SUBHADRA AND ORS.
v.
THANKAM
(Civil Appeal Nos. 291-292 of 2006)

JULY 8, 2010

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

Specific Relief Act, 1963 – s.26 – Applicability of – Suit for specific performance of agreement to sell – Decreed – Decree challenged – Plea of defendant that the agreement in question suffered from ambiguity as regards description of the property and hence rectification of the agreement u/s.26 was a condition precedent for passing a decree for specific performance – Held: Plea not tenable – Relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument – On facts, the agreement in question related to sale of specific property and there was no ambiguity or mutual mistake therein.

The appellant entered into an agreement to sell property (Ext. A1) in favour of respondent for money consideration. The respondent paid earnest money and subsequently approached the appellant with the balance consideration to get the sale deed executed. However, a dispute arose between the parties with regard to the correct extent/ identity of the property agreed to be sold by the appellant in favour of the respondent. While the appellant took the stand that only 5 cents of land was agreed to be sold to the respondent, the latter stated that though the land agreed to be sold was 5 cents, but in addition thereto, the other structures as contemplated in Ex. B1 were also to be sold for consideration.

The respondent filed suit for specific performance.

The trial court decreed the suit. The High Court upheld the decree.

In the instant appeals, it was contended that the language of Ext. A1 was ambiguous and uncertain and that the respondent ought to have sought rectification of the deed in relation to that extent of the property in terms of Section 26 of the Specific Relief Act 1963, and since no such relief for rectification was prayed by the respondent, the decree for specific performance ought not to have been granted.

Dismissing the appeals, the Court

HELD: 1.1. The provisions of Section 26 of the Specific Relief Act, 1963 would be attracted in limited cases and do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument. Even then the party claiming will have to make specific pleadings and claim an issue in that behalf. [Para 7] [308-D-F]

1.2. The plea of the appellant that since no relief for rectification has been prayed, the decree for specific performance ought not to be granted is not tenable. Section 26(4) of the Act only says that no relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed. However, proviso to Section 26(4) of the Act makes it clear that when such a relief has not been claimed by the concerned parties, the Court shall, at any stage of the proceedings allow him to amend the pleadings on such terms, as may be just, for including such a claim and it would be necessary for the party to file a separate suit.

The legislative intent in incorporating this provision, therefore, is unambiguous and clear. The purpose is not to generate multiplicity of litigation but to decide all issues in relation thereto in the same suit provided the provisions of Section 26 of the Act are attracted in the facts of a given case. [Para 8] [308-G-H; 309-A-C]

1.3. In the present case, the bare reading of the materials on record shows that something in addition to the bare land was intended to be sold. The description of the entire property has been given in Ext.B1. In other words, 5 cents and complete description of Ext. B1 was the subject matter of the sale in terms of Ext.A1. This aspect of the case stands fully clarified and Ext.A1 has been completely clarified with certainty by the report of the Commissioner, which was relied upon by the trial court. In face of the matters being beyond ambiguity, there is no occasion for this Court to interfere with this finding of fact. [Para 7] [308-B-D]

1.4. The provisions of Section 26 of the Act are not attracted in the facts and circumstances of the present case. On the contrary, the respondent had specifically taken up the plea that Exts. A1 and B1 relate to sale of specific property and there was no ambiguity or mutual mistake. Both the courts below have returned a concurrent finding in favour of the respondent and there is no reason to disturb the said finding. There is no controversy in the appreciation of evidence and the courts below have recorded the concurrent finding on the basis of evidence documentary and oral, adduced before them and have taken a view which is permissible and in accordance with law. [Para 8] [308-C-F]

Puram Ram v. Bhaguram, **(2008) 4 SCC 102, explained.**

Case Law Reference:

(2008) 4 SCC 102 explained Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 291-292 of 2006.

From the Judgment & Order dated 11.11.2003 of the High Court of Kerala at Ernkulam in A.S. 354 of 1994 and 667 of 1995.

Romy Chacko for the Appellants.

K. Parameshwar, A. Raghunath for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Ramakrishna Menon, who unfortunately died during the pendency of the litigation, entered into an agreement to sell, dated 20th June, 1979, in favour of Thankam for sale of the full rights over the property measuring about 5 cents of land in Sy. No. 460/3 in Peringavu Village and all improvements purchased and processed by him under the Document No. 1887 of 1969 and registered in Paras 283 to 285 of Book No. 1 Volume 54 of Thrissur, Sub Registrar Office for a total consideration of Rs.45,250/-. A sum of Rs.5,000/- was paid by way of earnest money and it was agreed that the sale deed would be executed in favour of the predecessor, within six months from the date of the execution of the Agreement. It was also stated in the Agreement, which came to be exhibited as Ext.A1 during the course of recording of evidence, that all receipts, encumbrance certificate etc. should be taken and handed over to the predecessor at the time of execution of the sale deed. In other words, the sale deed was to be executed on or before 20th December, 1979. Thankam served the Registered Notice dated 10th December, 1979 upon the seller stating that they were always ready and willing to purchase the property and were ready to execute a sale

deed, free of encumbrance, in their favour. A reply to the above notice was given on 12th December 1979, saying that the seller was prepared to give the land lying within the four well-defined boundaries, but only 5 cents would be given to the plaintiff. Thereafter, the defendant tried to demolish the northern boundary wall and tried to shift it towards the south. A suit was instituted by Thankam as O.S. No. 1387 of 1979 simply to prevent this mischief in which a commissioner was appointed to file a report after making an inspection of the property. Thereafter, the predecessor in interest and her husband approached the defendant with the balance consideration to get the sale deed executed, which was not so done and they, then, filed a suit for specific performance, which came to be registered as O.S. No. 3 of 1980.

2. Thankam, the plaintiff in this Suit is the respondent before this Court, while the applicants are the legal representatives of the deceased seller who, as already noticed, were brought on record. The Learned Trial Court framed the following issues:

(i) What is the correct extent or identity of the property agreed to be sold?

(ii) Whether the defendant had committed breach of the agreement?

(iii) Whether the plaintiff is entitled to specific performance of the agreement?

3. Both the above suits were tried together and finally, vide its judgment and decree dated 24th March, 1994, a decree was passed in favour of the respondent in both the suits. While granting a decree for specific performance, the Court directed the payment of the balance price of Rs.45,250/- at the time of registration of the sale deed. In the event the appellant failed to get the sale deed executed, the same was to be executed through the Court at the cost of the appellant. This judgment

and decree of the trial Court was challenged by the appellants by filing two separate appeals being Appeal Nos. 354 of 1994 and 667 of 1995 before the High Court of Kerala at Ernakulam. The High Court rejected both the appeals and while relying upon the report of the commissioner Ext.C1, it held that in the agreement, the intention of the parties was to sell the entire property obtained by him as per Ext.B1, in which the property had been fully described and 5 cents did not refer to the entire subject matter agreed to be sold under the terms of Agreement Ext.A1. Being aggrieved by the judgment of the High Court dated 11th November, 2003, the appellant has filed the present two appeals being Civil Appeal Nos. 291-292 of 2006. The main contentions raised before us are that the language of Agreement Ex.A1 is ambiguous, uncertain and that the respondent ought to have sought rectification of the deed in relation to that extent of the property in terms of Section 26 of the Specific Relief Act 1963 (hereinafter refer to as 'the Act'). It is further argued that the Courts in the judgments under appeal have failed to appreciate the documentary and oral evidence in its correct perspective inasmuch as only 5 cents of land have been agreed to be sold to the respondent by the appellant and/or their predecessor in interest and that much of land was not available.

4. At the very outset, we may notice that at page 18 of the paper book translated copy of Ext.A1 has been filed. This document does not contain any reference or mention about 5 cents of land of the Sy. No. argued to be sold. However, the original document which was shown to us during the course of the hearing does indicate measurement of land as 5 cents. The Learned Counsel appearing for the respondent stated that the land agreed to be sold was 5 cents, but in addition thereto, the other structures as contemplated in Ex.B1 were also to be sold for the consideration stated in Ex.A1. Thus, according to the Learned Counsel appearing for the respondent, there was hardly any dispute or appropriate defence raised to the claim of the respondent before the Trial Court, as such decree in

favour of the respondent has been passed in accordance with law and did not call for any interference by this Court.

5. At the very outset, we may notice that there are concurrent findings of facts recorded by the Courts in the impugned judgments as such we do not propose to interfere in such findings of facts. We would only refer to the necessary factual matrix of the case for the purpose of determination of the legal controversy as to whether the agreement suffers from any ambiguity and whether rectification of the document, in the facts and circumstances of the case, was a condition precedent for passing a decree for specific performance. We may refer to the findings recorded by the Learned Trial Court in regard to the description of the property and other facts which may be of relevance for the purposes of determining the main controversy between the parties which reads as under:

> "16. This document is marked as Ext.B1. The description of the property given in Ext. B1 would show that it is about 5 cents of land comprised in Sy. 460/3. It is the southern portion of the property of the entire extent that was sold. In the document there is the reference to the building in the property and the right to collect the rent from the occupants……
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> …..The commissioner on the basis of the above said document tried to fix the northern boundary of the property promised to be sold. When he measured 5 cents of land, it is his report that the northern old boundary wall was found to be about ¾ dannu to .16 dannu further north to the boundary fixed by measuring the property to the extent of 5 cents. The eastern property of Kuttappan Master was found to be 2.4 dannu away from the eastern boundary of the 5 cents of land. But the commissioner was not directed to find out the length and breadth of the property which is given in Ext. B1 as 4 dannu and 6 ¼ dannu. It is also the report of the commissioner that when the 5 cents of land was separately measured, the northern boundary so fixed

> would pass through the existing latrine and bath room, which was an old construction near to the northern boundary. Thus it is very clear that when the property is measured on the basis of the extent shown in Ext. B1, there is discrepancy with respect to the description of the property in Ext. B1 document. In Ext. B1 document there is the mentioning of occupation of the building by tenants and it is the admitted case that there are old latrine and bath room existing on the northern side of the property that being in the use of the tenants. It is the case of the plaintiff that there are two tenants in the property occupying the two portions of the building constructed under the same roof. It is the admitted case of the defendant that he renewed the rental transactions with the tenants occupying the building. The earlier commission report shows that on the northern wall there is a gap for entering into the plaint schedule property from the rest of the property owned by the mother-in-law of the defendant. In Ext.C1 report the commissioner has made it very clear that the property is having about 4 dannu and 1 ½ kole width. In the second report it is stated that the length of the property is more than 2.4 dannu than what is stated in Ext.B1. But as far as eastern boundary is concerned, it is clearly stated in Ext. B1 document that it is the property owned by Kuttappan Master. As far as the width of the property is concerned, the measurement of 4 dannu is almost accurate. When there is discrepancy among Sy. No., extent and boundaries of a property, the more certain one is to prevail upon that.
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> 17. The vender of the property was not examined to ascertain that she is having property further south to her southern compound wall mentioned in the plaint as the northern compound wall. So long as the vendor was not examined, it cannot be said that she is claiming to have any property beyond the southern compound wall which is the northern boundary of the property sold by Ext. B1. It is

already found that there is no separate description of the property in Ext. A1 karar. The mentioning is that of the property purchased on the basis of Ext. B1 document. Nothing is stated in Ext.B1 document regarding the balance of the property to be retained by the intended seller obtained on the basis of Ext. B1. There is no mentioning of value of the property per cent. Thus Ext. A1 karar was executed with the intention to sell the entire property obtained by the defendant on the basis of Ext. B1 document. It that is so, the assertion of the plaintiff that he was willing to execute the document after parting with the balance of consideration is to be upheld. The insistence of the defendant that the property should be measured so as to fix the extent i.e 5 cents, is only an attempt to evade the execution of the document. The parties never intended to execute any document only for 5 cents as the intention is to sell the entire property covered by Ext. B1. If that is so, the plaintiff is entitled to get a decree for specific performance of contract. The prohibitory injunction sought by the plaintiff is also to be upheld as tampering with the northern boundary wall is only with the intention to defeat the legitimate right of the plaintiff to get the document executed on the basis of Ext. A1 agreement. Therefore, both the suits are to be decreed. The issues are answered accordingly."

6. The above finding of facts was confirmed by the High Court in the exercise of its appellate jurisdiction. Both the suits filed have been decreed by a common judgment dated 31st January, 1984. The decree was set aside by the High Court vide its order dated 22nd August, 1990 wherein it remanded the suit for fresh disposal after fixing the boundaries of the property in dispute. The Trial Court conducted fresh trial in furtherance to this direction and passed a decree afresh vide its judgment dated 24th March, 1994.

The relevant para of Ex. P1 reads as under:

"The first party hereby argues (sic = agrees) to sell his full rights over the property Sy. 460/3 of Peringavu Village and all improvements purchased and possessed by 1st party under document No. 1887 of 1969 and resisted in Paras 283 to 285 of Book 1 Volume 54 of Thrissur Sub Registrar office to the Second party will and any encumbrance for a price of Rs.45,250/-."

