. The doctrine applies regardless whether the higher court or authority affirms or modifies the order passed by the lower court or authority. The juristic basis of the doctrine has been examined by this Court in a long line of decisions. One of the earliest of the said decisions was rendered in *Commissioner of Income Tax, Bombay v. Amritlal Bhogilal & Co.* (AIR 1958 SC 868). The

Court in that case declared that as a result of the confirmation or affirmation of the decision of the Tribunal by the Appellate Authority, the original decision merges in appellate decision whereupon it is only the appellate decision which subsists and is operative and capable of enforcement.

12. In *State of Madras v. Madurai Mills Co. Ltd.* (AIR 1967 SC 681) this Court had another occasion to examine the true scope and purport of the doctrine of merger. The court declared that the doctrine of merger was not a doctrine of rigid and universal application nor could it be said that where there are two orders one by the inferior authority and the other by a superior authority they must necessarily merge irrespective of the subject matter of the appeal or the revision or the scope of the proceedings in which such orders are passed. Subsequent decisions of this Court in *Gojer Bros. (Pvt.) Ltd. v. Ratan Lal Singh* (1974) 2 SCC 453 and *S.S. Rathore v. State of Madhya Pradesh* (1989) 4 SCC 582 have reiterated and explained that position. No reference to the pronouncements of this Court on the subject can be complete without a reference to the decision of this Court in *Kunhayammed's* case (supra) and *Mauria's* case (supra). In *Kunhayammed's* case (supra) a three-Judge Bench of this Court reviewed the decisions rendered on the subject and summed up its conclusions in para 44 of this decision. One of the said conclusions apposite to the case at hand is in the following words:

"44. To sum up, our conclusions are:

....

(iii) The 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.

…"

13. There is in the light of the above pronouncements no gainsaying that the doctrine of merger will depend largely on the nature of the jurisdiction exercised by the superior court and the content or the subject matter of challenge laid or capable of being laid before it.

14. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the Tribunal. That being so, the proceedings instituted by the Commissioner,

Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue's case. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the right of the party who is aggrieved of the other part of this order. If the doctrine of merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the Court or authority had not examined the correctness of that part of the order.

15. We have in the light of the above no hesitation in holding that the order passed by the Tribunal dismissing the appeal by the Revenue on the doctrine of merger is erroneous and unsustainable. We accordingly allow these appeals, set aside the impugned order and remand the matter back to the Tribunal for a fresh disposal in accordance with law. The parties to appear before the Tribunal on 6th September, 2010.

N.J. Appeals allowed.

CHARANJIT LAMBA

v.

COMMANDING OFFICER, SOUTHERN COMMAND AND ORS.

(Criminal Appeal No. 1027 of 2002)

JULY 06, 2010

[DALVEER BHANDARI AND T.S. THAKUR, JJ.]

Service Law – Dismissal – On ground of misconduct – Appellant, a Major in the Indian Army – Dismissed on the ground of committing the misconduct of a) making false claim towards payment of transport charges of his household luggage and car and b) of violating the rule requiring him to clear his electricity dues upon his transfer from the place of his posting – Dismissal challenged by appellant as being disproportionate to the gravity of the offence committed by him – Held: The challenge is not tenable – As an officer of disciplined force like the Army, appellant was expected to maintain the highest standard of honesty and conduct, and forebear from doing anything that could be termed as unbecoming of anyone holding that rank and office – Making a false claim for payment of transport charges of household luggage and car was a serious matter bordering on moral turpitude – Breach of the rule requiring him to clear his electricity dues upon his transfer from the place of his posting was also not credit worthy for an officer – Any act on the part of an officer holding a commission in the Indian Army which is subversive of army discipline or high traditions of the Army renders such person unfit to stay in the service of the nation's Army especially when the misconduct has compromised the values of patriotism, honesty and selflessness which values are too precious to be scarified on the altar of petty monetary gains, obtained by dubious means – Army Act – ss.45 and 52(f).

Administrative Law – Administrative action – Judicial review by Writ Court – Scope – Constitution of India, 1950 – Articles 226 and 14 –Doctrines – Doctrine of proportionality.

Appellant was a Major in the Indian Army. He was charged with the misconduct of a) making false claim towards payment of transport charges of his household luggage and car and b) of violating the rule requiring him to clear his electricity dues upon his transfer from the place of his posting. The alleged misconduct was found proved, whereupon the appellant was dismissed from service. Writ petition filed by the appellant was dismissed by the High Court.

In this Court, the appellant contended that the order of his dismissal was disproportionate to the gravity of the offence committed by him.

Dismissing the appeal, the Court

HELD:1.1. The courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. The doctrine of proportionality is now a well recognized ground on which a Writ Court can interfere with the order of punishment imposed upon an employee if the same is so outrageously disproportionate to the nature of misconduct that it shocks conscience of the Court. [Paras 9 and 15] [830-G-H; 828-F]

1.2. That the punishment imposed upon a delinquent should commensurate to the nature and generally of the misconduct is a requirement of fairness, objectivity, and non-discriminatory treatment. The same is recognized as being a part of Article 14 of the Constitution. [Para 15] [830-G]

1.3. The quantum of punishment in disciplinary matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or

the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate as to be suggestive of lack of good faith. What is clear is that while judicially reviewing an order of punishment imposed upon a delinquent employee the Writ Court would not assume the role of an appellate authority. It would not impose a lesser punishment merely because it considers the same to be more reasonable than what the disciplinary authority has imposed. It is only in cases where the punishment is so disproportionate to the gravity of charge that no reasonable person placed in the position of the disciplinary authority could have imposed such a punishment that a Writ Court may step in to interfere with the same. [Para 15] [830-H; 831-A-C]

Coimbatore District Central Coop. Bank v. Employees Assn. **(2007) 4 SCC 669** and *M.P. Gangadharan & Anr. v. State of Kerala & Ors.* **(2006) 6 SCC 162 – relied on.**

Bhagat Ram v. State of Himachal Pradesh **(1983) 2 SCC 442;** *Ranjit Thakur v. Union of India & Ors.* **(1987) 4 SCC 611;** *Ex-Naik Sardar Singh v. Union of India & **Ors.*** **(1991) 3 SCC 213;** *Hind Construction & Engineering Co. Ltd. v. Workmen* AIR **1965 SC 917;** *Management of the Federation of Indian Chambers of Commerce and Industry v. Workman, Shri R.K. Mittal* **(1972) 1 SC 40 – referred to.**

Council of Civil Service Union v. Minister for Civil Service **(1985) AC 374 – referred to.**

2. The present case is not one where the High Court could and ought to have interfered with the sentence imposed upon the appellant on the doctrine of proportionality. The appellant was holding the rank of a Major in the Indian Army at the time he committed the misconduct alleged and proved against him. As an officer

of disciplined force like the Army, he was expected to maintain the highest standard of honesty and conduct and forebear from doing anything that could be termed as unbecoming of anyone holding that rank and office. Making a false claim for payment of transport charges of house0hold luggage and car to Chandigarh was a serious matter bordering on moral turpitude. Breach of the rule requiring him to clear his electricity dues upon his transfer from the place of his posting was also not credit worthy for an officer. The competent authority was therefore justified in taking the view that the nature of the misconduct proved against the appellant called for a suitable punishment. Inasmuch as the punishment chosen was dismissal from service, the competent authority did not take an outrageously absurd view of the matter. The higher the public office held by a person the greater is the demand for rectitude on his part. An officer holding the rank of Major has to lead by example not only in the matter of his readiness to make the supreme sacrifice required of him in war or internal strife but even in adherence to the principles of honesty, loyalty and commitment. An officer cannot inspire those under his command to maintain the values of rectitude and to remain committed to duty if he himself is found lacking in that quality. Suffice it to say that any act on the part of an officer holding a commission in the Indian Army which is subversive of army discipline or high traditions of the Army renders such person unfit to stay in the service of the nation's Army especially when the misconduct has compromised the values of patriotism, honesty and selflessness which values are too precious to be scarified on the altar of petty monetary gains, obtained by dubious means. [Para 16] [831-D-H; 832-A-C]

Case Law Reference:

(2007) 4 SCC 669	**relied on**	**Para 7**

(1985) AC 374	**referred to**	**Para 8**
(1983) 2 SCC 442	**referred to**	**Para 10**
(1987) 4 SCC 611	**referred to**	**Para 11**
(1991) 3 SCC 213	**referred to**	**Para 11**
AIR 1965 SC 917	**referred to**	**Para 12**
(1972) 1 SC 40	**referred to**	**Para 13**
(2006) 6 SCC 162	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1027 of 2002.

From the Judgment & Order dated 15.09.1998 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 489 of 1997.

P.S. Patwalia, Jagjit Singh Chhabra, A.S. Rahi, Tushar Bakshi, Jaswant Persoya, for the Appellant.

Indira Jaising, ASG, S.K. Dubey, Balasubramanium, Samridhi Sinha, S. Anand, Anil Katiyar, B.V. Balaram Das, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of an order dated 15th September, 1998 passed by the High Court of judicature at Bombay whereby Criminal Writ Petition No.489 of 1997 filed by the appellant has been dismissed and the order of dismissal from service on proved misconduct affirmed. The factual matrix giving rise to the disciplinary proceedings against the appellant and his eventual dismissal from service has been set out by the High Court in the order under appeal. We need not, therefore, re-count the same over again. Suffice it to say that the appellant who at the

relevant time was serving as a Major in the Indian Army was consequent upon a finding recorded against him in a Court of Inquiry brought up for trial before a General Court Martial (GCM for short) on the following two distinct charges:

FIRST CHARGE ARMY ACT SECTION 52(f).

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT, WITH INTENT TO CAUSE WRONGFUL LOSS TO A PERSON

In that he, at field on 30th Jul 92, with intent to cause wrongful gain to himself, improperly claimed Rs.16,589.30 (Rs. Sixteen thousand five hundred eighty nine and paise thirty only) from CDA (Q) Pune on account of moving his household luggage and car to Chandigarh, well knowing that he was legally not entitled to the same.

SECOND CHARGE, ARMY ACT SECTION 45

BEING AN OFFICER BEHAVING IN A MANNER UNBECOMING HIS POSITION AND THE CHARACTER EXPECTED OF HIM

In that he, at Pune, between 03 Sep 92 and Jun 93, improperly failed to pay the final electricity bill dated 03 Sep 92 amounting to Rs.8132.35 (Rs. eight thousand one hundred thirty two and paise thirty five only) to Maharashtra State Electricity Board (MSEB) in respect of H No.12-B Kohun Road, Pune-1 which was allotted to him."