7. The bare reading of this portion shows that something in addition to the bare land was intended to be sold. The description of the entire property has been given in Ext.B1. In other words, 5 cents and complete description of Ext. B1 was the subject matter of the sale in terms of Ext.A1. This aspect of the case stands fully clarified and Ext.A1 has been completely clarified with certainty by the report of the Commissioner, which was relied upon by the trial Court. In face of the matters being beyond ambiguity, there is no occasion for this Court to interfere with this finding of fact. Furthermore, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases. The provisions of this Section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument. Even then the party claiming will have to make specific pleadings and claim an issue in that behalf.

8. The Learned Counsel appearing for the appellant placed reliance on the case of *Puram Ram v. Bhaguram,* [(2008) 4 SCC 102] and contended that since no relief for rectification has been prayed, the decree for specific performance ought not to be granted. This submission is based upon the misreading of the judgment of this Court. All that has been stated in the judgment is that Section 26 (4) of the Act only says that no relief for the rectification of an instrument shall

be granted to any party under this section unless it has been specifically claimed. However, proviso to Section 26 (4) of the Act makes it clear that when such a relief has not been claimed by the concerned parties, the Court shall, at any stage of the proceedings allow him to amend the pleadings on such terms, as may be just, for including such a claim and it would be necessary for the party to file a separate suit. The legislative intent in incorporating this provision, therefore, is unambiguous and clear. The purpose is not to generate multiplicity of litigation but to decide all issues in relation thereto in the same suit provided the provisions of Section 26 of the Act are attracted in the facts of a given case. We have already stated that the provisions of Section 26 of the Act are not attracted in the facts and circumstances of the present case. On the contrary, the respondent had specifically taken up the plea that Ext. A1 and B1 relate to sale of specific property and there was no ambiguity or mutual mistake. The Courts have returned a concurrent finding in favour of the respondent and we see no reason to disturb the said finding. The High Court has specifically noticed that perusal of Ext. B1 shows that the eastern boundary is the property owned by one Kuttappan Master and the northern boundary is shown as rest of the property as old one. There is no controversy in the appreciation of evidence and the Courts have recorded the concurrent finding on the basis of evidence documentary and oral, adduced before them and have taken a view which is permissible and in accordance with law. The contention of law raised before us on behalf of the appellant, in any case, has no merit as aforestated.

9. For the reasons afore recorded, we see no merit in the present appeals and same are dismissed. While declining to interfere in the concurrent judgment of the courts, we dismiss these appeals. The parties are, however, left to bear their own costs.

B.B.B. Appeals dismissed.

LAXMAN TATYABA KANKATE & ANR.
v.
TARAMATI HARISHCHANDRA DHATRAK
(Civil Appeal No. 6509 of 2005)

JULY 8, 2010

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

Specific Relief Act, 1963 – ss.13(1)(c) and 20 – Agreement to sell – Failure to execute sale deed – Suit for specific performance and, in the alternative, for refund of earnest money – Trial court partly decreeing the suit and directing refund of earnest money – First appellate court granting relief of specific performance – High Court affirming the decree passed by first appellate court – Held: Grant of decree of specific performance is lawful and also justified on the facts as well as equity – Even if the property was mortgaged to Co-operative Society, there is no bar to transfer the property in view of s. 48(d) of Co-operative Societies Act and ss. 12(1)(c) and 12(2) of Resettlement Act – Purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract where the property is encumbered for an amount not exceeding purchase money – Increase in the price of suit property cannot be a ground for denying decree of specific performance – Maharashtra Co-operative Societies Act, 1960 – s. 48(d) – Maharashtra Re-settlement of Project Displaced Persons Act, 1976 – ss. 12(1)(c) and 12(2) – Equity.

The plaintiff-respondent entered into an agreement with the defendants-appellants whereby the latter agreed to sell the suit land to the former. A sum of Rs. 10,000/- was paid at the time of agreement. As the appellants failed to execute the sale deed in favour of the respondent, the latter filed the suit for specific performance and, in the

alternative, for refund of earnest money along with damages.

The trial court concluded that there was no intention on the part of the defendants to sell the property and partially decreeing the suit, directed the defendants to pay a sum of Rs. 10,000/- with interest @ 6% p.a. and denied the relief of specific performance of contract. The first appellate court setting aside the decree passed by the trial court, passed the decree for specific performance upon grant of permission by the competent authority as contemplated u/s. 12(c) of Maharashtra Re-settlement of Project Displaced Persons Act, 1976 and also by the Co-operative Society as contemplated u/s. 47(2) of Maharashtra Co-operative Societies Act, 1960. The High Court affirmed the decree passed by the first appellate court.

In the instant appeal, the appellant-defendant contended that no decree for specific performance could have been passed because the property could not be transferred in favour of the respondent in view of the restriction u/s. 48 of Co-operative Societies Act and u/ss. 12(1)(c) 12(2) and 12(3) of the Re-settlement Act; that the courts below failed to appreciate the evidence in its correct perspective; and that the value of the suit property had increased tremendously.

Respondent-plaintiff volunteered to pay increased amount towards the consideration i.e. Rs. 1,50,000/- instead of Rs. 40,000/- in view of the increased price of the land.

Dismissing the appeal, the Court

HELD: 1. All the three courts have returned all the findings of fact in favour of the respondent. Such findings are based upon proper appreciation of evidence and no

legal infirmity can be traced in them. It is hardly permissible for Supreme Court to go into such questions of facts alone, in exercise of its jurisdiction under Article 136 of the Constitution of India. [Para 11] [322-A-B]

2.1 It is not correct to say that the land could not have been transferred in favour of the respondent in view of the restriction contained in the provisions u/s. 48 (d) of Maharashtra Co-operative Societies Act, 1960 and u/ss. 12(1) (c), 12(2) and 12(3) of Maharashtra Re-settlement of Project Displaced Persons Act, 1976. The appellants did not adduce any evidence that the property in question had been mortgaged or was under the charge of the Co-operative Society. The appellants did not place any such argument or specific plea. In fact, no such issue was either claimed or framed in this regard. [Paras 10 and 12] [323-C-D]

2.2 Besides, the provisions of clause (d) of Section 48 of Maharashtra Co-operative Societies Act, 1960 places a conditional restriction upon alienation of the whole or any part of the land or interest in the property unless and until the whole amount borrowed by the member of the Society has been repaid with interest. Once the loan of the Society has been cleared, it obviously cannot have any objection to transfer the property. No effort was made by the appellants to bring on record any evidence to show as to what was the extent of money currently due to the Society, if at all, and for what amount the property had been mortgaged in its favour. In the absence of any specific evidence in that regard, the Court will have to draw an adverse inference against the appellants for not producing before the court the best available evidence. In any case, the appellants cannot take advantage of their own wrong. [Para 12] [322-D-G]

2.3 As regards the plea that the land could not be

transferred in favour of the respondent in view of the restriction contained in Sections 12(1)(c) and 12(2) of the Maharashtra Re-settlement of Project Displaced Persons Act, 1976, a bare reading of the provisions shows that the Government can grant permission for transfer of the property, subject to such conditions, as it may deem fit and proper. Again, the appellants have neither claimed any issue nor led any evidence to substantiate even this plea. [Paras 12 and 13] [323-G-H; 324-A-B]

Nathulal v. Phool Chand AIR **1970 SC 546 – relied on.**

3.1 Section 13(1)(c) of the Specific Relief Act, 1963 clearly postulates that where a person contracts to sell an immovable property with an imperfect title and the property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract in its favour. [Para 13] [323-D-E]

3.2 Section 20 of the Specific Relief Act vests the court with a wide discretion either to decree the suit for specific performance or to decline the same. The discretion of the Court has to be exercised as per the settled judicial principles. In the instant case, it is the appellants who have taken advantage of the pendency of the proceedings. They have used the sum given towards earnest money for all this period as well as have enjoyed the fruits of the property. It is, therefore, not only lawful but even equity and facts of the case demand that a decree for specific performance should be granted in favour of the respondent. Besides, the respondent has agreed to pay much higher consideration than what was payable in terms of the agreement of sale. [Paras 14 and 15] [323-F; 325-B-E]

Bal Krishna vs. Bhagwan Das **(2008) 12 SCC 145;** *Mohammadia Cooperative Building Society Ltd. vs. Lakshmi Srinivasa Cooperative Building Society Ltd. and Ors.* **(2008) 7 SCC 310;** *P.V. Joseph's son Mathew vs. N. Kuruvila's Son* **AIR 1987 SC 2328 – distinguished.**

4. The onus to prove that the respondent had obtained signatures of the appellants on blank papers on the pretext of advancing a loan of Rs.2,000/- was entirely upon the appellants. No evidence, much less cogent documentary or oral evidence, was led by the appellants to discharge this onus. The averment has rightly been disbelieved by the courts concerned. The appellants led no evidence and brought nothing to the notice of this Court, even during the course of the hearing, in support of their case. [Para 16] [325-E-H]

5. It is a settled principle of law that before the first appellate court, the party may be able to support the decree but cannot challenge the findings without filing the cross-objections. The appellants have neither filed cross- objections nor any appeal challenging the findings recorded by the trial court. In fact, the entire conduct of the defendant-appellants shows that they have not only failed to prove their claim before the courts of competent jurisdiction but have even not raised proper pleas in their pleadings. [Para 16] [325-G-H; 326-A-B]

6.1 Increase in the price of the land in question cannot be a ground for denying the decree of specific performance to the respondent. The first appellate court, by a well reasoned judgment, has granted the relief of specific performance instead of only granting refund of money, as given by the trial court. The judgment of the first appellate court has been upheld by the High Court and there is no reason whatsoever to interfere with the concurrent findings of facts and law as stated in the judgment under appeal. [Para 17] [326-C-D]

6.2 The respondent has volunteered to pay a sum of Rs.1,50,000/- instead of Rs.40,000/- as the total sale consideration. This offer of the respondent is very fair. Even from the point of view of equity, the offer made by the respondents, substantially balances the equities between the parties. Therefore, no prejudice will be caused to the appellants in any manner whatsoever. [Paras 17 and 18] [326-D-E; 326-F-G]

Case Law Reference:

AIR 1970 SC 546	**Relied on.**	**Para 13**
2008 (12) SCC 145	**Distinguished.**	**Para 14**
2008 (7) SCC 310	**Distinguished.**	**Para 14**
AIR 1987 SC 2328	**Distinguished.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6509 of 2005.

From the Judgment & Order dated 17.07.2001 of the High Court of Judicature at Bombay bench at Aurangabad in Second Appeal No. 96 of 2001.

Miten Mahapatra, Ravindra Keshavrao Adsure for the Appellants.

Nitin Kumar Gupta (for Shivaji M. Jadhav) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Civil Judge, Senior Division, Shrirampur, District Ahmednagar (for short 'the Trial Court'), in a suit for specific performance and in the alternative for recovery of Rs. 10,000/-, vide his judgment and decree dated 25th July, 1995 partially decreed the suit of the plaintiff (respondent

herein), dismissing her claim for specific performance, ordered refund of earnest money with interest at the rate of 6% per annum pendente lite and future, with proportionate cost.

2. Against this decree, the respondent filed an appeal before the District Judge, Ahmednagar (hereinafter referred to as 'the First Appellate Court'), who, vide his judgment and decree, dated 28th November, 2000, decreed the suit in its entirety. The Court granted decree for specific performance in respect of the land in question and upon grant of permission by the competent authority, as contemplated under Section 12 (c) of the Maharashtra Re-settlement of Project Displaced Persons Act, 1976, (hereinafter referred to as 'the Re-settlement Act') and also by the Society, as contemplated under Section 47(2) of the Maharashtra Cooperative Societies Act, 1960, (for short 'the Societies Act'), the appellants were entitled to specific performance upon payment of the balance sale consideration of Rs. 30,000/-. It also directed the appellants to submit an application seeking permission from the competent authority and execute a registered sale deed in favour of the respondent herein.

3. The legality and correctness of the aforesaid decree was challenged by the appellants before the High Court of Judicature at Bombay at its Aurangabad Bench in Second Appeal No. 96 of 2001 which came to be dismissed vide judgment dated 17th July, 2001. Aggrieved from the aforesaid concurrent decrees passed by the Courts, the present appeal under Article 136 of the Constitution of India has been preferred by the appellants.

4. The necessary facts are that, according to the respondent, an agreement to sell dated 08.01.1991 was entered into between the parties in terms whereof the appellants had agreed to sell the land admeasuring 1H. 60 R. in Village Pimpri Lokai, Taluka Shrirampur, District Ahmednagar in Block No. 220, the boundaries of which were

stated in the plaint. A sum of Rs. 10,000/- was paid at that time and it was agreed that upon obtaining the permission from the competent authority, the demarcation of the land would be effected and the possession of the suit land would be given. The appellants were expected to execute the sale deed in favour of the respondent, as the respondent was always ready and willing to perform her part of the contract. Though the appellants assured that they would execute the sale deed in favour of the respondent, they failed to do so. A notice dated 05.06.1992 was served upon the appellants but no sale deed was executed.