2. Evidence adduced before the GCM eventually led to the appellant being held guilty for improperly claiming Rs.16,589.30 on account of transfer of his household luggage and car to Chandigarh. The GCM found that the family of the appellant had continued to occupy government accommodation at Pune even after his posting to the field area and that the agency who is alleged to have transported the luggage and the car of the appellant did not exist at the given address. The evidence given

by the appellant in his defence was also found by the GCM to be unreliable on account of material contradictions in the deposition of the defence witnesses. The GCM on proof of the said charge sentenced him to forfeiture of ten years past service for purposes of pension. In so far as the second charge, viz. non-payment of electricity bill was concerned, the GCM declared the appellant not guilty. In its opinion the appellant had never refused to pay the electricity bill which was at any rate a matter between him and the Maharashtra State Electricity Board. The GCM took the view that the default of the petitioner could not be termed as conduct unbecoming of an official subject to the Army Act to call for any penal action.

3. Aggrieved by the findings and the sentence awarded to him by the GCM the petitioner filed an appeal before the General Officer Commanding, Maharashtra and Gujarat Area (hereinafter referred to as the 'GOC M & G Area') who happened to be the confirming authority also. The GOC M & G Area, however, took the view that the sentence awarded to the appellant on the first charge was lenient inasmuch as the offence committed by the appellant was serious and involved moral turpitude. It also noted that the appellant had past convictions to his credit which ought to be kept in view. The finding recorded by the GCM in regard to the second charge framed against the appellant was also found to be untenable by GOC M & G Area as according to him the conduct of the appellant fell within the ambit of Section 4E of the Army Act which made his behaviour unbecoming of an officer. The GOC M & G Area accordingly remanded the matter back to the GCM for re-consideration on the question of sentence to be awarded to the appellant on the first charge and whether the appellant could be held guilty on the second charge. The order made it clear that the GOC M & G Area did not intend to interfere with the discretion vested in the GCM which was free to decide the matter in the manner it liked.

4. The GCM accordingly assembled again to consider the

matter and while sticking to the reasons given by it in regard to the first charge found the second charge also to have been proved. The GCM on that basis revoked the earlier sentence and sentenced the appellant to dismissal from service which order was after confirmation by the competent authority assailed by the appellant before the High Court at Bombay in Criminal Writ Petition No.489 of 1997 as already noticed earlier.

5. Before the High Court several contentions appear to have been urged on behalf of the appellant which were examined and repelled by the High Court while dismissing the writ petition in terms of the order impugned in this appeal. The correctness of the view taken by the High Court on the grounds urged before it has not been assailed before us except in so far as the High Court has held that the punishment of dismissal imposed upon the appellant was in no way disproportionate to the gravity of the offence committed by him.

6. Mr. P.S. Patwalia, learned senior counsel appearing for the appellant argued that the order of dismissal of the appellant from service was in the facts and circumstances of the case disproportionate to the gravity of the charges framed against the appellant. He relied upon the decisions of this Court to which we shall presently refer to submit that judicial review of the order of dismissal would justify intervention by a Writ Court in cases where punishment was disproportionate to the nature of misconduct proved against the delinquent. The present was according to him one such a case that called for the Court's intervention to either reduce the punishment or to direct the same to be reduced by the competent authority.

7. In *Coimbatore District Central Coop. Bank v. Employees Assn.* (2007) 4 SCC 669 this Court declared that the doctrine of proportionality has not only arrived in our legal system but has come to stay. With the rapid growth of the administrative law and the need to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by reference to which the

action of such authorities can be judged. If any action taken by an authority is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review.

8. This Court referred with approval to the decision of the House of Lords in *Council of Civil Service Union v. Minister for Civil Service* (1985 AC 374) where Lord Diplock summed up the grounds on which administrative action was open to judicial review by a Writ Court. Lord Diplock's off-quoted passage dealing with the scope of judicial review of an administrative action may be gainfully extracted at this stage:

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality'….."

9. The doctrine of proportionality which Lord Diplock saw as a future possibility is now a well recognized ground on which a Writ Court can interfere with the order of punishment imposed upon an employee if the same is so outrageously disproportionate to the nature of misconduct that it shocks conscience of the Court. We may at this stage briefly refer to the decisions of this Court which have over the years applied the doctrine of proportionality to specific fact situations.

10. In *Bhagat Ram v. State of Himachal Pradesh* (1983) 2 SCC 442 this Court held that if the penalty imposed is disproportionate to the gravity of the misconduct, it would be violative of Article 14 of the Constitution.

11. In *Ranjit Thakur v. Union of India & Ors.* (1987) 4 SCC 611, this Court was dealing with a case where the petitioner had made a representation about the maltreatment given to him directly to the higher officers. He was sentenced to rigorous imprisonment for one year for that offence. While serving the sentence imposed upon him he declined to eat food. The summary court martial assembled the next day sentenced him to undergo imprisonment for one more year and dismissal from service. This Court held that the punishment imposed upon the delinquent was totally disproportionate to the gravity of the offence committed by him. So also in *Ex-Naik Sardar Singh v. Union of India & Ors.* (1991) 3 SCC 213 instead of one bottle of brandy that was authorized the delinquent was found carrying four bottles of brandy while going home on leave. He was sentenced to three months rigorous imprisonment and dismissal from service which was found by this Court to be disproportionate to the gravity of the offence proved against him.

12. The decision of this Court in *Hind Construction & Engineering Co. Ltd. v. Workmen* (AIR 1965 SC 917) dealt with a situation where some workers had remained absent from duty treating a particular day as a holiday. They were for that misconduct dismissed from service. This Court held that the absence of the workmen could have been treated as 'leave without pay' and they could also be warned and not fined. Reversing the order of punishment this Court observed:

> "It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner.

13. Reference may also be made to *Management of the Federation of Indian Chambers of Commerce and Industry v. Workman, Shri R.K. Mittal* (1972) 1 SC 40) where the employer had issued a legal notice to the federation and to the international chamber of Commerce which brought discredit to the petitioner-employer. A domestic inquiry was held in which

he was found guilty and his services terminated. This Court held that the punishment was disproportionate to the misconduct alleged observing:

> "The Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation."

14. We may refer to the decision of this Court in *M.P. Gangadharan & Anr. v. State of Kerala & Ors.* (2006) 6 SCC 162, where this Court declared that the question of reasonableness and fairness on the part of the statutory shall have to be considered in the context of the factual matrix obtaining in each case and that it cannot be put in a straitjacket formula. The following passage is in this regard apposite:

> **"34.** The constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straitjacket formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the court must be satisfied that a case has been made out for exercise of power of judicial review. We are not unmindful of the development of the law that from the doctrine of Wednesbury unreasonableness, the court is leaning towards the doctrine of proportionality……."

15. That the punishment imposed upon a delinquent should commensurate to the nature and generally of the misconduct is not only a requirement of fairness, objectivity, and non-discriminatory treatment which even those form quality of a misdemeanour are entitled to claim but the same is recognized as being a part of Article 14 of the Constitution. It is also evident from the long time of decisions referred to above that the courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. Having said that we need to remember that the quantum of punishment in disciplinary

matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate as to be suggestive of lack of good faith. What is clear is that while judicially reviewing an order of punishment imposed upon a delinquent employee the Writ Court would not assume the role of an appellate authority. It would not impose a lesser punishment merely because it considers the same to be more reasonable than what the disciplinary authority has imposed. It is only in cases where the punishment is so disproportionate to the gravity of charge that no reasonable person placed in the position of the disciplinary authority could have imposed such a punishment that a Writ Court may step in to interfere with the same.

16. The question then is whether the present is indeed one such case where the High Court could and ought to have interfered with the sentence imposed upon the appellant on the doctrine of proportionality. Our answer is in the negative. The appellant was holding the rank of a Major in the Indian Army at the time he committed the misconduct alleged and proved against him. As an officer of disciplined force like the Army he was expected to maintain the highest standard of honesty and conduct and forebear from doing anything that could be termed as unbecoming of anyone holding that rank and office. Making a false claim for payment of transport charges of household luggage and car to Chandigarh was a serious matter bordering on moral turpitude. Breach of the rule requiring him to clear his electricity dues upon his transfer from the place of his posting was also not credit worthy for an officer. The competent authority was therefore justified in taking the view that the nature of the misconduct proved against the appellant called for a suitable punishment. Inasmuch as the punishment chosen was dismissal from service, the competent authority, did not in our opinion, take an outrageously absurd view of the matter. We need to remember that the higher the public office held by a person the

greater is the demand for rectitude on his part. An officer holding the rank of Major has to lead by example not only in the matter of his readiness to make the supreme sacrifice required of him in war or internal strife but even in adherence to the principles of honesty, loyalty and commitment. An officer cannot inspire those under his command to maintain the values of rectitude and to remain committed to duty if he himself is found lacking in that quality. Suffice it to say that any act on the part of an officer holding a commission in the Indian Army which is subversive of army discipline or high traditions of the Army renders such person unfit to stay in the service of the nation's Army especially when the misconduct has compromised the values of patriotism, honesty and selflessness which values are too precious to be scarified on the altar of petty monetary gains, obtained by dubious means.

17. In the result this appeal fails and is hereby dismissed.

B.B.B. Appeal dismissed.

LAND ACQN. OFFICER & ASSTT.COMMNR. & ANR.
v.
SHIVAPPA MALLAPPA JIGALUR & ORS.
(Civil Appeal Nos. 4988-5047 etc. of 2010)

JULY 7, 2010

[AFTAB ALAM, SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894: Interest on solatium – Liability to pay – Decision in **Gurpreet Singh *case, that interest on solatium could be claimed only in pending executions and not in closed executions and the execution court would be entitled to permit its recovery from the date of judgment in* *Sunder *case (19.9.2001) and not prior to that date – Interpretation of words 'closed execution' in Paragraph 54 of* Gurpreet Singh** *case and relevance of the date of decision in* *Sunder *case – Held: If main proceeding arising from landowner's claim for enhanced compensation remains pending before civil court or at the appellate stage, it is not deemed to be closed even if the award/decree passed by collector/civil court was put to execution and payment received by landowners in terms of award/decree – The stipulation that any interest on solatium can only be granted for period subsequent to the decision in* *Sunder *i.e. 19.9.2001, does not circumscribe the power of the court dealing with the main proceeding relating to enhancement of compensation and it is a limitation on the power of execution court.*

A Constitution Bench of this Court pronounced the judgment in **Sunder* case on September 19, 2001 which settled the issue regarding the liability of payment of interest on the amount of solatium. The applicability of the decision in **Sunder* case was explained and clarified in another Constitution Bench decision in ***Gurpreet Singh* case. It was explained that such interest on solatium

could be claimed only in pending executions and not in "closed executions" and the execution court would be entitled to permit its recovery from the date of judgment in **Sunder* (19.9.2001) and not prior to that date.