5. Thereafter, according to the respondent, the appellants also started causing obstruction in the peaceful possession of the respondent and one of such incidents occurred on 11.07.1992, which compelled the respondent to file the suit for specific performance, and in the alternative, for the refund of earnest money along with damages. One Vitthal Laxman Kankate also applied to the Court, vide Exh. 23, to be impleaded as a party, as he claimed right and interest in the said land. This application was allowed.

6. The suit was contested by the appellants who took various legal objections including, that the suit was bad for non-joinder of the necessary parties and, thus, was not maintainable. On merits, it was stated that no agreement, as alleged, was executed between the parties and the entire case, as pleaded by the respondent, was false. It was also averred that defendant No. 2 in the suit (appellant No. 2 in the present appeal) had also filed a suit wherein injunction was granted in favour of the said party.

7. A plea was also taken that the agreement to sell was not a registered document, as such, the same could not be acted upon. The appellants also took the stand that there was rapid increase in the market value of the land and, therefore, they could not have agreed to sell the property at the price

indicated in the agreement. However, it was really not in dispute that the plaintiff and the defendants were acquainted to each other. The learned Trial Court, on the basis of the record before it, noticed that the appellants claimed that they wanted to obtain a loan for a sum of Rs. 2,000/- from the respondent and had agreed to sign certain papers by way of security, that the respondent, on the pretext, got certain blank papers signed from the appellant as well as his son and that there was no intention to sell the property in question.

8. On the pleadings of the parties, the Trial Court framed the following issues and gave findings thereon :

	Issues	Findings
1	Does the plaintiff prove that the defendant agreed to sell the field for Rs. 40,000/-?	Proved
2	Does the plaintiff prove that the amount Rs. 10,000/- was paid as earnest money?	Proved
3	Does the plaintiff prove that amount of Rs. 30,000/- was agreed to be paid at the time of execution of sale deed?	Proved
4	Does the plaintiff prove that the sale deed was to be executed within 1 month from the permission of the Competent Authority?	Proved
5	Does the defendant prove that the plaintiff paid Rs. 2,000/- only as loan and the signature were obtained on blank stamp paper by way of security?	Proved Not
6	Does the plaintiff prove that she was ready and willing to perform her part of contract?	Proved

7	Whether the plaintiff is entitled for a decree of Specific Performance?	Not Proved
8	Whether the suit is bad for non-joinder of necessary party?	Does not survive
9	What relief and order?	as per final order

Additional issues

1	Whether the agreement is binding on the defendant No. 2.	Yes
2	Does plaintiff prove that by way of alternate relief, she is entitled to refund of earnest money with damages?"	Yes

9. The learned Trial Court decided all the material issues in favour of the respondent and, while upholding the agreement in favour of the respondent, it also returned a finding in favour of the respondent that she was always ready and willing to perform her part of the contract and had paid a sum of Rs. 10,000/- as earnest money. It may be noticed, that the stand taken by the appellants, that the signatures were obtained on blank papers, was answered by the Court in the negative. Despite these facts, the learned Trial Court, as already noticed, partially decreed the suit and directed the appellants to pay a sum of Rs. 10,000/- with interest at the rate of 6% per annum and without any additional amount of damages, as prayed by the respondent. The learned First Appellate Court, while setting aside the decree passed by the Trial Court only for payment of money, passed the decree for specific performance while otherwise affirming the conclusions arrived at by the Trial Court. The First Appellate Court returned the findings in favour of the respondent and held as under:

"Therefore, the sale is permissible with the prior permission of the government. Admittedly, the respondent No. 1 has agreed to obtain permission from the government prior to sale transaction. Therefore, there would not be legal bar while granting a relief of specific performance. The authority cited by the learned counsel for appellant is directly in point. The facts of the said authority and the facts of the present case are identical one. Hence, the reasons on account of which the learned trial court was not pleased to grant a relief of specific performance cannot be accepted. After having come to conclusion that there is no bar of section 12 of the Re-settlement Act, the another reason on account of which the learned trial court was not pleased to grant the said relief, is proper or not is to be considered. The learned trial court has observed that in view of provisions of the Section 48(e) of the Societies Act, the agreement for sale is void one, and hence it can't be enforced. According to learned trial court there was charge on the suit land in favour of the society i.e. since the respondent no. 1 has taken the loan amount. The learned trial court has relief on the entry in the record of rights, while coming to conclusion that there was charge of the society of the suit land in view of the loan transaction, and the appellant was aware of it in view of her admission that she had seen the entry. Consequently, the learned trial court has come to conclusion that there is a bar while granting relief of specific performance u/s 48 (e) of the Co.op. societies Act. In my opinion, in view of the authority reported in the case of *Narayan vs. Macchindra,* 1994 Mh. L.J.558 it can't be said that there would be any legal bar while enforcing the agreement Exh.45. ……..

x x x x x x x x x x

……. Therefore, there would not be any legal impediment while granting a relief of specific performance subject to certain conditions i.e. prior permission of the state government and permission from the society of

village Pimprilokai, taluka Newasa. There are no reasons on record so as to prevent the appellant from claiming a relief of specific performance. The respondents were not able to show as to why discretion should not be grant a relief of specific performance. Since the agreement for sale, Exh. 45, is lawful one, it can be safely enforced. Consequently, the finding in respect of point No. 2 is answered in the affirmative. In view of the findings in respect of point Nos. 1 and 2, it logically follows that the judgment and decree of the learned trial court have to be set aside, and suit filed by appellant is decreed, which is for a relief of specific performance however subject to certain conditions i.e. regarding prior permission of the state government of society of village Pimprilokai. Incase, both authorities are not pleased to grant permission then appellant would be entitled to claim refund of the earnest amount from respondents which is to the tune of Rs. 10,000/-."

10. The findings and the conclusions of fact and law arrived at by the Courts were affirmed by the High Court which sustained the decree passed by the First Appellate Court. The learned counsel appearing for the appellants vehemently argued that the decree for specific performance could not have been passed by the Courts against the appellants, as the property was mortgaged to the cooperative society, and the property being under the charge of the society, no title could be passed in favour of the respondent. Secondly, it was contended that the Courts have failed to appreciate the evidence in its correct perspective and the judgment under appeal is liable to be set aside. Lastly, it was contended that during the pendency of the proceedings, the value of the land has increased tremendously and it would be unjust and unfair to pass a decree for specific performance in favour of the respondent.

11. At the very outset, we may notice that all the three Courts have returned all the findings of fact in favour of the present respondent. Such findings are based upon proper appreciation of evidence and no legal infirmity can be traced in them. It is hardly permissible for this Court to go into such questions of facts alone, in exercise of its jurisdiction under Article 136 of the Constitution of India.

12. From the judgment of the learned Trial Court, it is apparent that the appellants had not placed any such argument or specific plea before that Court. In fact, as is evident from the afore reproduced issues, no such issue was either claimed or framed, in this regard. It is rightly contended by the learned counsel appearing for the respondent that the appellants had not adduced any evidence that the property in question had been mortgaged or was under the charge of the society. Be that as it may, the provisions of clause (d) of Section 48 of the Societies Act, places a restriction upon alienation of the whole or any part of the land or interest in the property unless and until the whole amount borrowed by the member of the society has been repaid with interest. In other words, the restriction is conditional and once the loan of the society has been cleared, the society obviously cannot have any objection to transfer the said property. No effort was made by the appellants to bring on record any evidence to show as to what was the extent of money currently due to the society, if at all, and for what amount the property had been mortgaged in favour of the society. In the absence of any specific evidence in that regard, the Court will have to draw an adverse inference against the appellants for not producing before the Court the best available evidence. In any case, the appellants cannot take advantage of their own wrong. Coming to the other submission, that the land could not be transferred in favour of the respondent in view of the restriction contained in Section 12 (1) (c) and Section 12 (2) of the Re-settlement Act, the bare reading of these provisions show that the Government can grant permission for transfer of

the property, subject to such conditions, as it may deem fit and proper.

13. In the present case, the appellants have neither claimed any issue nor led any evidence before the Court to substantiate even this plea. Furthermore, the learned First Appellate Court while relying upon the judgment of this Court in the case of *Nathulal v. Phoolchand* [AIR 1970 SC 546], had dealt with both these contentions rightly and in accordance with the law. We see no reason as to how a presumption can be raised against the respondent on face of the fact that the appellants chose not to lead any evidence on either of these aspects. These contentions raised on behalf of the appellants are, therefore, without any substance. The learned counsel appearing for the appellants drew our attention to Section 13 (1) (c) of the Specific Relief Act, 1963 (for short 'the Act'), which clearly postulates that where a person contracts to sell immovable property with an imperfect title and the property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract in its favour. Even from this point of view, the right of the present respondent is fully protected.

14. It will also be useful to refer to the provisions of Section 20 of the Act which vests the Court with a wide discretion either to decree the suit for specific performance or to decline the same. Reference in this regard can also be made to the case of *Bal Krishna v. Bhagwan Das* [(2008) 12 SCC 145], where this Court held as under :

> "**13.** ……..The compliance with the requirement of Section 16(*c*) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.
>
> **14.** It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

Similar view was taken by this Court in the case of *Mohammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. & Ors.* [(2008) 7 SCC 310], where the Court reiterated the principle that jurisdiction of the Court to grant specific performance is discretionary and role of the plaintiff is one of the most important factor to be taken into consideration. We may also notice that in the case of *P.V. Joseph's son Mathew v. N. Kuruvila's Son* [AIR 1987 SC 2328], this Court further cautioned that while

exercising discretionary jurisdiction in terms of Section 20 of the Act, the Court should meticulously consider all facts and circumstances of the case. The Court is expected to take care to see that the process of the Court is not used as an instrument of oppression giving an unfair advantage to the plaintiff as opposed to the defendant in the suit.

15. The discretion of the Court has to be exercised as per the settled judicial principles. All the aforesaid principles are squarely satisfied in the present case and it is the appellants before us who have taken advantage of the pendency of the proceedings. They have used the sum of Rs. 10,000/-, which was given as earnest money for all this period, as well as, have enjoyed the fruits of the property. The present case does not fall within the ambit of any of the aforesaid cases specified under Section 20 (2) of the Act. In the present case, it is not only lawful but even equity and facts of the case demand that a decree for specific performance should be granted in favour of the respondent. Besides all this, the respondent before us has agreed to pay much higher consideration than what was payable in terms of the agreement to sell between the parties.

16. The onus to prove that the respondent had obtained signatures of the appellants on blank papers on the pretext of advancing a loan of Rs. 2,000/- was entirely upon the appellants. No evidence, much less cogent documentary or oral evidence, was led by the appellants to discharge this onus. The averment has rightly been disbelieved and the plea was rightly rejected by the concerned Courts in the judgment under appeal. The appellants led no evidence and nothing was brought to our notice, even during the course of the hearing, to show that this plea could be accepted. It is a settled principle of law that before the First Appellate Court, the party may be able to support the decree but cannot challenge the findings without filing the cross objections. As it appears from the record, the present appellants have neither filed cross objections nor their

appeal challenging the findings recorded by the learned Trial Court. In fact, the entire conduct of the present appellants shows that they have not only failed to prove their claim before the Courts of competent jurisdiction but have even not raised proper pleas in their pleadings.

17. It was contended on behalf of the appellants that there has been considerable increase in the price of the land in question. Though that may be true, it cannot be a ground for denying the decree of specific performance to the respondent. The learned First Appellate Court, by a well reasoned judgment, has granted the relief of specific performance instead of only granting refund of money, as given by the Trial Court. The judgment of the First Appellate Court has been upheld by the High Court and we see no reason whatsoever to interfere with the concurrent findings of facts and law as stated in the judgment under appeal. However, the learned counsel appearing for the respondent volunteered and after taking instructions stated that they would be willing to pay a sum of Rs. 1,50,000/- instead of Rs. 40,000/- as the total sale consideration. We find this offer of the respondent to be very fair.

18. We have already held that the defence taken up by the appellants in the suit was totally unbelievable. There is no reason or ground as to why the relief of specific performance should be declined to the respondent. She satisfied all the requirements of Section 20 of the Act. Even then, if we examine this case purely from the point of view of equity, the offer now made by the respondent substantially balances the equities between the parties and the very argument raised on behalf of the appellants that there has been increase in the price of the land in question loses its significance. Now, no prejudice will be caused to the appellants in any manner whatsoever.

19. For the reasons afore recorded, we see no legal or other infirmity in the judgment under appeal. While dismissing

the present appeal, we direct that the respondent will abide by her offer and would pay a total sale consideration of Rs. 1,50,000/- and upon payment of Rs. 1,50,000/- – Rs. 10,000/- = Rs. 1,40,000/- and complying with the conditions stated in the judgment dated 28th November, 2000 of the First Appellate Court, the sale deed shall be registered in favour of the respondent in terms of the decree passed by the First Appellate Court subject to the above modifications.

20. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

K.K.T. Appeal dismissed.

STATE OF MAHARASHTRA & ORS.
v.
SANGHARAJ DAMODAR RUPAWATE & ORS.
(Civil Appeal No. 5205 of 2010)

JULY 9, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Code of Criminal Procedure, 1973 – s. 95 – Notification under – Forfeiture for of books – On the basis of FIR alleging offences u/ss. 153, 153A r/w s. 34 IPC – Notification quashed by High Court – On appeal held: The power u/s. 95 has direct impact on the right of freedom of speech and expression under Article 19(1)(a) of Constitution and impinges on right to privacy – Therefore, the provision has to be construed strictly and the power thereunder must be exercised only in accordance with the procedure laid down therein – It is mandatory for such notification to state the ground on which the Government formed its opinion – Test of validity of notification – Legal aspects to be kept in mind – Discussed – On facts, the notification is invalid as the conditions statutorily mandated for exercise of powers u/s. 95 are lacking – The FIR which formed the basis for issuance of notification since was quashed by Supreme Court, the notification also becomes invalid – Constitution of India, 1950 – Article 19(1)(a).

State of Maharashtra issued notification u/s. 95(1) Cr.P.C., directing forfeiture of every copy of the book titled "Shivaji – Hindu King in Islamic India". The notification was issued on the basis of an FIR registered u/ss. 153, 153A r/s. s. 34 IPC. The notification was challenged and the same was quashed by High Court. Therefore, the instant appeal was filed by the State.

Dismissing the appeal, the Court

HELD: 1.1 The power to issue a declaration of forfeiture u/s. 95 Cr.P.C. postulates compliance with twin essential conditions, viz., (i) the Government must form the opinion to the effect that such newspaper, book or document contains any matter, the publication of which is punishable u/s. 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of IPC, and (ii) the Government must state the grounds of its opinion. Therefore, it is mandatory that a declaration by the State Government in the form of notification to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government, must state the grounds on which the State Government has formed a particular opinion. A mere citation of the words of the Section is not sufficient. The power to forfeit a newspaper, book or document is a drastic power inasmuch as it not only has a direct impact upon the due exercise of a cherished right of freedom of speech and expression as envisaged in Article 19(1)(a) of the Constitution, it also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search the places where they are reasonably suspected to be found, again impinging upon the right of privacy. Therefore, the provision has to be construed strictly and exercise of power under it has to be in the manner and according to the procedure laid down therein. [Paras 18 and 19] [347-C-F; 347-H; 348-A-B]

1.2 The following legal aspects can be kept in mind while examining the validity of a notification issued u/s. 95 of Cr.P.C.:

(i) The statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of forfeiture. Therefore, the grounds of Government's opinion must be stated in the notification issued u/s. 95 Cr.P.C. and while

testing the validity of the notification the Court has to confine the inquiry to the grounds so disclosed;

(ii) Grounds of opinion must mean conclusion of facts on which opinion is based. Grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which the Government may choose. A mere repetition of an opinion or reproduction of the Section will not answer the requirement of a valid notification. However, at the same time, it is not necessary that the notification must bear a verbatim record of the forfeited material or give a detail gist thereof;

(iii) The validity of the order of forfeiture would depend on the merits of the grounds. The High Court would set aside the order of forfeiture if there are no grounds of opinion. However, it is not the duty of the High Court to find for itself whether the book contained any such matter whatsoever;

(iv) The State cannot extract stray sentences of portions of the book and come to a finding that the said book as a whole ought to be forfeited;

(v) The intention of the author has to be gathered from the language, contents and import of the offending material. If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge u/s. 153-A IPC that the writing contains a truthful account of past events or is otherwise supported by good authority. Adherence to the strict path of history is not by itself a complete defence to a charge u/s. 153-A IPC;

(vi) Section 95(1) Cr.P.C. postulates that the ingredients of the offences stated in the notification should "appear" to the Government to be present. It does

not require that it should be "proved" to the satisfaction of the Government that all requirements of punishing Sections, including *mens rea,* were fully established;

(vii) The onus to dislodge and rebut the *prima facie* opinion of the Government that the offending publication comes within the ambit of the relevant offence, including its requirement of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof;

(viii) The effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also be relevant for judging the probable consequences of the writing. [Para 25] [353-B-H; 354-A-H; 355-A-B]

Harnam Das vs. State of Uttar Pradesh **AIR 1961 SC 1662 – followed.**

Narayan Dass Indurakhya vs. State of Madhya Pradesh **1972 (3) SCC 676;** *The State of Uttar Pradesh vs. Lalai Singh Yadav* **1976 (4) SCC 213;** *Manzar Sayeed Khan vs. State of Maharashtra and Anr.* **2007 (5) SCC 1 – relied on.**

Baragur Ramachandrappa and Ors. vs. State of Karnataka and Ors. **2007 (5) SCC 11 – referred to.**

Ramesh vs. Union of India and Ors. **1988 (1) SCC 668;** *Bhagwati Charan Shukla vs. Provincial Government* **AIR 1947 Nag 1;** *Nand Kishore Singh and etc. vs. State of Bihar and Anr.* **AIR 1986 PATNA 98 – cited**

2.1 In the instant case, the conditions statutorily mandated for exercise of power u/s. 95 Cr.P.C. are lacking

and, therefore, the action of the Government cannot be sustained. It is plain from a bare reading of the notification that the Government's opinion, is based on the grounds set out in the preamble to the notification. The opinion of the State Government is based on the factum of registration of an FIR against the author and others for offences punishable u/ss. 153 and 153-A r/w. Section 34 of the IPC. In *Manzar Sayeed Khan'*s case, Supreme Court while quashing the same FIR which was referred to in the notification has held that the offending articles in the book do not constitute an offence u/s. 153-A IPC. It is explicit that the entire edifice of the impugned notification being based on the registration of the said FIR, it gets knocked off by the decision of the Supreme Court in *Manzar Syeed Khan's* **case [Paras 26, 27 and 28] [355-H; 356-A, C-D]**

Manzar Sayeed Khan vs. State of Maharashtra and Anr. **2007 (5) SCC 1 – relied on.**

2.2 It is not correct to say that only the subjective satisfaction of the State Government was called for and the matter covered by the notification is sufficient and cannot be assailed. It is manifest that the notification does not identify the communities between which the book had caused or is likely to cause enmity. Therefore, it cannot be found out from the notification as to which communities got outraged by the publication of the book or that the said publication had caused hatred and animosity between particular communities or groups. The statement in the notification to the effect that the book is "likely to result in breach of peace and public tranquillity and in particular between those who revere *Shri Chhatrapati Shivaji Maharaj* **and those who may not" is too vague a ground to satisfy the afore-enumerated tests. Moreover, the High Court has also noted that the Advocate General was unable to produce or disclose any**

material or information to find out as to which were the groups based on religion, race, language or religion or caste or communities who do not revere *Shri Chhatrapati Shivaji Maharaj***. The notification of forfeiture, dated 20th December 2006, does not fulfil the mandatory requirements of sub-section (1) of Section 95 Cr.P.C. and is, therefore, invalid. [Para 28 and 29] [357-D; 356-F-H; 357-A-B]**

Case Law Reference:

AIR 1961 SC 1662	**Followed.**	**Para 20**
1972 (3) SCC 676	**Relied on.**	**Para 21**
1976 (4) SCC 213	**Relied on.**	**Para 22**
2007 (5) SCC 1	**Relied on.**	**Para 23**
1988 (1) SCC 668	**Cited.**	**Para 23**
AIR 1947 Nag 1	**Cited.**	**Para 23**
2007 (5) SCC 11	**Referred to.**	**Para 24**
AIR 1986 PATNA 98	**Cited.**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5205 of 2010.

From the Judgment & Order dated 26.04.2007 of the High Court of Judicature at Bombay in Writ Petition No. 1721 of 2004.

Shekhar Naphade, Sanjay Kharde, Aparajita Singh, Asha G. Nair, Ravindra Keshavrao Adsure for the Appellants.

Prashant Bhushan, Pravin Satale, Indira Uninair, Naresh Kumar, Kamini Jaiswal for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. This appeal, by special leave, filed by the State of Maharashtra and its functionaries, arises out of the judgment dated 26th April, 2007 delivered by the High Court of Judicature at Bombay in Writ Petition No.1721 of 2004. By the impugned judgment, passed in an application under Section 96 of the Code of Criminal Procedure,1973 (for short "the Code") read with Article 226 of the Constitution of India, the High Court has set aside and quashed notification dated 20th December, 2006, issued in the name of Governor of Maharashtra in exercise of the powers conferred by sub-section (1) of Section 95 of the Code, directing forfeiture of every copy of the book captioned as "Shivaji – Hindu King in Islamic India" written by one Prof. James W. Laine.

3. The three writ petitioners, who are respondents No.1, 2 and 3 herein, are respectively stated to be a well known lawyer and a public activist in the Ambedkarite movement, intended to mobilize the deprived sections of the society; (ii) a well-known film maker, whose documentaries are stated to be known the world over for their artistic finesse, conveying democratic and secular message and (iii) a social activist. Respondents No. 4 to 6 impleaded as such vide this Court's order dated 29th August, 2007 respectively are Prof. James W. Laine, the author of the book, Oxford University Press, India, the publisher through its Constituted Attorney Mr. Manzar Sayed Khan and Mr. Vinod Hansraj Goyal, proprietor of Rashtriya Printing Press, Delhi, the printer of the book.

4. For the purpose of appreciation of the questions raised, the foundational facts may be noticed. These are:

On 28th May, 2003, respondent No. 5, the publisher entered into an agreement with Oxford University Press, U.S.A. for publishing in India a paper-bound book entitled "Shivaji – Hindu King in Islamic India" authored by Prof. James W. Laine (respondent No.4), a Professor of Religious Studies, Macalester

College, U.S.A. The said book was originally published by Oxford University Press, Inc., U.S.A. As per the terms of the agreement, respondent No.5 agreed to reprint the book without any changes or deletions. In all, 803 copies of the book were published i.e. 488 copies in June and 315 copies in October, 2003 and was released in July 2003 and 215 copies were sold in the month of July itself.

On 10th November 2003, the publisher (respondent No.5) received a letter from four historians whereby the publisher and the author had been asked to retract the objectionable statement complained of and tender an apology. Mr. Manzar Sayed Khan, expressed regrets for the said statement and informed the objectors that instructions had been issued to all his offices in India to immediately withdraw all copies of the book from circulation. After withdrawal of the book from circulation, a mob at Pune blackened the face of a Sanskrit Scholar Shri Shashikant Bahulkar whose name appeared in the acknowledgement of the book, having helped the author, Prof. James W. Laine, by providing him with some information during his visit to Pune. This incident was widely reported in the press. On 28th December, 2003, the author Prof. James W. Laine sent a fax, apologising for the mistake, if any, committed in writing the passage and stated that he only was responsible for the said statement written in the book, and the publisher was not at all responsible for the same. On 5th January, 2004, a mob of 100 to 125 persons allegedly belonging to the Sambhaji Brigade ransacked Bhandarkar Oriental Research Institute (BORI), Pune and destroyed a large number of books and rare manuscripts. This incident was also widely reported in the press.

On 7th January, 2004, respondent No.4, the author in an interview, explained the reason for writing the book and expressed deep anguish at the destruction of rare manuscripts and books in BORI, Pune. Four days after the alleged incident i.e. on 9th January, 2004, the State of Maharashtra, the

appellant herein, registered a first information report (for short "FIR") at Deccan Police Station, Pune, against respondents No. 4 to 6 i.e. Prof. James W. Laine, the author, Mr. Manzar Sayed Khan, the publisher and Mr. Vinod Hansraj Goyal, the printer of the book under Sections 153, 153-A and 34 of the Indian Penal Code, 1860 (for short "the IPC").

On 15th January, 2004, in exercise of powers conferred by sub-section (1) of Section 95 of the Code, the Government of Maharashtra issued a notification declaring that every copy of the aforementioned book shall be forfeited to the Government. The said notification was challenged in the Bombay High Court by respondents No.1 to 3 herein. However, during the pendency of the petition, this notification was withdrawn and another notification dated 20th December, 2006 was issued. The notification reads as follows:

"GENERAL ADMINISTRATION DEPARTMENT
Mantralaya, Mumbai 400 032,
dated the 20th December, 2006

NOTIFICATION

CODE OF CRIMINAL PROCEDURE, 1973.