The issues which arose for consideration in these groups of appeals viz. Groups A, B, C and D pertain to the interpretation of the term 'closed execution' as used in paragraph 54 of decision in ***Gurpreet Singh* case and the relevance of the date of decision in **Sunder* case.

Disposing of the appeals, the Court

HELD: (Group A) 1. The reference to "closed executions" in Para 54 of judgment in ***Gurpreet Singh* does not mean cases in which the main proceeding arising from the landowner's claim for enhanced compensation remains pending before the civil court or at the appellate stage. It may sometimes happen that the award of the Collector or the decree of the civil court is put to execution and payments are made in terms of the award or the decree of the civil court and in that sense the award or the decree is satisfied. Nevertheless, an appeal against the award or the decree of the civil court may still remain pending either before the High Court or even before this Court. In appeal, the superior court may enhance the compensation which would lead to enhancement of solatium and consequently the interest on the additional amounts of compensation and solatium. In such a situation, the landowner/claimant would be bound to go back to the execution court for realisation of the additional amounts in terms of the modified decree. In such cases, the execution proceedings cannot be deemed to be closed and neither was it the intent of the observations in the decision in **Gurpreet Singh*. The stipulation in the decision in ***Gurpreet Singh* that any interest on solatium can only be granted for the period

subsequent to September 19, 2001, the date of the decision in *Sunder, it is evident that this again, was a limitation on the power of the execution court. The direction in no way circumscribes the power of the court dealing with the main proceeding relating to enhancement of the compensation. The matter can be looked at from another angle. The appeal being the continuation of the original proceeding, in the facts of the cases in this sub-group, there can be no question of accrual of interest only after the date of the decision in *Sunder . [Para 13] [842-D-H; 843-A-G]

Gurpreet Singh* vs. *Union of India,* **(2006) 8 SCC 457 – held inapplicable.

Sunder* vs. *Union of India,* **(2001) 7 SCC 211 – referred to.

(Group B)

2. State had made payment of interest on the amount of Solatium to the respondents-landowners. Interest was paid, however, up to the year 2002 and not up to September 11, 2005 when the actual payment was made. In the facts and circumstances, the petitioner is directed to pay to the respective respondents/land owners the balance amounts of interest on solatium for the period from 2002 to 11.9.2005. [Para 17, 19] [844-F-H; 845-D]

(Group C)

3. In view of the orders passed in the cases in the sub-groups B, all these Special Leave Petitions are dismissed. [Para 24] [846-B]

(Group D)

4. From the facts, it is manifest and clear that on September 19, 2001 when the decision in *Sunder was

rendered, the land acquisition proceedings (including the execution proceedings) were over and closed. The reference court had given its decision and the modified award was fully satisfied; all payments in terms of the award of the reference court were made to the landowners/claimants. After the decision in *Sunder, an appeal was filed against the judgment and award given by the reference court. That effort remained unsuccessful. Then a review petition was filed before the reference court and the matter was finally brought to the High Court in revision against the order passed by the reference court. It is, thus, patent that a concluded and closed proceeding was sought to be revived by the device of filing a review petition and then filing a revision against the order dismissing the review petition. This was plainly impermissible in view of the decision of this court in paragraph 54, in **Gurpreet Singh. [Para 33] [849-E-H; 850-A]

Gurpreet Singh vs. *Union of India,* **(2006) 8 SCC 457, held applicable.**

Case law reference:

(2006) 8 SCC 457	**held inapplicable**	**[Paras 1, 2, 11, 12, 13]**
(2001) 7 SCC 211	**referred to**	**[Paras 1, 11, 13, 30]**
(2006) 8 SCC 457	**held applicable**	**[Paras 17, 33, 34]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 4988-5047 of 2010.

From the Judgment & Order dated 01.06.2004 of the High Court of Karnataka at Bangalore in Civil Revision Petition Nos., 650, 1306, 1307, 1308, 1309, 1310, 1311, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1336, 1337, 1338, 1340, 1341, 1342, 1343, 1345, 1347, 1348, 1349, 1372, 1373,

1374, 1375, 1376, 1377, 1378, 1379, 1659, 1660, 1661, 1662, 1663, 1664, 1666, 1668, 1670, 1674, 1675, 1676, 1677, 1678, 1679, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690 and 1691 of 2003.

WITH

C.A. Nos. 5052, 5053, 5054, 5058, 5057, 5055, 5056, 5061, 5059, 5060, 5062, 5065, 5066, 5067 of 2010, SLP (C) Nos. 20021, 20022, 20023 & 20024 of 2005, 5063, 5064, 5069, 5068, 5048-5051 of 2010, SLP (C) Nos. 241 of 2006, 25015 of 2005, S.L.P.(C)...CC NO. 4641 of 2005, S.L.P. (C)...CC NO. 4646, S.L.P. (C)...CC NO. 5375, S.L.P. (C)...CC NO. 5402, S.L.P. (C)...CC NO. 5505, S.L.P.(C)...CCNO. 5521, S.L.P. (C)...CCNO. 5831, S.L.P.(C)...CC NO. 5835, S.L.P. (C)...CC NO. 5841 of 2005, S.L.P. (C)...CC NO. 5853, S.L.P. (C)...CC NO. 5899. S.L.P. (C)...CC NO. 5923, SLP (C) NO. 9504 of 2005.

Basava Prabhu S. Patil, Sanjay R. Hegde, A. Rohen Singh, Ramesh Mishra, Rajesh Mahale, B. Subrahmanya Prasad, Ajay Kumar M., Ajit S Bhasme, Kiran Suri, S.J.Amith, Y. Raja Gopala Rao, Mohan V. Katarki, Javed Mahmud Rao for the Appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. In all the cases in this large group, arising from land acquisition proceedings, the State of Karnataka is directed to pay interest on the amounts of solatium. The liability to pay interest on solatium stands settled by the Constitution Bench decision of this Court in *Sunder* vs. *Union of India,* (2001) 7 SCC 211. But Mr. Sanjay R. Hegde, learned Standing Counsel for the State of Karnataka, the appellant in all the appeals, submitted that the question of applicability of the decision in *Sunder* was explained and clarified in another Constitution Bench decision of this Court

(delivered after the filing of these appeals) in *Gurpreet Singh* vs. *Union of India,* (2006) 8 SCC 457. Relying upon paragraph 54 of the judgment in *Gurpreet Singh*, Mr. Hegde submitted that in cases where full payments were made in terms of the decree and the execution proceedings were consequently closed, the proceedings could not be re-opened and directions given for payment of interest on the basis of the decision in *Sunder*; further, any direction for payment of interest on solatium could only be for the period subsequent to the date of decision in *Sunder* (September 19, 2001). In other words, in cases where the full amounts of solatium were paid before September 19, 2001, there would be no question of payment of any interest. He, therefore, submitted that all the cases should be remitted to the respective courts below to re-examine the claim of the landowners/claimants in light of the decision in *Gurpreet Singh.*

2. We see no reason to adopt the course suggested by Mr. Hegde. The facts of the cases before us are quite simple and it can be easily ascertained which of these cases, if any, are hit by the decision in *Gurpreet Singh*. Besides, all the cases are fairly old. An order of remand would simply start a fresh round of appeals and further appeals, and would keep the land-holders/claimants embroiled in litigation for an extended period. If we can, we would not like the landowners/claimants to suffer any longer. If any landowner/claimant has a lawful claim, he must get it; otherwise, the matter must end here and now.

3. On the basis of the respective facts, the appeals in this group can be divided into four sub-groups. And now we propose to deal with each sub-group separately.

4. Before proceeding further, it may be stated that some cases belonging to different sub-groups enumerated herein below were earlier disposed of in piecemeal manner by order passed on March 25, 2010. Since all the cases in the different sub-groups are now being dealt within a consolidated manner, we recall the earlier order passed on March 25, 2010.

A

CIVIL APPEAL NOS.5054, 5055, 5056, 5057, 5058, 5059, 5060, 5061, 5062, 5063, 5064, 5065, 5066, 5067, 5068 & 5069 OF 2010

(Arising out of Special Leave Petition (C) Nos. 18518/2005, 18522/2005, 18523/2005, 18521/2005, 18519/2005, 18525/2005, 18526/2005, 18524/2005, 18528/2005, 20027/2005, 20029/2005, 19786/2005, 19787/2005, 19788/2005, 23003/2005, 22773/2005)

5. There are sixteen cases in this sub-group with identical facts.

6. Delay condoned.

7. Leave granted.

8. Mr. Hegde, learned counsel appears on behalf of the appellant, the Special Land Acquisition Officer and Ms. Kiran Suri, learned counsel represents the respondents landowners in all the appeals in this sub-group.

9. The facts of the case, relevant for the present are very simple and brief and may be stated thus. The possession of the land coming under acquisition was taken over by the State on August 14, 1989 even before the issuance of the preliminary notification that came on January 3, 1992. The Land Acquisition Officer gave his award on October 13, 1993 fixing compensation at the rate of Rs.20,000/- per acre. On reference made under Section 18 of the Act, the civil court, by judgment and order dated November 27, 1998 enhanced the compensation to Rs.60,000/- per acre. It also awarded solatium @ 30%, additional market value @ 12% from the date of dispossession till the date of the award and interest @ 9% for the first year and 15% from the second year onwards till the date of realisation. Both the Special Land Acquisition Officer and the landowners/claimants filed their respective appeals

against the order of the civil court. The appeal preferred by the Special Land Acquisition Officer was dismissed but the appeals of the landowners/claimants (MFAs in the High Court of Karnataka) came to be admitted. While the landowners appeals were pending before the Karnataka High Court, a Constitution Bench of this Court pronounced the judgment in *Sunder* which settled the issue regarding the liability of payment of interest on the amount of solatium. Later on, the appeals filed by the landowners were allowed by the Karnataka High Court by judgment and order dated March 31, 2003. The High Court further enhanced the rate of compensation from Rs.60,000/- per acre fixed by the civil court to Rs.78,000/- per acre and in the operative portion (paragraph 14 of the judgment) directed as follows:-

> "Accordingly, we allow all these appeals in part. The appellants/land owners are entitled to compensation of Rs.78,000/- per acre, along with the statutory benefits. The awards passed by the Reference Court under appeals accordingly shall stand modified. In the circumstances of the case, there shall be no order as to costs."