No. BAP-2004/422/C.R.113/2004/XXXIV. – Whereas, Shri Chhatrapati Shivaji Maharaj is revered by various sections of the people domiciled in the State of Maharashtra;

And Whereas, the Oxford University Press having its office at YMCA Library Building, Jai Singh Road, New Delhi 110 001, has in the Year 2003, published a book, captioned as "SHIVAJI – Hindu King in Islamic India" written by one Shri James W. Laine, having ISBN 019 5667719 containing 127 pages (hereinafter referred to as "the said Book");

And Whereas, the said author has in his said Book,

made several derogatory references specified in the Schedule appended hereto regarding Shri Chhatrapati Shivaji Maharaj, in particular about his parentage and the Bhosale family to which he belonged;

And Whereas, publication of the said Book containing the said derogatory references is prejudicial to the maintenance of harmony between different groups and has disturbed the public tranquillity;

And Whereas, the publication and circulation of the said Book, has not only already resulted in causing enmity between the persons who revere Shivaji and other persons who may not so revere; but is likely to continuously cause such enmity;

And Whereas, the said author has in the "ACKNOWLEDGMENTS" to the said Book has expressed gratitude to the "Bhandarkar Oriental Research Institute, Pune" and the librarian and other Scholars therein;

And Whereas, after publication of the said book, there was agitation against the said "Bhandarkar Oriental Research Institute, Pune", by members of an association called as "Sambhaji Brigade" and certain other people revering Shri Chhatrapati Shivaji Maharaj;

And Whereas, for publication of the said Book, an offence under sections 153, 153A read with Section 34 of the Indian Penal Code has been registered in the Deccan Gymkhana Police Station, Pune as C.R. No. 10 of 2004.

And Whereas, for the reasons aforesaid, the Government of Maharashtra is of the opinion that the circulation of the said Book containing scurrilous and derogatory references against Shri Chhatrapati Shivaji Maharaj has resulted in causing enmity between various

communities and has led to acts of violence and disharmony and that any further circulation of the said Book is likely to result in breach of peace and public tranquillity and in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not; and cause disturbances to public tranquillity and maintenance of harmony between such groups and as such the said Book should be forfeited;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973 (2 of 1974), read with Section 21 of the General Clauses Act, 1897 (10 of 1897) and of all other powers enabling it in that behalf and in supersession of the Government Notification, General Administration Department, No. BAP-2004/422/C.R.113/2004/XXXIV, dated the 15th January 2004, the Government of Maharashtra hereby declares that every copy of the said Book shall be forfeited to the Government.

Schedule

1. "So when Shivaji opened his eyes on the world, he was nurtured by a mother who had been deserted by her husband and left to give birth in a hill fortress 60 kms. North of Pune." (Introduction page 4).

2. "Looking back from the coronation in 1674, the Killing of Afzal Khan in 1659 was not simply an act of courage, it was premeditated violence in the service of the Brahmanic world order." (Chapter II, The Epic Hero, page 25).

3. "Thus Shivaji could argue that his family should not be classified a Kunbi peasant or shudra clan, but was, in fact, related to Rajput, Aryan Kshatriyas. This led to a general ambiguity about the status of all Marathas." (Chapter IV "The Patriot", page 66).

4. "Here we have a kind of Brahmin prejudice that Marathas might make admirably fierce warriors but will not have prudence of the Brahmins. Thus Ranade argues that the national movement drew on the talents and loyalty of all classes, but he maintains the critical importance of the Brahmins Ramdas and Dadaji in his narrative. (Chapter IV "The Patriot", page 76).

5. "In other words, Shivaji's secularism can only be assured if we see him as motivated less by patriotism than by simple quest of power." (Chapter IV "The Patriot", page 77).

6. "Shivaji's parents were married under trying circumstances. They were children, and Jijabai's parents opposed the match, considering themselves, as Jadhava (Yadavas), to be too aristocratic to accept a groom from the Bhosles, a clan not accepted as one of ninety-six upper class Maratha families. (Chapter V "Cracks in the Narrative", page 91).

7. "The repressed awareness that Shivaji had an absentee father is also revealed by the fact that Maharashtrians tell jokes naughtily suggesting that his guardian Dadaji Konddev was his biological father." (Chapter V "Cracks in the Narrative", page 93).

8. "One could assume, as Sarkar did, that he (Shivaji) agreed to go to Aurangazeb's court in Agra because he had hopes (sic) of being made Mughal Viceroy of the Deccan. Had he received such an honour (sic), it is doubtful that he would have planned a coronation eight years later, but would have conducted his career much as his father did as an Aadil Shahi noble and Governor of Bangalore." (Chapter V "Cracks in the Narrative", page 99).

By order and in the name of the Governor of Maharashtra,

MANISHA MHAISKAR,
Joint Secretary to Government."

5. In view of the said development, with the leave of the Court, the petition was amended and challenge to notification dated 20th December, 2006 was laid mainly on the grounds that: (1) there was no material to show that the publication of the book had resulted in disturbance of public tranquillity or maintenance of harmony between various groups as set out therein, and (2) the publication does not disclose any offence under Section 153-A of the IPC. Finding substance in both the grounds, as stated above, by the impugned judgment, the High Court has quashed and set aside the notification dated 20th December, 2006 by observing thus:

"We called upon the learned Associate Advocate General to show us any material in their possession which would indicate, that the publication of the book is causing enmity between various communities and which were those communities. The learned Associate Advocate General was unable to produce or disclose any such material or which were the groups based on religion, race, language or religion or caste or communities who do not revere Shree Chhatrapati Shivaji Maharaj. The only answer was, that the order is based upon the grounds set out in the notification. In our opinion, to make a legal order under Section 95 of the Code of Criminal Procedure, apart from the fact that offence as set out therein must be indicated, the notification must disclose the grounds based on which the State has formed an opinion, that the author by his publication sought to promote or attempted to promote disharmony or feeling of enmity between various groups as set out therein. All that is pointed out to us is, that subsequent to the publication of the book, there was an agitation against Bhandarkar Oriental Research Institute, Pune by members of an Association called as "Sambhaji

Brigade" and certain other people revering Shree Chhatrapati Shivaji Maharaj. We pointedly asked the learned Associate Advocate General whether the employees of the Bhandarkar Institute, Pune constituted that group or class. It was fairly conceded before us that it was not so. Whether a group of employees would constitute a group is not required to be answered. In other words, there is nothing on record to show that the publication was likely to promote disharmony or feeling of enmity between various groups, as likely to cause disturbance to public tranquillity and maintenance of harmony between various groups. Bhandarkar Oriental Research Institute Pune, enjoys an international reputation as a research institute in the State of Maharashtra. It was unfortunate that for whatever reasons the said institute was vandalized and precious documents destroyed History is the loser."

6. Being aggrieved, the State of Maharashtra and its functionaries are before us in this appeal.

7. We have heard Mr. Shekhar Naphade, learned Senior Counsel appearing on behalf of the petitioners; Mr. Prashant Bhushan, learned counsel appearing on behalf of the respondents No.1 to 3 and Ms. Kamini Jaiswal, learned counsel appearing on behalf of the respondents No.4 to 6.

8. Prefacing his arguments with the historical perspective of rivalry between Brahmins and Marathas, both at the social and the political level, Mr. Naphade submitted that some of the words used in the book and culled out in the notification under different items clearly try to resurrect the social and political tensions between Brahmins and Marathas and try to drive a wedge between the said two communities. It was submitted that the notification in question clearly sets out that the book contains derogatory references to Chhatrapati Shivaji Maharaj and is prejudicial to the maintenance of harmony between different groups and that in fact it had disturbed the social

tranquillity of the State. It was contended that the notification has to be read in its entirety and if it is so read, it clearly refers to threat to maintenance of harmony between two groups, which is clearly demonstrated by an attack on Bhandarkar Institute by Sambhaji Brigade as a sequel to the publication and circulation of the book. While candidly conceding that the operative part of the notification does not specifically refer to conflict between Brahmins and Marathas, learned counsel urged that the notification has to be read in the historical background and if it is so read, the only possible conclusion is that the two groups referred to in the notification mean Brahmins on the one hand and Marathas on the other. According to the learned counsel, it is a settled rule of interpretation that while construing any notification of this nature, the historical background can be taken into account.

9. Mr. Naphade also contended that in a criminal case the burden of establishing that a case under Sections 153 and 153-A of the IPC is made out, is on the State, whereas, while judging the action of the Government under Section 95 of the Code, the parameters are qualitatively different inasmuch as there is a presumption that the notification is valid and the burden to show that the decision of the Government to forfeit the book is without any foundation, is on the writ petitioners.

10. Learned counsel also argued that the subjective satisfaction of the Government as contemplated in Section 95 of the Code cannot be canvassed either in an application under Section 96 of the Code or in a writ petition under Article 226 of the Constitution. According to the learned counsel, neither the High Court nor this Court can sit in appeal over the Government's decision to forfeit the book. Relying on the decision of the Bombay High Court in the case of *Gopal Vinayak Godse Vs. The Union of India and Others*[1], learned counsel submitted that if a book has a tendency to create a rift between the two different communities, then Article 19(1)(a) of

1. Air 1971 Bombay 56.

the Constitution cannot be pressed into service, even on the ground that the book contains historical truth.

11. As regards the concession of the counsel for the State before the High Court, as recorded in the impugned judgment, it is pleaded in the written submissions that the concession so made was clearly under misconception of law and facts. It is pleaded that the concession made by an Additional Advocate General is not binding on the Government. In support of the said stand, reference is made to the decisions of this Court in *M.T. Khan and Others Vs. Govt. of A.P. and Others*[2] and *Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala*[3]. Learned counsel also placed reliance on the decision of this Court in *Baragur Ramachandrappa and Others Vs. State of Karnataka and Others*[4] in support of his proposition that Sections 95 and 96 of the Code, when read together, are clearly preventive in nature and are designed to pre-empt any disturbance to public order and, therefore, if a forfeiture is called for in public interest, it must have pre-eminence over any individual interest.

12. Per contra, Mr. Prashant Bhushan, while emphasizing that the book in question, which makes historical investigation to discover and interpret Shivaji, the great hero of 17th Century in India and Maharashtra in particular, is a scholarly, historical piece about a much revered and admired historical figure of India, vehemently submitted that even if there were any critical comments about Shivaji Maharaj, banning the book would strike at the very root of the fundamental right to freedom of expression in a democracy. It was asserted that there is nothing disparaging or malicious about Shivaji and his parents in the book as alleged in the notification. Learned counsel maintained that there is no scurrilous matter in the book which is prejudicial to the maintenance of public tranquillity along with law and order and, in any case, it is the primary responsibility of a Government

2. (2004) 2 SCC 267.

3. (1991) 4 SCC 195.

4. (2007) 5 SCC 11.

to prevent mischief-maker from taking the law into their own hands. In support of the proposition that it is for the State to maintain public order and the books, films, etc. cannot be banned merely based on an apprehension of clashes, learned counsel placed reliance on the decision of this Court in *S. Rangarajan Vs. P. Jagjivan Ram and Others*[5].

13. Learned counsel also urged that on facts in hand, the conditions requisite for invoking Section 95 of the Code are not fulfilled inasmuch as apart from the fact that detailed grounds have not been provided to the respondents, it is evident from the notification that all that has been stated therein is that the book contains scurrilous and derogatory references to Shri Chhatrapati Shivaji Maharaj and that has caused enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the book is likely to result in breach of peace and public tranquillity and in particular, between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not. It was also pleaded that the notification is neither based on grounds that offence under Section 153-A of the IPC was made out nor it has been shown that how the references are derogatory or scurrilous and above all, even the communities, who were alienated from each other or whose religious beliefs were hurt, have not been named or identified.

14. Learned counsel then contended that paragraphs in the book, complained of, do not constitute an offence either under Section 153 or under Section 153-A of the IPC as in the notification there is no allegation that the book has caused or likely to cause enmity between different classes of the society or has created a situation of hatred between or among particular religions/castes/social groups as contemplated in Section 153-A of the IPC. It is pointed out that the notification does not even identify the communities, which, according to the Government, were allegedly alienated from each other or

5. (1989) 2 SCC 574.

whose religious beliefs had been wounded. Reliance was placed on the decision of this Court in *Manzar Sayeed Khan Vs. State of Maharashtra and Another*[6], relating to the same book, wherein, while holding that the book did not make out an offence under Section 153-A of the IPC, the FIR registered against the Author of the book (respondent No.4) was quashed. Reliance was also placed on the decisions of this Court in *Bilal Ahmed Kaloo Vs. State of A.P.*[7] and *Harnam Das Vs. State of Uttar Pradesh*[8]. Learned counsel thus asserted that there was no justification whatsoever for ordering forfeiture of the book and the impugned notification is a gross misuse of Section 95 of the Code.

15. Before evaluating the rival contentions, a brief reference to the relevant provisions of the Code and the precedents on the point would be necessary.

16. Section 95 of the Code reads as follows:

"*95. Power to declare certain publications forfeited and to issue search-warrants for the same.*—(1) Where—

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer

6. (2007) 5 SCC 1.

7. (1997) 7 SCC 431.

8. AIR 1961 SC 1662.

may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in section 96,—

(a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);

(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96."

17. Section 96 of the Code, relevant for the purpose, is as under:

"96. Application to High Court to set aside declaration of forfeiture. —(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

(2) .....

(3) .....

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of section 95, set aside the declaration of forfeiture.

(5) ……."

18. Section 95 of the Code is an enabling provision, which, in the circumstances enumerated in the Section, empowers the State Government to declare that copy of a newspaper, book or document be forfeited to the Government. It is evident that the provision deals with any newspaper, book or document which is printed. The power to issue a declaration of forfeiture under the provision postulates compliance with twin essential conditions, viz., (i) the Government must form the opinion to the effect that such newspaper, book or document contains any matter, the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the IPC, and (ii) the Government must state the grounds of its opinion. Therefore, it is mandatory that a declaration by the State Government in the form of notification, to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government, must state the grounds on which the State Government has formed a particular opinion. A mere citation of the words of the Section is not sufficient. Section 96 of the Code entitles any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture is made under Section 95 of the Code, to move the High Court for setting aside the declaration on the ground that it does not contain any such matter as is referred to in sub-section (1) of Section 95.

19. Undoubtedly, the power to forfeit a newspaper, book or document is a drastic power inasmuch as it not only has a direct impact upon the due exercise of a cherished right of freedom of speech and expression as envisaged in Article

19(1)(a) of the Constitution, it also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to be found, again impinging upon the right of privacy. Therefore, the provision has to be construed strictly and exercise of power under it has to be in the manner and according to the procedure laid down therein.

20. The scope and width of a somewhat similar provision contained in Section 99A of the Code of Criminal Procedure, 1898 (for short "the 1898 Code") was examined by a Constitution Bench of this Court in *Harnam Das Vs. State of Uttar Pradesh (supra)*. Speaking for the majority, A.K. Sarkar, J. held that in that case though the order of forfeiture passed by the Government had set out its opinion that the books contained matters the publication of which was punishable under Sections 153-A and 295-A of the IPC but it did not state, as it should have, the grounds of that opinion. Striking down the order of forfeiture, the learned judge observed as under:

"(4) Two things appear clearly from the terms of this Section. The first thing is that an order under it can be made only when the Government forms a certain opinion. That opinion is that the document concerning which the order is proposed to be made, contains "any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 295-A of the Penal Code." Section 124-A deals with seditious matters, Section 153-A with matters promoting enmity between different classes of Indian citizens and Section 295-A with matters insulting the religion or religious beliefs of any class of such citizens. The other thing that appears from the Section is that the Government has to state the grounds of its opinion. The order made in this case, no doubt, stated that in the Government's opinion the books contained matters the publication of which was punishable under Sections 153-A and 295-A of the Penal Code. It did not, however, state,

> as it should have, the grounds of that opinion. So it is not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, nor why the Government thought that such alienation or offence to religion had been caused."

Thus, the Court observed that in the notification it was not known which communities were alienated from each other or whose religious beliefs had been wounded and why the Government thought that such alienation or offence to religion had been caused. It was held that if the grounds of opinion are not stated, the order of forfeiture must be set aside, because then the Court cannot be satisfied that the grounds given by the Government justify the order. *Inter alia* observing that it is the duty of the High Court to set aside an order of forfeiture if it is not satisfied that the grounds on which the Government formed its opinion could justify that opinion, the Court also noted that it is not the duty of the High Court to find for itself whether the book contained any such matter.

21. Significance of setting out the grounds of the opinion of the Government was again emphasised in *Narayan Dass Indurakhya Vs. State of Madhya Pradesh*[9]. It was observed that grounds must be distinguished from the opinion, as grounds of the opinion must mean the conclusion of facts on which the opinion is based. The Court said:

> "6. There is a considerable body of statutory provisions which enable the State to curtail the liberty of the subject in the interest of the security of the State or forfeit books and documents when in the opinion of the Government, they promote class hatred, religious intolerance, disaffection against the State, etc. In all such cases, instances of some whereof are given below the State Government has to give the grounds of its opinion. Clearly the grounds must be distinguished from the opinion. Grounds of the opinion must mean the conclusion of facts on which the opinion is

9. (1972) 3 SCC 676.

> based. There can be no conclusion of fact which has no reference to or is not ex facie based on any fact."

It was also observed that mere repetition of an opinion or reproduction of the Section without giving any indication of the facts will not answer the requirement of a valid notification.

22. Section 99A of the 1898 Code again came up for consideration before a bench of three Judges of this Court in *The State of Uttar Pradesh Vs. Lalai Singh Yadav*.[10] Emphasizing the importance of furnishing of grounds by the Government for its opinion, speaking for the bench, V.R. Krishna Iyer, J. observed as under:

> "8. A drastic restriction on the right of a citizen when imposed by statute, calls for a strict construction, especially when quasi-penal consequences also ensue. The imperial authors of the Criminal Procedure Code have drawn up Section 99A with concern for the subject and cautionary mandates to government. The power can be exercised only in the manner and according to the procedure laid down by the law. Explicitly the section compels the government to look at the matter which calls for action to consider it as to the clear and present danger it constitutes in the shape of promoting feelings of enmity and hatred between different segments of citizens or as to its strong tendency or intendment to outrage the religious feelings of such segments (there are other proclivities also stated in the section with which we are not concerned for the present purpose) and, quite importantly, to state the grounds of its opinion. We are concerned with the last ingredient. When the section says that you must state the grounds it is no answer to say that they need not be stated because they are implied. You do not state a thing when you are expressively silent about it. To state 'is to declare or to set forth, especially in a precise, formal or authoritative

10. (1976) 4 SCC 213.

manner; to say (something), especially in an emphatic way ; to assert' (Random House Dictionary). The conclusion is inescapable that a formal authoritative setting forth of the grounds is statutorily mandatory….."

While reiterating that a formal authoritative setting forth of the grounds is statutorily mandatory and the Court cannot make a roving enquiry beyond the grounds set forth in the order and if the grounds are left out altogether then there is nothing available to the Court to examine and the notification must fail, the Court also observed that the grounds or reasons linking the primary facts with the forfeiter's opinion need not be stated at 'learned length'. In some cases, a laconic statement may be enough; in others a longer ratiocination may be proper. The order may be brief but it cannot be blank as to the grounds which form the basis of the opinion on which the Government relies. It was also observed that since an order of forfeiture constitutes a drastic restriction on the rights of a citizen, the relevant provisions of the Code have to be strictly construed.

23. At this juncture, it would be appropriate to refer to the decision of this Court, to which one of us (D.K. Jain, J.) was a party, in *Manzar Sayeed Khan Vs. State of Maharashtra & Another (supra),* which arose on account of registration of the FIR against the Author, Publisher and Printer, respondents No.4 to 6 in this appeal, on publication and distribution of the book "Shivaji – Hindu King in Islamic India", the subject matter of the present case. Quashing the FIR against the author, this Court observed that the intention to cause disorder or incite people to violence is the *sine qua non* of the offence under Section 153-A of the IPC and the prosecution has to prove *prima facie* the existence of *mens rea* on the part of the accused. It was, *inter alia,* observed that the intention of the publication has to be judged primarily by the language of the book, the circumstances in which it was written and published; the matter complained of must be read as a whole and one cannot rely on strongly worded and isolated passages for proving the

charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning. Reliance was placed on the decision of this Court in *Ramesh Vs. Union of India and others*[11]*,* wherein the observations of Vivian Bose, J. (as he then was) in *Bhagwati Charan Shukla Vs. Provincial Government*[12]*,* to the effect that "the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view" were approved.

24. Recently in *Baragur Ramachandrappa and Others Vs. State of Karnataka and Others* (supra), this Court again considered the scope of Section 95 of the Code. Approving the interpretation of Sections 95 and 96 of the Code given by a special bench of the Patna High Court in *Nand Kishore Singh & etc. Vs. State of Bihar and Another*[13], wherein it was observed that it would be fallacious to mathematically equate the proceedings under Sections 95 and 96 of the Code with a trial under Section 295-A of the IPC with the accused in the dock, the Court went on to elucidate that Section 95 did not require that it should be "proved" to the satisfaction of the State Government that all requirements of the punishing Sections including *mens rea* were fully established and all that Section 95(1) required was that the ingredients of the offence should "appear" to the Government to be present. While observing that Section 95 of the Code exemplifies the principle that freedom of speech and expression is not unfettered, this Court commended that freedom must be available to all and no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. It cannot be ignored that India is a country with vast disparities in language, culture and religion

11. (1988) 1 SCC 668.

12. AIR 1947 Nag 1.

13. AIR 1986 Patna 98.

and unwarranted and malicious criticism or interference in the faith of others cannot be accepted.

25. It would thus, appear that no inflexible guidelines can be laid down to test the validity of a notification issued under Section 95 of the Code. Nonetheless the following legal aspects can be kept in mind while examining the validity of such a notification:

(i) The statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of forfeiture. Therefore, the grounds of Government's opinion must be stated in the notification issued under Section 95 of the Code and while testing the validity of the notification the Court has to confine the inquiry to the grounds so disclosed;

(ii) Grounds of opinion must mean conclusion of facts on which opinion is based. Grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which Government may choose. A mere repetition of an opinion or reproduction of the Section will not answer the requirement of a valid notification. However, at the same time, it is not necessary that the notification must bear a verbatim record of the forfeited material or give a detail gist thereof;

(iii) The validity of the order of forfeiture would depend on the merits of the grounds. The High Court would set aside the order of forfeiture if there are no grounds of opinion because if there are no grounds of opinion it cannot be satisfied that the grounds given by the Government justify the order. However, it is not the duty of the High Court to find for itself

whether the book contained any such matter whatsoever;

(iv) The State cannot extract stray sentences of portions of the book and come to a finding that the said book as a whole ought to be forfeited;

(v) The intention of the author has to be gathered from the language, contents and import of the offending material. If the allegations made in the offending article are based on folklore, tradition or history something in extenuation could perhaps be said for the author;

(vi) If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under Section 153-A of the IPC that the writing contains a truthful account of past events or is otherwise supported by good authority. Adherence to the strict path of history is not by itself a complete defence to a charge under Section 153-A of the IPC;

(vii) Section 95(1) of the Code postulates that the ingredients of the offences stated in the notification should "appear" to the Government to be present. It does not require that it should be "proved" to the satisfaction of the Government that all requirements of punishing sections, including *mens rea,* were fully established;

(viii) The onus to dislodge and rebut the *prima facie* opinion of the Government that the offending publication comes within the ambit of the relevant offence, including its requirement of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof;

(ix) The effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also be relevant for judging the probable consequences of the writing.

26. Having assessed the validity of notification dated 20th December 2006 on the touchstone of the afore-stated principles, we are of the opinion that in the present case, the conditions statutorily mandated for exercise of power under Section 95 of the Code are lacking and therefore, the action of the Government cannot be sustained.

27. It is plain from a bare reading of the notification that the Government's opinion, that the circulation of the said book, containing scurrilous and derogatory references to Shri Chhatrapati Shivaji Maharaj, has resulted in causing enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the said book is likely to result in breach of peace and public tranquillity, is based on the grounds set out in the preamble to the notification, viz., the author has made several derogatory references, specified in the Schedule appended to the notification, regarding Shri Chhatrapati Shivaji Maharaj, in particular about his parentage and the Bhosale family; the said derogatory references are prejudicial to the maintenance of harmony between different groups and has disturbed the public tranquillity, the publication and circulation of the book has not only already resulted in causing enmity between the persons who revere Shri Chhatrapati Shivaji Maharaj and other persons who may not so revere but is likely to continuously cause such enmity and that for publication of the book an FIR for offences under Sections 153 and 153-A read with Section 34 of the IPC has been registered against the author.

28. Thus, being one of the essential conditions for exercise of power under Section 95 of the Code, that the publication contains matter which is an offence under various provisions of the IPC, the opinion of the State Government is based on the factum of registration of an FIR against the author and others for offences punishable under Sections 153 and 153-A read with Section 34 of the IPC. As stated above, vide order dated 5th April, 2007, in *Manzar Sayeed Khan*'s case *(supra),* this Court while quashing the same FIR which was registered against Prof. James W. Laine and others and was referred to in the notification has held that the offending articles in the book do not constitute an offence under Section 153-A of the IPC. It is explicit that the entire edifice of the impugned notification being based on the registration of the said FIR, it gets knocked off by the decision of this Court. Furthermore, it is stated that "the Government of Maharashtra is of the opinion that the circulation of the said book containing scurrilous and derogatory references against Shri Chhatrapati Shivaji Maharaj has resulted in causing enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the said book is likely to result in breach of peace and public tranquillity and in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not; and cause disturbances to public tranquillity and maintenance of harmony between such groups and as such the said book should be forfeited". We are unable to persuade ourselves to agree with learned counsel for the appellants that only the subjective satisfaction of the State Government was called for and the matter covered by the notification is sufficient and cannot be assailed. It is manifest that the notification does not identify the communities between which the book had caused or is likely to cause enmity. Therefore, it cannot be found out from the notification as to which communities got outraged by the publication of the book or it had caused hatred and animosity between particular communities or groups. We feel that the statement in the notification to the effect that the book is "likely to result in breach of peace and public tranquillity and

in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not" is too vague a ground to satisfy the afore-enumerated tests. Moreover, the High Court has also noted that the learned Associate Advocate General was unable to produce or disclose any material or information to find out as to which were the groups based on religion, race, language or religion or caste or communities who do not revere Shri Chhatrapati Shivaji Maharaj. If that be so, no fault can be found with the finding of the High Court to the effect that there is nothing on record on the basis whereof the Government could form the opinion that the book was likely to promote disharmony or feeling of enmity between various groups or likely to cause disturbance to public tranquillity and maintenance of harmony between various groups.