10. Following the judgment of the High Court, the landowners once again went before the execution court for realisation of the additional amounts in terms of the High Court order. A copy of the execution petition along with the order sheet of the execution proceeding is produced before us, that leave no room for doubt that though payments in terms of the decree passed by the civil court were made earlier, execution proceedings commenced afresh directly in pursuance of the judgment and order passed by the High Court in the landowners'/claimants' appeals and the decree/award modified on that basis.

11. In light of the above facts, we now examine the objection raised by Mr. Hegde relying upon the observations and directions made in paragraph 54 of the Constitution bench

decision in *Gurpreet Singh*. Paragraph 54 of the decision is as follows:

> "54. One other question also was sought to be raised and answered by this Bench though not referred to it. Considering that the question arises in various cases pending in Courts all over the country, we permitted counsel to address us on that question. That question is whether in the light of the decision in *Sunder vs. Union of India* (2001) 7 SCC 211, the awardee/decree-holder would be entitled to claim interest on solatium in execution though it is not specifically granted by the decree. It is well settled that an execution court cannot go behind the decree. If, therefore, the claim for interest on solatium had been made and the same has been negatived either expressly or by necessary implication by the judgment or decree of the reference court or of the appellate court, the execution court will have necessarily to reject the claim for interest on solatium based on *Sunder* on the ground that the execution court cannot go behind the decree. But if the award of the reference court or that of the appellate court does not specifically refer to the question of interest on solatium or in cases where claim had not been made and rejected either expressly or impliedly by the reference court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to apply the ratio of *Sunder* and say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution. *Otherwise, not. We also clarify that such interest on solatium can be claimed only in pending executions and not in closed executions and the execution court will be entitled to permit its recovery from the date of the judgment in Sunder (19-9-01) and not for any prior period.* We also clarify that this will not entail any reappropriation or fresh appropriation by the decree-holder. This we have indicated by way of clarification also

> in exercise of our power under Articles 141 and 142 of the Constitution of India with a view to avoid multiplicity of litigation on this question."
>
> (emphasis added)

12. Relying upon the portion shown in italics in the above quoted passage, Mr. Hegde argued that in these cases the amount of solatium as determined by the civil court was paid long before September 19, 2001, following which the execution proceeding was closed and hence, no liability of any interest on the amount of solatium could be fastened upon the State in light of the decision in *Gurpreet Singh*.

13. We are unable to accept the submission and in our view the decision in *Gurpreet Singh* has no application to the facts of the present cases. In paragraph 54 of the decision in *Gurpreet Singh's* case, the Court was considering the scope of execution proceedings and the limitations of the execution court. The three lines relied upon by Mr. Hegde must be read and understood in the context of what is said earlier. The Court clearly said that the execution court could not go beyond the decree. In the event, the claim of interest was rejected expressly or by necessary implication in the decree, it would not be permissible for the execution court to grant interest relying upon the decision in *Sunder*. But, even then the Court went on to clarify that if the award of the reference court or the appellate court was *silent* on the issue of solatium and interest then it would be open to the execution court to apply the ratio of *Sunder* and say that the compensation awarded would include solatium and in such an event interest on the amount could be directed to be deposited in execution. The decision in *Gurpreet Singh*, thus, actually enlarged the scope of execution proceeding, in a certain way, on the basis of the decision in *Sunder*. Coming now to the passage specially relied upon by Mr. Hegde, we do not have the slightest doubt that the reference to "closed executions" does not mean cases in which the main proceeding arising from the landowner's claim for enhanced compensation

remains pending before the civil court or at the appellate stage. It may sometimes happen, as illustrated by this case that the award of the Collector or the decree of the civil court is put to execution and payments are made in terms of the award or the decree of the civil court and in that sense the award or the decree is satisfied. Nevertheless, an appeal against the award or the decree of the civil court may still remain pending either before the High Court or even before this Court. In appeal, the superior court may enhance the compensation which would lead to enhancement of solatium and consequently the interest on the additional amounts of compensation and solatium. In such a situation, the landowner/claimant would be bound to go back to the execution court for realisation of the additional amounts in terms of the modified decree. In such cases, the execution proceedings cannot be deemed to be closed and neither was it the intent of the observations in paragraph 54 of the decision in *Gurpreet Singh*. Coming now to the stipulation that any interest on solatium can only be granted for the period subsequent to September 19, 2001, the date of the decision in *Sunder*, it is evident that this again, is a limitation on the power of the execution court. The direction is actually referable to those cases in which the award of the reference court or the appellate court being *silent,* it is left open to the execution court to give direction for the deposit of interest on solatium. In such cases, the reference court can ask for interest only for the period subsequent to September 19, 2001. The direction in no way circumscribes the power of the court dealing with the main proceeding relating to enhancement of the compensation. The matter can be looked at from another angle. The appeal being the continuation of the original proceeding, in the facts of the cases in this sub-group, there can be no question of accrual of interest only after the date of the decision in *Sunder*. At this stage, it may be recalled that the civil court had awarded solatium @ 30% and interest @ 9% for the first year and @ 15% from second year onwards till the date of realisation. The State's appeal against the judgment of the civil court was dismissed. Thus, the direction for payment of solatium with

interest at the rates indicated had become final. The High Court enhanced the rate of compensation. This would inevitably lead to an increase in the amount of solatium and consequently in the amount of interest on the unpaid amount of solatium. Thus, looked at from any point of view, the question of payment of interest subsequent to September 19, 2001 does not arise.

14. For the reasons discussed above, we see no merit in these appeals. The appeals are, accordingly, dismissed but with no order as to costs.

15. For any grievance with regard to calculation of the amounts of solatium or interest, it will be open to the appellant, the Special Land Acquisition Officer to raise his objections, if otherwise permissible in law.

B

SLP …….CC Nos.4641 of 2005, 4646 of 2005 and SLP CC Nos.5375 of 2005.

16. These three Special Leave Petitions were filed beyond the period of limitation. In SLP…..(CC) No.4641 of 2005, there is delay of 158 days, in SLP….(CC) No.4646 of 2005, there is delay of 219 days and in SLP……(CC) No.5375 of 2005, there is delay of 187 days.

17. Mr. Patil, learned Senior Counsel, appearing for the respondents-landowners stated that after filing the SLPs, the State had made payment of interest on the amount of solatium to the respondents-landowners. In SLP…..(CC) No.4641 of 2005, the amount of interest paid to the land owner/respondent was Rs.41,236/-, in SLP…..(CC) No.4646 of 2005, Rs.50,752/- and in SLP…..(CC) No. 5375 of 2005 it was Rs.41,236/-. Interest was paid, however, up to the year 2002 and not up to September 11, 2005 when the actual payment was made. Hence, according to the respondent-landowners, the amount of interest for the period 2002 to September 11, 2005 still remains unpaid. The amounts that remain unpaid are much smaller than

the amounts that were paid to the landowners/claimants, as indicated above.

18. Mr. Patil further stated that these three SLPs before us are out of a batch of 20 similar cases. Learned counsel gave us a tabular chart giving the details of all the 20 cases that were disposed of by the High Court under different MFA Nos. In this Chart, the present SLPs figure at serial nos. 11, 15 and 13. He further informed us that the SLPs arising from the cases at serial nos. 10 and 16 were earlier dismissed by this Court, one [SLP…..(CC) No.1611/2005] on the ground of limitation alone and other [SLP…..(CC) No.3929/2005] both on the ground of delay and on merits.

19. In the aforesaid facts and circumstances, we see no reason to interfere in these matters. The Special Leave Petitions are dismissed, both on grounds of delay and on merits with the direction to the petitioner to pay to the respective respondents/land owners the balance amounts of interest on solatium for the period from 2002 to 11.9.2005.

20. The observations and directions of the High Court in regard to any differences in calculation remain undisturbed.

SLP…..(CC) Nos.5505, 5521, 5831, 5835, 5853, 5841, 5899 and 5923 of 2005.

21. In view of the order passed in SLP……(CC) Nos.4641 of 2005 etc. etc., these Special Leave Petitions are also dismissed both on the grounds of delay and on merits. The observations and directions of the High Court in regard to any differences in calculation remain undisturbed.

C

SLP (C) No.9504/2005, SLP (C) No.25015/2005, SLP.....(CC) No.5402/2005, SLP (C) No.241/2006, SLP (C) No.20021/2005, SLP (C) No.20023/2005, SLP (C) No.20022/2005, SLP (C) No.20024/2005

22. SLP (C) No. 9504/2005 is within time.

23. Delay condoned in rest of the matters.

24. In view of the orders passed in the cases in the preceding sub-groups, all these Special Leave Petitions are to be dismissed subject to the observation that in case of any grievance in regard to calculations, it will be open to the petitioner/the Special Land Acquisition Officer to raise his objections, if otherwise permissible in law.

25. It may also be added that accrual of interest will cease on the date the full amount of solatium is paid along with the interest accrued on it.

D

CIVIL APPEAL NOS. 4988-5047, 5048-5051, 5052 & 5053 OF 2010

(Arising out of SLP (C) Nos.25319-25378 of 2004, 23075-23078/2005, 12386/2006 & 1801/2007).

26. Leave granted.

27. We finally come to sub-group, to which at least the submission of Mr. Hegde, based on the decision in *Gurpreet Singh* seems to fully apply.

28. The facts of the cases in this sub-group are as brief and simple as in the earlier sub-groups. In the Collector's award made on August 20, 1997, the market value of the acquired lands was fixed @ Rs.21,500/- per acre (Kharab land @ Rs.400/acre). Against the award of the Collector, 20 references came to be made under section 18 of the Act at the instance of the aggrieved landowners/claimants. All the 20 reference cases were decided by a common judgment and order dated November 30, 1998 passed by Civil Judge and Additional CJM, Koppal, in LAC No.44 of 1998 and analogous cases. The

civil court enhanced the market value of the subject lands from Rs.21,500/- per acre to Rs.50,000/- per acre. It also held the claimants entitled to solatium at 30% of the market value along with the additional market value at 12% per annum from the date of taking possession of the land on January 12, 1994 to the date of the award on August 20, 1997. It further held the claimants entitled to interest @ 9% per annum from the date of taking possession of the land on January 12, 1994 for the first year and after that from January 12, 1995 @ 15% till the date of full and final payment of the compensation. What is relevant for the present, however, is that the civil court expressly rejected the landowners' claim for *interest on solatium* observing as follows:

> "The Claimants are not entitled for interest on solatium and additional market value in view of the case law reported in 1996 (2) SCC 71 (Premnath Kapoor and another vs. National Fertilizers Corporation of India Ltd., and others.)."

29. Apparently no one took the decision of the civil court any further and the matter was allowed to rest at that stage.

30. On September 19, 2001 came the decision of the Constitution Bench of this court in *Sunder* and then an appeal (MFA No.837 of 2002) was filed against the judgment and order passed by the Civil Court on November 30, 1998. The appeal, when it was filed, was barred by limitation by 1072 days. It is also not denied that long before the filing of the appeal or even before the judgment in *Sunder* came on September 19, 2001, the claimants had received all the payments in terms of the judgment and award given by the civil court.

31. A single judge of the High Court dismissed the appeal by order dated March 20, 2002 observing as follows:

> "6. The only ground urged by the appellants in their appeals is that the Hon'ble Supreme Court distinguishing its earlier judgment in the case of PREMNATH KAPOOR & ANR.

> VS. NATIONAL FERTILISER CORPORATION OF INDIA LTD., & Ors. Reported in 1996 (2) SCC 72, has held in Sunder vs. Union of India reported in 2001 (6) SCALE 405, that a claimant is entitled to compensation under the Land Acquisition Act shall also be entitle to get interest on the aggregate amounts including solatium. In the said decision a Constitutional Bench of the Supreme Court has decided the question referred to the Bench as to whether the State is liable to pay interest on solatium under Sec.23(2) of the Land Acquisition Act and the said question has been answered in the affirmative.
>
> 7. Therefore, it appears that the appellants who never intended to challenge the awards were made to file the appeals after the above judgment of the Hon'ble Supreme Court. Thus no ground is made out by the appellants for condonation of such exorbitant delay. The appellants could have sought review of the order before the reference Court in view of the judgment of the Hon'ble Supreme Court."

32. Taking advantage of the remark that in view of the decision in *Sunder*, the landowners/claimants might have moved the reference court in review, as many as 36 review petitions came to be filed before the civil court. All those review petitions were dismissed by the Civil Judge (Senior Division), Koppal by order dated January 2, 2003 passed in Misc. Case No.30/202 and analogous cases. The Civil Judge found that the case set up for condonation of the huge delay was palpably false and further that the review petitions were not maintainable and there were no reasonable grounds to review its judgment and award dated November 30, 1998.

33. Against the order of the civil court, the landowners/claimants came in revision before the High Court. A very large number of revisions (59 in all) were clubbed together for hearing before a division bench of the Karnataka High Court. All the revisions were finally allowed by judgment and order dated June 1, 2004 in Civil Revision Petition No.650 of 2003 and other

analogous cases. The High Court did not allow either the long (and unexplained) delay or the earlier rejection of the claimants' appeal by a single judge of the court against the judgment of the civil court in section 18 references, or the fact that the claimants had received all payments in terms of the court's order long before the decision in *Sunder* was given by this court, stand in their way in claiming interest on the amounts of solatium and additional market value. The long and erudite judgment passed by the High Court is full of kind sentiments for the revision petitioners whose lands were compulsorily acquired by the Government and is also supported by good legal reasoning. The High Court decision was given long before the Constitution Bench decision of this Court in *Gurpreet Singh.* But when it comes up for consideration before us in this appeal the decision in *Gurpreet Singh* is very much there. We do not know how we would have responded to the judgment of the High Court, had it come before us, without the intervening decision of this Court in *Gurpeet Singh*. But the Constitution Bench decision is as much binding on us, as on the High Court. And, when tested against the decision in *Gurpreet Singh*, the High Court judgment coming under appeal appears to be plainly untenable. The High Court decision seeks to do exactly what is held impermissible in *Gurpreet Singh*. From the facts noted above, it is manifest and clear that on September 19, 2001 when the decision in *Sunder* was rendered, the land acquisition proceedings (including the execution proceedings) were over and closed. The reference court had given its decision and the modified award was fully satisfied; all payments in terms of the award of the reference court were made to the landowners/claimants. After the decision in *Sunder*, an appeal was filed against the judgment and award given by the reference court. That effort remained unsuccessful. Then a review petition was filed before the reference court and the matter was finally brought to the High Court in revision against the order passed by the reference court. It is, thus, patent that a concluded and closed proceeding was sought to be revived by the device of filing a review petition and then filing

a revision against the order dismissing the review petition. This was plainly impermissible in view of the decision of this court in paragraph 54, in *Gurpreet Singh*.

34. On behalf of the respondents-landowners/claimants, it was sought to be argued that the decision in *Gurpreet Singh* imposed limitations on the power of the execution court but it did not restrict the power of the High Court in exercise of its revisional jurisdiction. We are unable to accept the submission. The order passed by the civil court, dismissing the review petition was wholly in accordance with the view taken by this court in *Gurpreet Singh.* The High Court order, reversing the order of the civil court and allowing the claim of the respondents led to a result disapproved by this court.

35. Thus, when looked at from any angle, the High Court decision coming under appeal is untenable. We are, therefore, constrained to interfere in the matter and set aside the judgment of the division bench of the Karnataka High Court coming under appeal.

36. The appeals in this sub-group are allowed but with no order as to costs.

D.G. Appeals disposed of.

GOVT. OF INDIA THROUGH SECRETARY & ANR.
v.
RAVI PRAKASH GUPTA & ANR.
(Special Leave Petition (C) No. 14889 of 2009)

JULY 7, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Persons with Disabilities (Equal Opportunities, Protection, Rights and Full Participation) Act, 1995 – ss. 32 and 33 – Interpretation of – Held: Reservation u/s. 33 is not dependent on identification u/s. 32, though duty has been cast upon the Government to make appointments in the number of posts reserved for the categories mentioned in s. 33 in respect of persons suffering from the disabilities – On facts, denial of appointment to visually impaired candidate who cleared Civil Services Examination on the ground that there was only one post meant for such persons, not correct – On account of failure of Government to identify posts for persons falling within the ambit of s. 33, candidate should not be deprived of the benefit of his selection purportedly on the ground that there were no available vacancies in the said category – High Court rightly rejected the submission that only after identification of posts suitable for such appointment u/s. 32, the provisions of s. 33 could be implemented – Thus, order of High Court that a clear vacancy was available to which candidate could be accommodated on the basis of his position in the merit list, does not call for interference.

The respondent no. 1 was a visually handicapped candidate. He was declared successful in the Civil Services Examination and was placed at serial no. 5 of the merit list of such candidates. The respondent no. 1 was not given appointment on the ground that only one post was offered under the visually handicapped category. The respondent filed an application claiming

appointment under the reservation of vacancies for disabled categories u/s. 33 of the Persons with Disabilities (Equal Opportunities, Protection, Rights and Full Participation) Act, 1995. The respondent contended that the said Act came into force in 1996 and if the vacancies were to be considered from the year 1996, then instead of one vacancy being declared for the year in question, there should have been at least reservation of 3% of the posts available for the persons suffering from different kinds of disabilities which is 7 vacancies from the reserved categories of disabilities and the same were interchangeable. The tribunal dismissed the application. The High Court set aside the order of the tribunal. Hence the appeal.

Dismissing the Special Leave Petition, the Court

HELD: 1.1 The respondent No.1 is eligible for appointment in the Civil Services after having been declared successful and having been placed at serial no.5 in the disabled category of visually impaired candidates, cannot be denied. [Para 14] [862-C]

1.2 The submission regarding the implementation of the provisions of section 33 of the Persons with Disabilities (Equal Opportunities, Protection, Rights and Full Participation) Act, 1955, only after identification of posts suitable for such appointment, under section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of section 33 of the Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission that identification of Grade 'A' and 'B' posts in the I.A.S. was undertaken after the year 2005 is not of much substance. The High Court

pointed out that neither section 32 nor section 33 of the Act makes any distinction with regard to Grade 'A', 'B', 'C' and 'D' posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to the notice of this Court on behalf of the petitioners. [Para 15] [862-G-H; 863-A-C]

1.3 It is only logical that, as provided in section 32 of the Act, posts have to be identified for reservation for the purposes of section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of section 33. The legislature never intended the provisions of section 32 of the Act to be used as a tool to deny the benefits of section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment. [Para 16] [863-D-E]

1.4 While it cannot be denied that unless posts are identified for the purposes of section 33 of the Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of section 33 are dependent on section 32 of the Act, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. The reservation under section 33 of the Act is not dependent on identification, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in

section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise. [Para 17] [864-E-H; 865-A-B]

1.5 There is no reason to interfere with the judgment of the High Court impugned in the Special Leave Petition. All interim orders are vacated. The petitioners shall pay the cost of these proceedings to the respondent no. 1 assessed at Rs. 20,000/-. [Paras 19 and 20] [865-C-E]

Francis Coralie Mullin vs. Administrator, Union Territory of Delhi & Ors **(1981) 1 SCC 608;** *The National Federation of Blind vs. Union Public Service Commission & Ors*. **(1993) 2 SCC 411 – referred to.**

Case Law Reference:

(1981) 1 SCC 608	**Referred to.**	**Para 9**
(1993) 2 SCC 411	**Referred to.**	**Para 11**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 14889 of 2009.

From the Judgment & Order dated 25.02.2009 of the High Court of Delhi at New Delhi in WP (C) No. 5429 of 2008.

Indira Jaising, ASG, Rachna Srivastava, Naresh Kaushik, Samridhi Sinha, R.K. Tanwar, Sonam Anand, Anil Katiyar, Ravi Prakash Gupta (Respondent-In-person), Kashi Vishseshwar, A. Sumathi, S.K. Rungta, Pratiti Rungta, Samir Ali Khan, Binu Tamta, Upasana Nath for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Government of India, through the Secretary, Ministry of Personnel & Public Grievances, Department of Personnel and Training and through the Secretary, Ministry of Social Justice and Empowerment, has filed this Special Leave Petition against the judgment and order dated 25th February, 2009, passed by the Delhi High Court in Writ Petition (Civil) No.5429 of 2008, allowing the Writ Petition and setting aside the order dated 7th April, 2008, passed by the Central Administrative Tribunal, Principal Bench, New Delhi, in O.A. No.1397 of 2007, filed by the Respondent No.1 herein, and allowing the reliefs prayed for therein.