29. In view of the foregoing, we are in agreement with the High Court that the notification of forfeiture, dated 20th December 2006, does not fulfil the mandatory requirements of sub-section (1) of Section 95 of the Code and is, therefore, invalid. No ground is made out warranting our interference with the impugned judgment. The appeal is dismissed accordingly, leaving the parties to bear their own costs.

K.K.T. Appeal dismissed.

MANAGING DIRECTOR, MAHARASHTRA STATE FINANCIAL CORPORATION & ORS.

v.

SANJAY SHANKARSA MAMARDE

(Civil Appeal No. 7189 of 2002)

JULY 9, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Consumer Protection Act, 1986 – ss 2(o), 2(g) and 23 – Sanction of loan by State Financial Corporation to complainant – Non-disbursement of balance instalments by Corporation to complainant – Complaint alleging deficiency in service – Allowed by National Commission – Direction to Corporation to pay compensation to complainant – Correctness of – Held: Not correct – Non-release of loan amount was not because of any deficiency on the part of Corporation but due to complainant's conduct – Complainant failed to furnish progress report and did not discharge his liability towards interest despite repeated demands – Thus, failure of Corporation to render 'service' could not give rise to claim for recovery of any amount under the Act.

The State Financial Corporation sanctioned loan to the complainant for his hotel project. The said loan of Rs. 30 lakhs was to be disbursed to the complainant in instalments on complainant's furnishing the progress report of the project at Amravati. The Corporation released the first instalment of the loan of Rs. 2,90,000/- to the complainant. However, the Corporation did not submit the progress report of the project and the other documents. The complainant also did not discharge his liability towards the interest despite repeated demands. The Corporation also came to know about the proposal for railway line between Amravati and Narkhed which was likely to affect the hotel project. As such the Corporation

stopped the disbursement of balance amount of loan to the complainant. The complainant filed a complaint before the National Consumer Disputes Redressal Commission against the Corporation alleging deficiency in service on the part of the Corporation on account of their failure to release the balance loan amount. The Commission allowed the complainant and directed the Corporation to pay to the complainant an amount of Rs. 4,84,457/- as compensation. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 Clause (o) of section 2 of the Consumer Protection Act defines "service". The use of the words 'any' and 'potential' in the context these have been used in clause (o) indicates that the width of the clause is very wide and extends to any or all actual or potential users. The legislature has expanded the meaning of the word further by extending it to every such facilities as are available to a consumer in connection with banking, financing etc. Undoubtedly, when banks or financial institutions advance loans, they do render 'service' within the meaning of the clause. [Para 15] [368-G; 369-B-C]

1.2 It is manifest from the language employed in clause (g) of the section 2 defining deficiency that its scope is also very wide but no single decisive test in the determination of the extent of fault, imperfection, nature and manner of performance etc. required to be maintained can be laid down. It must depend on the facts of the particular case, having regard to the nature of the 'service' to be provided. [Para 16] [369-F]

1.3 In the instant case, the Corporation was obliged to disburse to the complainant a loan of Rs.30 lakhs in instalments on complainant's furnishing the progress report of the project. Although, no specific information

with regard to the actual dates for release of the instalments of the loan amount are forthcoming, yet it can be gathered from the correspondence on record that the loan amount was to be disbursed periodically (perhaps half yearly), on the basis of the report of the approved valuer on the progress of the project. It is evident from Corporation's letters that the complainant not only failed to furnish the progress report, he also did not discharge his liability towards interest, as demanded from him from time to time. Even the cheque in the sum of Rs.30,000/- issued by the complainant to the Corporation on 2nd September, 1992 towards up-front fee was returned unpaid by his bankers. In Corporation's letter dated 24th February, 1994 it was alleged that the complainant had not only failed to pay interest, it was also found on inspection on couple of occasions by the Regional Manager that during the last four months there was no further progress in implementation of the project. It is significant that these allegations and details of interest due from the complainant had not been seriously disputed by the complainant either before the Commission or in the counter affidavit filed by him in this appeal. In the background of the factual scenario as emerging from the material on record, there was no shortcoming or inadequacy in the service on the part of the Corporation in performing its duty or discharging its obligations under the loan agreement. The Corporation was constrained not to release the balance instalments and recall the loan on account of stated defaults on the part of the complainant himself. Non release of loan amount was not because of any deficiency on the part of the Corporation but due to complainant's conduct and therefore, the failure of the Corporation to render 'service' could not be held to give rise to claim for recovery of any amount under the Act. [Para 17] [370-A-H]

1.4 Unless the action of a financial institution is found to be mala fide, even a wrong decision taken by it is not open to challenge, as the wisdom of a particular decision is normally to be left to the body authorized to decide. [Para 18] [371-B]

U.P. Financial Corporation and Ors. vs. Naini Oxygen and Acetylene Gas Ltd. and Anr. **(1995) 2 SCC 754 – Relied on.**

1.5 Having considered the matter in the light of the correspondence exchanged between the Corporation and the complainant, there can be no hesitation in holding that there has not been any deficiency in the service the Corporation was required to provide to the complainant. The Commission was not correct in coming to the said conclusion. The complainant being himself a defaulter right from inception of his dealing with the Corporation, when his cheque in the sum of Rs. 30,000/- got dishonoured, coupled with persistent defaults in discharging his liability to the Corporation towards interest, despite repeated demands, he cannot be permitted to plead at the later stage that he suffered on account of deficiency in service by the Corporation because of non-disbursement of balance instalments of loan by them. While not insisting upon the borrower to honour the commitments undertaken by him, the Corporation alone cannot be shackled hand and foot in the name of fairness. Fairness cannot be a one-way street. Where the borrower has no genuine intention to repay and adopts pretexts and ploys to avoid payment like in the instant case, he cannot make the grievance that the Corporation was not acting fairly, even if requisite procedures have been followed. [Para 19] [371-G-H; 371-A-D]

Haryana Financial Corporation and Anr. vs. Jagdamba Oil Mills and Anr. **(2002) 3 SCC 496 – Relied on.**

1.6 The order passed by the Commission is set aside and the complaint filed by the complainant is dismissed. Amount deposited in terms of order dated 19th July, 2004 shall be released to the Corporation on maturity of the fixed deposit. [Para 20] [372-D-E]

Case Law Reference:

(1995) 2 SCC 754	**Relied on.**	**Para 18**
(2002) 3 SCC 496	**Relied on.**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7189 of 2002.

From the Judgment and Order dated 07.01.2002 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 9 of 1995.

Santosh Paul, Arvind Gupta and M.J. Paul for the Appellants.

Manish Pitale and Sunil Kumar Verma for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in this appeal, filed under Section 23 of the Consumer Protection Act, 1986 (for short "the Act"), by the Maharashtra State Financial Corporation (hereinafter referred to as "the Corporation"), is to the final order, dated 7th January, 2002, passed by the National Consumer Disputes Redressal Commission, New Delhi (for short "the Commission") in Original Petition No. 9 of 1995. By the impugned order, the Commission has accepted the complaint preferred by the respondent (hereinafter referred to as "the complainant") against the Corporation and has directed the Corporation to pay to the complainant an amount of Rs.4,84,457/- as compensation, within a period of two months from the date of the order and in case of default, to pay interest

at the rate of 18% per annum from the date of order till actual payment.

2. Succinctly put, the material facts giving rise to the present appeal are as follows:

The complainant approached the Corporation for sanction of loan for his hotel project at Amravati. As per the project report, the capital outlay was of Rs.74.45 lakhs. The means of finance envisaged in the project report were as follows:

i) Proprietor's capital	:	Rs.16.80 lakhs
ii) Term loan from Corporation	:	Rs.30.00 lakhs
iii) Special Capital Incentive from SICOM :	:	Rs.21.30 lakhs
iv) Unsecured loans	:	Rs. 6.35 lakhs
Total	:	Rs.74.45 lakhs

3. The Complainant's loan proposal was approved by the Executive Committee of the Corporation on 27th May, 1992, sanctioning a term loan of Rs.30 lakhs to the complainant. Accordingly, a sanction letter along with terms and conditions of the loan was issued to the complainant on 2nd July, 1992. The material conditions of loan were as follows:

"(a) The loan shall be utilised exclusively for the project as per the scheme approved by MSFC and the specific purposes for which the same is sanctioned.

(b) The loan shall be disbursed by MSFC in one lump sum or in instalments as and when the said purposes are fulfilled or at the entire discretion of the Corporation or may be refused if in the opinion of the Corporation, the purpose for which the full

loan has been sanctioned are not properly fulfilled.

(c) The loan will be disbursed either for acquisition of fixed assets under the said scheme or for reimbursement of funds utilised for acquisition of fixed assets taken for security under the said scheme.

(d) A minimum margin of 55% over all on fixed assets shall be maintained during the currency of the loan.

(e) The loan shall be repaid within a period of 8 years by 13 half yearly instalments commencing from the end of 2nd year of disbursement of the first instalment of the loan. The amount of each instalment repayable being about 1/13 of the amount sanctioned regardless of the amount disbursed.

(f) The interest shall be charged @ 22% p.a. and the same shall be payable quarterly on the total loan and the same shall be charged from the date of disbursement of first instalment of the loan."

Additionally, it was also agreed that the loan amount would be disbursed depending on the progress of the work in accordance with a set time schedule. The progress of the construction work was required to be evaluated by the valuer approved by the Corporation.

4. The said conditions were accepted by the complainant. Pursuant to complainant's request vide his letter dated 2nd September, 1992, undertaking to bring entire 100% capital; filing his banker's confirmation for grant of bridge loan against subsidy i.e. (SCI) and load sanction letter from MSEB, before availing of the next disbursement, the first instalment of the loan of Rs.2,90,000/- was released by the Corporation to the complainant. On the same day, the complainant issued a cheque in the sum of Rs.30,000/- towards up-front fees to the

Corporation. However, the said cheque of Rs.30,000/- was dishonoured when presented for payment. By their letter dated 15th December, 1992, the Corporation intimated the complainant that despite the release of first instalment of Rs.2.90 lakhs, he had neither submitted papers for further disbursements nor reported progress of the project and had also failed to submit Chartered Accountant's certificate showing his investment. Subsequently, a valuation report dated 7th January 1993, showing that a total amount of Rs.6,97,057/- (Rs.5,02,099/- as per previous valuation + Rs.1,94,958/- as per present valuation) had been spent on the construction of the hotel was filed by the complainant. According to the Corporation, despite the fact that the complainant had failed to submit complete documents, second instalment of Rs.87,000/- was released to him on 19th January 1993, after adjusting therefrom the amount of interest due in terms of the conditions of loan.

5. Vide their letter dated 5th March, 1993, the Corporation requested the complainant to inform them about the progress of the project and avail the balance loan limit by submitting valuation report, Chartered Accountant's certificate towards further investment made by him for creation of fixed assets. According to the Corporation, since they had learnt that there was a proposal for laying a railway line between Amravati and Narkhed which was likely to affect the hotel project and the complainant had also defaulted in payment of interest despite repeated requests by them vide their letters dated 10th December 1993 and 24th February, 1994, they did not release further instalments of the loan sanctioned to the complainant. On the contrary, the stand of the complainant was that although by June 1993, he had spent Rs.27,25,510/- but no evaluation was done by the valuer of the Corporation and all his request for release of further instalments fell on deaf ears. All the time, the Corporation insisted on a written assurance from the railway authorities that the proposed Amravati and Narkhed railway line would not be passing through the hotel project site,

before releasing the balance loan amount.

6. Finally, vide their letter dated 5th September, 1994, the Corporation informed the complainant that the entire balance unavailed term loan of Rs.26.23 lakhs had been treated as cancelled. The said intimation was followed by a legal notice dated 18th October, 1994 by the Advocate of the Corporation, wherein it was alleged that the complainant had failed to pay the interest on the amount already disbursed to him; as on 31st March, 1994 he was in arrears by more than Rs.1 lakh as interest and he had also failed to give any alternative proposal for the hotel project as the project at the existing site was likely to be affected by new railway track from Amravati to Narkhed. The complainant was called upon to repay the entire loan amounting to Rs.5,19,726/-, the outstanding amount as on 23rd September,1994, within fifteen days from the date of receipt of the said notice.

7. It appears from the impugned order that by his letter dated 15th September 1994, the complainant protested to the recall of loan sanctioned to him. It is stated that the complainant pointed out that though a number of instalments of the loan had fallen due to be paid to the complainant, it was only as late as on 29th July, 1994, that he was asked to submit a letter from the competent authority regarding the status of the railway line and that he promptly submitted a certificate issued by the Commissioner, Amravati Division affirming that there was no proposal of Amravati – Narkhed line.