2. The Respondent No.1 is a visually handicapped person who suffers from 100% blindness. He appeared in the Civil Services Examination conducted by the Union Public Service Commission in the year 2006. After clearing the preliminary examination, the Respondent No.1 appeared for the main examination in October, 2006 and was declared successful and was, thereafter, called for a personality test scheduled for 1st May, 2007. Pursuant to such interview, the names of 474 candidates who were selected were released on 14th May, 2007. In the said list, the name of one other visually impaired candidate also figured. The Respondent No.1 was at serial no.5 of the merit list prepared for visually handicapped candidates, who had been declared successful in the examination. According to the Respondent No.1, although there were more than 5 vacancies available in the visually handicapped category, only one post was offered under the said category and he was, therefore, not given appointment despite the vacancies available.

3. Being aggrieved by the manner in which selections were made for appointment in the visually handicapped category, the Respondent No.1 filed a Writ Petition, being Writ Petition (Civil) No.5338 of 2007, before the Delhi High Court. The same was

subsequently withdrawn since it was the Central Administrative Tribunal only which had jurisdiction to entertain such matters at the first instance. The Respondent No.1, accordingly, withdrew the Writ Petition, with liberty to approach the Central Administrative Tribunal. Thereafter, he filed an application under Section 19 of the Administrative Tribunals Act, 1985, which was registered as O.A. No.1397 of 2007, staking his claim for appointment under the reservation of vacancies for disabled categories provided for under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection, Rights and Full Participation) Act, 1995, hereinafter referred to as 'the Disabilities Act, 1995'. The basic contention of the Respondent No.1 was that since the aforesaid Act came into force in 1996 providing a statutory mandate for reservation of 3% of the posts available for persons suffering from different kinds of disabilities enumerated in Section 33 of the Disabilities Act, 1995, such reservation ought to have been in force with effect from the date on which the Act came into force. According to the Respondent No.1, if the vacancies were to be considered from the year 1996, then instead of one vacancy being declared for the year in question, there should have been at least 7 vacancies from the reserved categories of disabilities which were interchangeable. It was, therefore, the case of the Respondent No.1 that having regard to the number of appointments made with regard to the disabled categories reserved under Section 33 of the Disabilities Act, 1995, since the Act came into force, there were at least 7 posts which could be filled up in the year 2006. However, in that year only one post from this category had been filled. It was, therefore, the case of the Respondent No.1 that being at serial no.5 of the list of successful candidates amongst the physically impaired candidates, there were sufficient number of vacancies in which he could have been appointed and that the authorities had acted contrary to the provisions of the above Act upon the faulty reasoning that the vacancies in the reserved posts could not be declared, without first identifying the same for the purposes of Sections 32 and 33 of the Disabilities Act, 1995.

4. The case of the Respondent No.1 having been negated by the Tribunal, the Respondent No.1 as indicated hereinbefore, moved the High Court and the High Court, upon accepting the Respondent No.1's case, set aside the order of the Central Administrative Tribunal dated 7th April, 2008, and allowed the Respondent No.1's O.A. No.1397 of 2007 filed before the Tribunal. While allowing the said application, the High Court, upon observing that a clear vacancy was available to which the Respondent No.1 could be accommodated on the basis of his position in the merit list, issued a mandamus to the Respondent No.1 to offer him an appointment to one of the reserved posts by issuing an appropriate appointment letter, within six weeks from the date of the order. Certain consequential orders were also passed together with cost of Rs.25,000/- to be paid by the Petitioner herein.

5. On behalf of the Government of India, which is the Petitioner herein, learned Additional Solicitor General, Ms. Indira Jaising, submitted that the submissions advanced on behalf of the Respondent No.1 which had been accepted by the High Court, were not tenable and that the Government of India had been actively involved in complying with the provisions of the Disabilities Act, 1995, after it came into force. The learned ASG contended that the Government of India had been making reservation for physically handicapped persons in Group 'C' and 'D' posts from 1977 and in order to consider the growing demand from the visually handicapped persons, a meeting for identification of jobs in various Ministries/ Departments was scheduled in 1985 and 416 such posts were identified in Group 'A' and 'B' posts. In 1986, an Office Memorandum was issued by the Department of Personnel & Training (DoPT) providing for preference to be given to handicapped person for these posts. In 1988, another Office Memorandum was issued by the Government of India indicating that the identification done in the year 1986 would remain valid till the same was modified. After the Act came into force in 1996, a further Office Memorandum was issued, whereby

reservation of physically handicapped persons in identified Group 'A' and Group 'B' posts/services was extended to posts which were to be filled up through direct recruitment. Learned ASG submitted that in 1999 the Ministry of Social Justice & Empowerment constituted an Expert Committee to identify/ review posts in categories 'A, 'B', 'C' and 'D', in which recommendations were made for identification of posts for the visually handicapped persons. The report of the Expert Committee was accepted by the Ministry in 2001 and posts were duly identified for persons with disabilities. Learned ASG, however, made it clear that the 416 posts, which had been identified in 1985, did not include All India Services and that for the first time in 2005, the posts of the Indian Administrative Service were identified in compliance with the provisions of Section 33 of the Disabilities Act, 1995 and pursuant to such identification, the posts were reserved and filled up. Ms. Jaising also submitted that reservation upto 3% of vacancies in the reserved posts were, accordingly, identified with effect from 2006 and the claim of the Respondent No.1 for appointment on the basis of the argument that the reservation should have taken effect from 1996 when the Act came into force, was liable to be rejected.

6. Appearing in-person, Mr. Ravi Prakash Gupta, the Respondent No.1 herein, strongly defended the impugned judgment of the High Court and urged that the Special Leave Petition filed by the Government of India was liable to be dismissed. Mr. Gupta submitted that the fact that he was completely blind was known to the Petitioners and their respective authorities from the very beginning, since he had annexed his blindness certificate with his original application in the proforma provided by the Union Public Service Commission (U.P.S.C.), which showed the percentage of his blindness as 100%. However, the main thrust of Mr. Gupta's submissions was that when the Disabilities Act, 1995, came into force in 1996, it was the duty of the concerned authorities to reserve 3% of the total vacancies available immediately

thereafter. The plea of non-identification of posts prior to the year 2006 was only an attempt to justify the failure of the Petitioners to act in terms of the Disabilities Act, 1995. Mr. Gupta submitted that the High Court had negated such contention made on behalf of the Petitioners and rightly directed the Petitioners to calculate the number of vacancies in terms of Section 33 of the above Act from 1996 when the said Act came into force.

7. Mr. Gupta then submitted that in terms of the Department's OM No.3635/3/2004 dated 29th December, 2005, reservations have been earmarked and should have been made available from 1996 itself and in the event the vacancies could not be filled up owing to lack of candidates, the same could have been carried forward for two years after which the same could have been treated as lapsed. Mr. Gupta submitted that although the Petitioners were fully aware of the said Office Memorandum, they chose not to act on the basis thereof and as admitted on behalf of the Government of India, the IAS cadre was identified in 2006 for the purposes of Section 33 of the Disabilities Act, 1995. In fact, the Act remained on paper as far as visually challenged candidates were concerned and only after the judgments of the Delhi High Court in the case of Ravi Kumar Arora and in the case of T.D. Dinakar were delivered, that the identification process was started. Mr. Gupta submitted that it would be pertinent to mention that the two above-mentioned candidates were appointed in the Civil Services without waiting for identification of their respective services on the orders of the High Court.

8. Mr. Gupta submitted that the plea of non-identification of posts in the IAS till the year 2006 could not absolve the petitioners of their statutory obligation to provide for reservation in terms of Section 33 of the aforesaid Act.

9. During the course of hearing, leave had been granted to one A.V. Prema Nath and one Mr. Rajesh Singh to intervene in the proceedings. The submissions made by the Respondent

No.1 have been repeated and reiterated on behalf of the Intervenor No.1, Shri A.V. Prema Nath by A. Sumathi, learned Advocate. His written submissions are embellished with references to various decisions of this Court, including the decision in *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi & Ors.* [(1981) 1 SCC 608], regarding the right to life under Article 21 of the Constitution. The main thrust of the submissions is with regard to the denial of rights to persons with disabilities under Section 33 of the Disabilities Act, 1995, which prevent them from enjoying their fundamental rights to equality and the right to live, by the State.

10. More detailed submissions were made by Mr. S.K. Rungta, learned Advocate, appearing on behalf of the Intervenor No.2, Mr. Rajesh Singh, and it was also sought to be pointed out that the said intervenor was himself a candidate from amongst the visually impaired candidates and had, in fact, been placed at serial no.3 in rank in the merit list for visually impaired candidates in the Central Services Examinations, 2006, whereas the Respondent No.1 had been placed at serial no.5. In other words, what was sought to be projected was that Shri Rajesh Singh had a better claim for appointment from amongst the visually impaired candidates over the Respondent No.1 and that if the vacancies in the reserved category were to be calculated from 1996 and even from 2001, when identification of posts in respect of Civil Services forming part of the IAS Cadre was sought to be effected and a notification to that effect was issued, the Respondent No.1 could not have been appointed.

11. It was further submitted that in the decision of this Court in *The National Federation of Blind vs. Union Public Service Commission & Ors.* [(1993) 2 SCC 411], the demand by blind candidates for being permitted to write the examination in Braille script, or with the help of a Scribe, for posts in the IAS was duly accepted for recruitment to the lowest posts in the service reserved for such persons. It was also held that blind

and partially blind persons were eligible for appointment in Government posts. It was submitted that the submissions made on behalf of the Petitioners that the notification in respect of the services in respect of the Group 'A' and 'B' services in the IAS in 2005 was not a fresh exercise, but only an attempt to consolidate and strengthen the identification already available and that such an exercise could at best be said to be enabling and supplementary action for the smooth implementation of the statutory provisions containing the scheme of reservation for persons with disabilities, could not be taken as an excuse to postpone the benefit which had already accrued to candidates falling within 3% of the vacancies indicated in Section 33 of the Disabilities Act, 1995. It was also urged that after the issuance of OM dated 29th December, 2005 and OM dated 26th April, 2006, there was hardly any room for the Government of India to deny the benefit of reservation to persons with disabilities, including the blind, in Civil Services encompassing the IAS from the year 1996 itself. Furthermore, since the Act itself did not make any distinction between Group 'A' and Group 'B' services and Group 'C' and Group 'D' services, it was not available to the Government of India to contend that since identification had been done only for Group 'C' and Group 'D' services, prior to the year 2005, reservation in respect of Group 'A' and 'B' services, which include the IAS, for which identification was commenced in 2005, would only be available thereafter.

12. On behalf of the Intervenor No.2, it was submitted that the Special Leave Petition was liable to be dismissed with exemplary costs.

13. We have examined the matter with great care having regard to the nature of the issues involved in relation to the intention of the legislature to provide for integration of persons with disabilities into the social main stream and to lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities and for their education, training, employment and

rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific Region, is fulfilled.

14. That the Respondent No.1 is eligible for appointment in the Civil Services after having been declared successful and having been placed at serial no.5 in the disabled category of visually impaired candidates, cannot be denied. The only question which is relevant for our purpose is whether on account of the failure of the Petitioners to identify posts for persons falling within the ambit of Section 33 of the Disabilities Act, 1995, the Respondent No.1 should be deprived of the benefit of his selection purportedly on the ground that there were no available vacancies in the said category. The other question which is connected with the first question and which also requires our consideration is whether the reservation provided for in Section 33 of the Disabilities Act, 1995, was dependent on identification of posts suitable for appointment in such categories, as has been sought to be contended on behalf of the Government of India in the instant case.

15. Although, the Delhi High Court has dealt with the aforesaid questions, we wish to add a few observations of our own in regard to the objects which the legislature intended to achieve by enacting the aforesaid Act. The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the

submission made on behalf of the Union of India that identification of Grade 'A' and 'B' posts in the I.A.S. was undertaken after the year 2005 is not of much substance. As has been pointed out by the High Court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Grade 'A', 'B', 'C' and 'D' posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

16. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in *every establishment* (**emphasis added**). For the sake of reference, Sections 32 and 33 of the Disabilities Act, 1995, are reproduced hereinbelow :

> *"32.Identification of posts which can be reserved for persons with disabilities.-* Appropriate Governments shall –
>
> (a) Identify posts, in the establishments, which can be reserved for the persons with disability;
>
> (b) At periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.
>
> **33.Reservation of posts.-** Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-
>
> (i) blindness or low vision;
>
> (ii) hearing impairment;
>
> (iii) locomotor disability or cerebral palsy,
>
> in the posts identified for each disability:
>
> Provided, that the appropriate Government may, having regard to the type of work carried on in any department or establishment by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

17. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could

remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

18. The various decisions cited by A. Sumathi, learned Advocate for the first intervenor, Shri A.V. Prema Nath, are not of assistance in the facts of this case, which depends on its own facts and interpretation of Sections 32 and 33 of the Disabilities Act, 1995.

19. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the Special Leave Petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court.

20. The petitioners shall pay the cost of these proceedings to the respondent No.1 assessed at Rs.20,000/-, within four weeks from date.

N.J. Special Leave Petition dismissed.

M/S. KANCHANGANGA SEA FOODS LTD.

v.

COMMISSIONER OF INCOME TAX

(Civil Appeal Nos. 3844-3847 of 2003)

JULY 7, 2010

[D.K. JAIN, C.K. PRASAD, JJ.]

Income Tax Act, 1961: ss.5(2), 195, 201 – Receipt by Non resident Company – Chargeability to tax – On facts, assessee obtained permit to carry fishing operations – A Non resident Company agreed to provide fishing trawlers to the assessee – Charter fee payable to Non Resident Company by way of 85% of gross earning from sale of fish – Chartered vessels with entire catch brought to Indian port – Payment of charter fee to the Non resident company in India after valuation and payment of local tax – Held: Receipt of charter fee by Non resident company was chargeable to tax – Assessee erred in not deducting the tax.

The assessee-appellant had been engaged in the business of export of sea food and for that purpose had obtained permit to fish in the exclusive economic zone of India. The assessee entered into an agreement with a Non-Resident company for providing the fishing trawlers. In terms of the agreement, assessee was required to pay charter fee of 85% of the gross earning from the sale of fish to the Non-Resident company.

The Non-Resident Company delivered the trawlers to the assessee at Chennai Port. Actual fishing operations were done outside the territorial waters of India but within the exclusive economic zone. The catch made at high seas were brought to Chennai where surveyor of Fishery Department verified the log books and assessed the value of the catch over which local taxes were levied and

paid. The assessee after paying the dues arranged for customs clearance and paid 85% of the catch to the Non Resident Company.

The assessee did not deduct the tax from the Non-Resident company.

The question which came up for consideration in the present appeal was whether the assessee was in default under Section 201 of the Act for failure to deduct tax under Section 195 of the Act.

Dismissing the appeal, the Court

HELD: 1. From a plain reading of Section 5(2) of the Income Tax Act, it is evident that total income of non-resident company shall include all income from whatever source derived received or deemed to be received in India. It also includes such income which either accrues, arises or deem to accrue or arise to a non-resident company in India. The legal fiction created has to be understood in the light of terms of contract. In the present case the chartered vessels with the entire catch were brought to the Indian Port, the catch were certified for human consumption, valued, and after customs and port clearance non-resident company received 85% of the catch. So long the catch was not apportioned, the entire catch was the property of the assessee and not of non-resident company as the latter did not have any control over the catch. It was after the non-resident company was given share of its 85% of the catch that it came within its control. It is trite to say that to constitute income, the recipient must have control over it. Thus the non-resident company effectively received the charter-fee in India. Therefore, the receipt of 85% of the catch was in India and that being the first receipt in the eye of law and being in India would be chargeable to tax. The non-resident

company having received the charter fee in the shape of 85% of fish catch in India, sale of fish and realization of sale consideration of fish by it outside India shall not mean that there was no receipt in India. When 85% of the catch is received after valuation by the non-resident company in India, in sum and substance, it amounts to receipt of value of money. Had it not been so, the value of the catch ought to have been the price for which non-resident company sold at the destination chosen by it. According to the terms and conditions of the agreement charter fee was to be paid in terms of money i.e. US Dollar 600,000 per vessel per annum "payable by way of 85% of gross earning from the fish-sales". There is no escape from the conclusion that income earned by the non-resident company was chargeable to tax under Section 5(2) of the Income Tax Act. [Para 14] [878-C-H; 879-A-B]

Commissioner of Income-Tax, A.P. v. Toshoku Ltd. **125 I.T.R. 1980 525;** *Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income-Tax, Mumbai* **(2007) 288 I.T.R. 408 (SC) – distinguished.**

2. The assessee was liable to deduct tax under Section 195 of the Income Tax Act on the payment made to the non-resident company and admittedly it having not deducted and deposited was rightly held to be in default under Section 201 of the Income Tax Act. [Para 18] [880-A-B]

Case Law Reference:

125 I.T.R. 1980 525	**distinguished**	**Paras 11, 15**
(2007) 288 I.T.R. 408 (SC)	**distinguished**	**Paras 11, 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 3844-3847 of 2003.

From the Judgment and Order dated 07.06.2002 of the

High Court of Andhra Pradesh at Hyderabad in Referred Case No. 144 of 1995.

WITH

C.A. Nos. 3849-3852 of 2003.

A. Subba Rao and Naik H.K., for the Appellant.

R.P.Bhatt, H.R. Rao, Yatinder Chaudhary and B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. All these appeals arise out of a common judgment dated 7th June, 2002 passed by the Division Bench of the Andhra Pradesh High Court in Referred Case No.144 of 1995 and Writ Petition No.1103 of 1998 and as such they were heard together and are being disposed of by this judgment.

2. Facts giving rise to the present appeals are that the appellant M/s. Kanchanganga Sea Foods Limited is a company incorporated in India and engaged in sale and export of sea food and for that purpose obtained permit to fish in the exclusive economic zone of India. To exploit the fishing rights, the appellant-company (hereinafter referred to as the "assessee") entered into an agreement dated 7th March, 1990 chartering two fishing vessels i.e., two pairs of Bull Trawlers, with Eastwide Shipping Co. (HK) Ltd. a non-resident company incorporated in Hong Kong. Clause 4 of agreement which is relevant for the purpose reads as follows :-

"4. Deponent Owners to provide:

The Deponent Owners will provide fishing vessels, as approved by Government of India, for all inclusive charter fee of US $ 600,000.00 per vessel per annum. The charter fee is inclusive of fuel cost, maintenance repairs, wages, food for the crew and any other expenses incurred in connection with the operation of the vessel. They will provide training to the Indian crew in all aspects of fishing techniques, maintenance and running of the engine. In addition:

a) The Deponent Owners should pay the charterers Rs.75,000/- or 15% of the gross value of the catch whichever is more.

b) Annual charter fee shall be maximum of US $ 600,000 per vessel per annum payable by way of 85% of gross earning from the fish sales subject to the condition that this will not exceed 85% of the sales value of the catch per vessel per annum on voyage to voyage basis. Minimum 15% of the earning by way of sales value of catch of fish should accrue to the charterer. Payment to the Deponent Owners should not exceed the above charter fee.

c) Export value of catch from the chartered vessels should not be lower than the prevailing international market price at the time of export."

Thus, according to the terms of the agreement the Eastwide Shipping Co.(HK) Ltd., the owner of the fishing Trawlers (hereinafter referred to as the "non-resident company") was to provide fishing Trawlers to the assessee for all inclusive charter fee of US $ 600,000 per vessel per annum. In terms of the agreement the assessee was to receive Rs.75,000/- or 15% of the gross value of catch, whichever is more. The charter fee was payable from earning from the sale of fish and for that purpose 85% of the gross earnings from the sale of fish was to be paid to the non-resident company.

3. Necessary permission to remit 85% of the gross earning from the sale of fish towards charter-fee was granted by the Reserve Bank of India. As per agreement the Trawlers

were to be delivered at Chennai Port for commencement of fishing operation. Clause 4 of the terms and conditions of permission granted by the Reserve Bank of India reads as follows:

> "4. In case you are required to deduct tax at source while paying charter hire charges, you have to produce documentary evidence showing the payment of taxes by deduction at source from the charter hire charges paid by you. However, if no tax is to be deducted at source as above, a clearance to that effect should be obtained from the Ministry concerned and submitted to us before payment of charter hire charges."

4. Trawlers were delivered to the assessee with full equipment and complement of staff at Chennai Port. Actual fishing operations were done outside the territorial waters of India but within the exclusive economic zone. The voyage commenced and concluded at Chennai Port. The catch made at high seas were brought to Chennai where surveyor of Fishery Department verified the log books and assessed the value of the catch over which local taxes were levied and paid. The assessee after paying the dues arranged Customs clearance for the export of the fish and the Trawlers, which were used for fishing, carried the fish to destination chosen by non-resident company. The Trawlers reported back to Chennai Port after delivering fishes to the destination and commenced another voyage. The assessee did not deduct the tax from the non-resident company nor produced any clearance certificate during the Assessment Years 1991-92 to 1994-95. Notice under Section 201(1) of the Income Tax Act was issued to it to show cause as to why it should not be deemed to be an assessee in default in relation to tax deductible but not deducted. The assessee filed objection contending that the non-resident company did not carry out activities or operations in India which have the effect of resulting in accrual of income in India and hence it was not obliged to make any deduction. Alternatively, it was contended that even if the operation of

bringing the catch to India Port for Customs appraisal and export to the non-resident company results in an operation, it was an operation for mere purchase of goods and, therefore, there was no income liable for assessment. It was also contended that even if 85% of the catch is considered as charter fee to the non-resident company it was paid outside India. Accordingly the plea of the assessee is that where the entire income is not taxable there is no obligation to deduct tax at source. The Income Tax Officer considered the objections raised by the assessee and finding the same to be untenable rejected the same and while doing so observed as follows:

> "In the light of the above, I have no hesitation in holding that the income earned by the non-resident company was chargeable to tax u/s. 5(2) of the Income Tax Act. The assessee made payment to the foreign-company, the sums representing hire charges, without deducting taxes at source, thereby committed default under the provisions of Section 195. This is, therefore, a fit case to deem it to be an assessee in default as laid down in Section 201(1) of the Income Tax Act, 1961."

5. Ultimately, it held the assessee to be in default of Rs.1,66,91,962/-, which included interest due under Section 201(1A) of the Income Tax Act. The Income Tax Officer further held the assessee liable to pay interest @ 15% on the taxes payable and interest accrued at a rate of Rs.1,55,872/- per month from 1st October, 1992 onwards till the date of payment.

6. On appeal by the assessee, the Deputy Commissioner (Appeals) declined to interfere and affirmed the order of the Income Tax Officer on its following findings:

> "It is commercial venture of the appellant. For giving assistance to it, Eastwide is paid hire charges. Actual payment is made at an Indian Port, that is, in India. Only when the catch is brought in, its suitability is certified on inspection its valuation is made, and customs and port

clearance is given, that Eastwide effectively receives its payment. Simultaneously the appellant also credits Eastwide's account. Therefore, Eastwide actually receives the hire charges in India. In this connection it has to be remembered that for the purpose of Income Tax Act the nature of a receipt is to be considered from the commercial point of view and is not to be confused with its nature under the general law. (C.I.T. vs. Scindia Worshop Ltd. – 119 I.T.R. 526, 331 Bom.)."

7. However, the Deputy Commissioner reduced the liability to Rs.8,34,597/-. The assessee unsuccessfully preferred appeal before Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") and on its following finding it dismissed the appeal :

"The entire catch of fish belonged to the assessee. It was shown as sale by the assessee, 85% of such fish catch was adjusted against the liability of the assessee towards hire charges for chartering the vessels from the non-resident. It was thus in discharge of the assessee's liability against hire charges and therefore, it would be receipt in the hands of the non-resident under Section 5(2) of the Act."

8. The Tribunal on an application filed before it by the assessee had referred to the Andhra Pradesh High Court, the following questions of law:

"1. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that payment is made to the Non-Resident by the assessee in India ?

2. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the receipt in the form of 85% of the catch of fish by the Non-Resident was in India since all the formalities are completed in India ?

3. Whether on the facts and in the circumstances of the case the Appellate Tribunal is justified in rejecting the claim that there is no payment to the non-resident by the assessee but there was only a receipt of 15% of the value of fish catch from the non-resident to the assessee ?

4. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the assessee is liable to deduct tax at source under section 195 of the Act on the alleged payment made to the Non-Resident towards hire charges even though the alleged payment is not in cash ?

5. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the assessee was in default under Section 201 of the Income Tax Act, 1961, for the failure to deduct tax under section 195 of the Act ?"

9. The assessee, then filed application before the Tribunal for stay of collection which was rejected and the writ petition and special leave petition preferred against that order were dismissed by the High Court and this Court. The assessee had also filed application for rectification of the order dismissing the appeals dated 14th February, 1995 but the said application was also dismissed.

10. Aggrieved by the same assessee filed Writ Petition No.1103 of 1998 and both the Reference and the Writ Petition were heard together by the High Court and have been answered and disposed of together by the common judgment impugned in these appeals. The High Court answered all the questions referred to it against the assessee and in favour of the Revenue, same read as follows:-

"*On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that payment is made to the non-resident by Assessee in India.*

On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the receipt in the form of 85% of the catch of fish by the non-resident was in India since all the formalities are completed in India.

On the facts and in the circumstances of the case, the Tribunal is justified in rejecting the claim that there is no payment to the non-resident by the Assessee but there was only a receipt of 15% of the value of fish catch from the non-resident to the Assessee;

On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the Assessee is liable to deduct tax at source under Section 195 of the Act on the alleged payment made to the non-resident towards hire charges even though the alleged payment is not in cash; and

On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the Assessee was in default under Sec.201 of the Income Tax Act, 1961 for the failure to deduct tax under Section 195 of the Income Tax Act."

11. Mr. A. Subba Rao, learned Counsel appearing on behalf of the appellant-assessee submits that there was no income chargeable which resulted to the non-resident company as no payment of any sum by the assessee to the non-resident company took place in India and therefore, the liability to deduct tax at source under Section 195 of the Income Tax Act or the liability under Section 201 of the Act did not arise. It has also been pointed out by the learned Counsel that there was no receipt of income at all in India as the 85% of the fish catch, which was given to the non-resident company, was sold outside

India and the sale proceeds thereof were also realized outside India. In his submission, the non-resident company, therefore, had no receipts in India. In support of the submission reliance has been placed on a decision of this Court in the case of *Commissioner of Income-Tax, A.P. v. Toshoku Ltd.* (125 I.T.R. 1980 525) and our attention has been drawn to the following passage from the said judgment:

> "In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl.(a) of the Explanation to s.9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."

Reliance has also been placed on a decision of this Court in the case of *Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income-Tax,* Mumbai [(2007) 288 I.T.R. 408 (SC)] and our attention has been drawn to the following passage at pages 443-444:

> "Therefore, in our opinion, the concepts profits of business connection and permanent establishment should not be mixed up. Whereas business connection is relevant for the purpose of application of Section 9; the concept of permanent establishment is relevant for assessing the income of a non-resident under the DTAA. There, however, may be a case where there can be overlapping of income; but we are not concerned with such a situation. The entire transaction having been completed on the high seas, the profits on sale did not arise in India, as has been

contended by the appellant. Thus, having been excluded from the scope of taxation under the Act, the application of the double taxation treaty would not arise. The Double Tax Treaty, however, was taken recourse to by the appellant only by way of an alternate submission on income from services and not in relation to the tax of offshore supply of goods."

12. Mr. R.P. Bhatt, learned Senior Counsel appearing on behalf of the respondent, however, contends that income had accrued to the non-resident company in India and admittedly the assessee having not carried out its obligations to make deductions, the authorities and the Tribunal rightly held the assessee in default.

13. We have considered the submissions advanced and we do not find any force in the submissions of the Counsel for the appellant and the authorities relied on are clearly distinguishable and those in no way support assessee's contention. Section 5(2) of the Income Tax Act provides, what would be the total income of a non-resident, same reads as follows:

"5(1) xxxx xxxx xxxx

(2) *Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—*

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

14. From a plain reading of the aforesaid provision it is evident that total income of non-resident company shall include all income from whatever source derived received or deemed to be received in India. It also includes such income which either accrues, arises or deem to accrue or arise to a non-resident company in India. The legal fiction created has to be understood in the light of terms of contract. Here, in the present case the chartered vessels with the entire catch were brought to the Indian Port, the catch were certified for human consumption, valued, and after customs and port clearance non-resident company received 85% of the catch. So long the catch was not apportioned the entire catch was the property of the assessee and not of non-resident company as the latter did not have any control over the catch. It is after the non-resident company was given share of its 85% of the catch it did come within its control. It is trite to say that to constitute income the recipient must have control over it. Thus the non-resident company effectively received the charter-fee in India. Therefore, in our opinion, the receipt of 85% of the catch was in India and this being the first receipt in the eye of law and being in India would be chargeable to tax. In our opinion, the non-resident company having received the charter fee in the shape of 85% of fish catch in India, sale of fish and realization of sale consideration of fish by it outside India shall not mean that there was no receipt in India. When 85% of the catch is received after valuation by the non-resident company in India, in sum and substance, it amounts to receipt of value of money. Had it not

been so, the value of the catch ought to have been the price for which non-resident company sold at the destination chosen by it. According to the terms and conditions of the agreement charter fee was to be paid in terms of money i.e. US Dollar 600,000/= per vessel per annum "payable by way of 85% of gross earning from the fish-sales". In the light of what we have observed above there is no escape from the conclusion that income earned by the non-resident company was chargeable to tax under Section 5(2) of the Income Tax Act.

15. Now referring to the decisions of this Court in the case of *Toshoku Ltd.(supra)*, same is clearly distinguishable. In the said case the amount credited in favour of the assessee was not at its disposal and in the background of the said fact it was held that making entries in the books would not amount to receipt of income, actual or constructive, which would be evident from the following passage of the judgment:

> "It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control."

Here the non-resident company had received charter-fee in India in the shape of 85% of the catch after its valuation, over which it had alone control and therefore receipt was chargeable to tax.

16. In the case of *Ishikawajima-Harima Heavy Industries Ltd.*(supra) the entire transaction was completed on high-seas, and in this background, it was held that profit did not arise in India. In the case in hand, undisputedly the catch was brought to an Indian Port, where it was valued and after paying the local taxes, charter fee in the shape of 85% of the catch was given to the non-resident company.

17. Both the decisions, therefore, do not lend any support to the contention of the assessee.

18. From the conspectus of discussion aforesaid, it is obvious that the assessee was liable to deduct tax under Section 195 of +the Income Tax Act on the payment made to the non-resident company and admittedly it having not deducted and deposited was rightly held to be in default under Section 201 of the Income Tax Act.

19. We do not find any merit in these appeals and they are dismissed accordingly, but without any order as to costs.

D.G. Appeal dismissed.