8. Having failed to get any favourable response from the Corporation, on 17th January 1995, the complainant filed a complaint with the Commission. It seems that during the pendency of the complaint before the Commission, the Corporation retraced their steps and proposed to renew the loan on certain conditions, which were not acceptable to the complainant.

9. As already stated, the Commission has accepted the

complaint and has come to the conclusion that there was no justifiable ground for the Corporation to deny disbursement of loan to the complainant. According to the Commission, having sanctioned the loan and then stopping its disbursement without any cause amounted to deficiency in service on the part of the Corporation. However, keeping in mind the passage of time, the Commission did not find it expedient to direct the Corporation to release further instalments of the loan, sanctioned as far back as in July 1992.

10. Being aggrieved by the award of compensation, the Corporation has preferred this appeal.

11. We have heard Mr. Santosh Paul, learned counsel appearing for the Corporation and Mr. Manish Pitale, learned counsel appearing for the complainant.

12. Learned counsel appearing for the Corporation submitted that in the instant case there was no deficiency in service as defined in Section 2(g) of the Act. The learned counsel argued that the Commission has exceeded its jurisdiction in examining the administrative decision of the Corporation to recall the loan as it felt that having regard to the past conduct of the complainant it was not in the interest of the Corporation to disburse the balance amount of loan to him. Relying on the decision of this Court in *U.P. Financial Corporation & Ors. Vs. Naini Oxygen & Acetylene Gas Ltd. & Anr.,*[1] it was submitted that unless the action of the Corporation was held to be *mala fide*, even a wrong decision taken by it was not open to challenge as it is not for the Courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Reliance was also placed on another decision of this Court in *Haryana Financial Corporation & Anr. Vs. Jagdamba Oil Mills & Anr.,*[2] to contend that in commercial

1. (1995) 2 SCC 754.
2. (2002) 3 SCC 496.

matters the Court should not risk their judgments for the judgments of the bodies to whom that task is assigned. It was asserted that since the Corporation was of a *bona fide* belief that the entire hotel project of the complainant may get affected because of the proposed railway line and further there were defaults on the part of the complainant to discharge his liability towards quarterly instalments of interest, the decision of the Corporation not to disburse further instalments cannot be termed as *mala fide* or unreasonable and, therefore, there was no question of any deficiency in the service of the Corporation towards the complainant.

13. Supporting the impugned judgment, learned counsel appearing for the complainant, on the other hand, submitted that in the absence of any stipulation in the conditions of loan for stopping the disbursement on account of default in the payment of interest on time, the action of the Corporation in not releasing the remaining instalments on the stipulated dates not only affected the hotel project, it also caused a huge loss to the complainant as he was deprived of the special capital incentive by SICOM. It was argued that the non release of the instalments on the specious plea that there was a proposal for a railway line was *mala fide* inasmuch as there was no such proposal.

14. The short question arising for consideration is whether the Commission was correct in holding that there has been deficiency in service provided by the Corporation to the complainant on account of their failure to release the balance loan amount?

15. Clause (o) of Section 2 of the Act defines "service" to mean:-

> "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing

construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

The use of the words 'any' and 'potential' in the context these have been used in clause (o) indicates that the width of the clause is very wide and extends to any or all actual or potential users. The legislature has expanded the meaning of the word further by extending it to every such facilities as are available to a consumer in connection with banking, financing etc. Undoubtedly, when the bank or financial institutions advance loans, they do render 'service' within the meaning of the clause. In that behalf, there is no dispute.

16. "Deficiency" under clause (g) of Section 2 of the Act means:-

"deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;"

It is manifest from the language employed in the clause that its scope is also very wide but no single test as decisive in the determination of the extent of fault, imperfection, nature and manner of performance etc. required to be maintained can be laid down. It must depend on the facts of the particular case, having regard to the nature of the 'service' to be provided.

17. Therefore, in so far as the present case is concerned, in order to examine whether there was a deficiency in service by the Corporation, it has to be seen if there was any inadequacy in the quality, nature and manner of performance which was required to be maintained by the Corporation in terms of their letter dated 2nd July, 1992, conveying the

sanction of loan to the complainant. As noted above, the Corporation was obliged to disburse to the complainant a loan of Rs.30 lakhs in instalments on complainant's furnishing the progress report of the project. Although, no specific information with regard to the actual dates for release of the instalments of the loan amount are forthcoming, yet it can be gathered from the correspondence on record that the loan amount was to be disbursed periodically (perhaps half yearly), on the basis of the report of the approved valuer on the progress of the project. It is evident from Corporation's letters dated 5th March, 1993, 10th December, 1993, 24th February, 1994 and 29th July, 1994 that the complainant not only failed to furnish the progress report, he also did not discharge his liability towards interest, as demanded from him from time to time. As already stated, even the cheque in the sum of Rs.30,000/- issued by the complainant to the Corporation on 2nd September, 1992 towards up-front fee was returned unpaid by his bankers. In Corporation's letter dated 24th February, 1994 it was alleged that the complainant had not only failed to pay interest, it was also found on inspection on couple of occasions by the Regional Manager that during the last four months there was no further progress in implementation of the project. It is significant that these allegations and details of interest due from the complainant had not been seriously disputed by the complainant either before the Commission or in the counter affidavit filed by him in this appeal. In the background of the factual scenario as emerging from the material on record, we are convinced that there was no shortcoming or inadequacy in the service on the part of the Corporation in performing its duty or discharging its obligations under the loan agreement. The Corporation was constrained not to release the balance instalments and recall the loan on account of stated defaults on the part of the complainant himself. Non release of loan amount was not because of any deficiency on the part of the Corporation but due to complainant's conduct and therefore, the failure of the Corporation to render 'service' could not be

held to give rise to claim for recovery of any amount under the Act.

18. We also find substance in the contention of learned counsel for the Corporation that unless the action of a financial institution is found to be mala fide, even a wrong decision taken by it is not open to challenge, as the wisdom of a particular decision is normally to be left to the body authorized to decide. In *U.P. Financial Corporation & Ors. Vs. Naini Oxygen & Acetylene Gas Ltd. & Anr.* (supra) this Court had observed that a Corporation being an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge, in the discharge of its functions, it is free to act according to its own right. The views it forms and the decisions it takes would be on the basis of the information in its possession and the advice it receives and according to its own perspective and calculation. In such a situation, more so in commercial matters, the court should not risk their judgments for the judgments of the bodies to which that task is assigned. It was held that: (SCC p. 761, para 21)

> "Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable".

19. Having considered the matter in the light of the correspondence exchanged between the Corporation and the complainant, we have no hesitation in holding that there has not been any deficiency in the service the Corporation was required to provide to the complainant. In our opinion, the Commission was not correct in coming to the aforestated conclusion. We are of the view that the complainant being himself a defaulter right from inception of his dealing with the Corporation, when

his cheque in the sum of Rs. 30,000/- got dishonoured, coupled with persistent defaults in discharging his liability to the Corporation towards interest, despite repeated demands, he cannot be permitted to plead at the later stage that he suffered on account of deficiency in service by the Corporation because of non-disbursement of balance instalments of loan by them. As was observed by this Court in *Jagdamba Oil Mills* (supra), while not insisting upon the borrower to honour the commitments undertaken by him, the Corporation alone cannot be shackled hand and foot in the name of fairness. Fairness cannot be a one-way street. Where the borrower has no genuine intention to repay and adopts pretexts and ploys to avoid payment like in the present case, he cannot make the grievance that the Corporation was not acting fairly, even if requisite procedures have been followed.

20. For the foregoing reasons, we allow the appeal; set aside the order passed by the Commission and dismiss the complaint filed by the complainant. Amount deposited in terms of order dated 19th July, 2004 shall be released to the Corporation on maturity of the fixed deposit. There shall, however, be no order as to costs.

N.J. Appeal allowed.

SIKANDAR SINGH & ORS.
v.
STATE OF BIHAR
(Criminal Appeal No. 227 of 2007)

JULY 9, 2010

[D.K. JAIN AND R.M. LODHA, JJ.]

Penal Code, 1860:

ss. 302/149 and 307/149 – Murder and attempt to murder – 'Common object' – Eight accused armed with guns and other lethal weapons – One of them fired at the victims – One of the victims died at the spot – Another received injuries but survived – Vicarious liability of other accused – HELD: Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming unlawful assembly must be shown to have committed some overt act – 'Common object' does not require a prior concert and a common meeting of minds before the attack – Ingredients of s.149 – Explained – Both the courts below were correct in coming to the conclusion that prosecution had established the case against all the accused.

ss. 96 to 102 – Right of private defence of property – Out of eight accused armed with guns and other lethal weapons, one firing at the person who was cleaning the plot in dispute with broomstick causing his death – The same accused also fired at the brother of deceased who received injuries but survived – HELD: Right of private defence is a defensive right – It is neither a right of aggression nor of reprisal – Burden of establishing the plea of self-defence is on the accused, but it is not as onerous as that lies on the prosecution – Plea of self-defence has rightly been rejected by trial court as the accused had no right over the land much less a right to be protected at the cost of life of other persons – High Court also

rightly held that the accused being aggressors, could not claim right of self-defence.

Criminal Law:

Non-explanation of injuries on accused – HELD: Having regard to the nature of the injuries, i.e. simple and superficial, suffered by one of the accused, prosecution case cannot be overthrown for non-explanation of the said injuries – Penal Code, 1860 – ss.302.149 and 307/149.

The five appellants along with three others were prosecuted for murder of 'US', the brother of PW-4, and attempting to murder PW-4. The prosecution case was that a title suit between 'US' (deceased) and the accused with regard to a plot of land in front of the house of 'US' was pending. On the date of the incident when 'US' was cleaning the said plot, accused 'RS' came there and protested against the same. Heated arguments ensued between them. On the instigation of another accused, 'RS' went to his house and returned with a gun and other accused persons who were also armed with lethal weapons. They exchanged hot and abusive language with 'US'. Accused 'RS' fired at 'US', who died at the spot. He also fired at PW-4 who sustained injuries on his head and face. Certain villagers including PWs 1, 2, 3 and 5 rushed to the spot meanwhile and witnessed the incident. Two of the accused died during the trial. The trial court convicted and sentenced accused 'RS' inter alia, u/ss 302 and 307 IPC, four accused u/ss 302/149 and 307/149 IPC, and the sixth accused u/s 148 IPC. Their appeal was dismissed by the High Court.

In the appeal filed by five accused, except accused 'RS', it was contended for the appellants that (i) there was no evidence to show that there was any meeting of minds of the appellants as to the common object to commit the offences alleged; (ii) when the suit relating to the dispute

of ownership of the land between the parties was still pending in the court, the deceased and his brother had no business to clean the land, and the complainant party being the aggressor, the appellants acted in self-defence; and (iii) that the prosecution failed to explain the injuries sustained by appellant-accused 'SJ'.

Dismissing the appeal, the Court

HELD: 1.1. Section 149 IPC has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring vicarious liability u/s 149 IPC for the offence committed by a member of the unlawful assembly, the liability of other members of such unlawful assembly during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [para 14] [386-E-H; 387-A]

Mizaji & Anr. Vs. State of U.P. **1959 Suppl. SCR 940 = 1959 AIR 572 - relied on.**

1.2. A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the

members composing it, and from a consideration of all the surrounding circumstances. [para 16] [388-D-E]

Masalti Vs. State of U.P. **1964 (8) S.C.R. 133 – relied on**

Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra **2009 (15) SCR 58 = 2009 (10) SCC 773 - referred to.**

1.3. In the instant case, it has come in evidence, particularly, the testimony of PWs 4 and 5, that when the accused persons reached the place of occurrence with accused 'RS', accused 'SS' and 'RS' were armed with guns and the other accused with lethal weapons, like spear, *farsa* and lathi. Though it is true that as per the evidence, it was 'RS' who fired at the deceased and his brother (PW-4) with his gun, yet it was clear from the nature of the weapons that they possessed, that being more than five in number, they did form an unlawful assembly with the common object of eliminating the deceased and his brother and in prosecution of the common object, the deceased was shot dead and an attempt on the life of his brother (PW-4) was made by one of the members of the unlawful assembly, namely, 'RS'. Thus, all of them had knowledge of the common object of the assembly. Therefore, their case falls within theambit of s.149 IPC, and they are guilty of the offences for which they have been convicted and sentenced. [para 19] [389-G-H; 390-A-F]

2.1. The right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so,

the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended, and should not exceed its legitimate purpose. However, the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. [para 23-24] [391-G; 392-B-E]

Jai Dev Vs. *State of Punjab* **1962 SCR 489 = 1963 AIR 612;** and *Dharam & Ors. Vs. State of Haryana* **2006 (10) Suppl. SCR 391=JT 2007 (1) SC 299- relied on.**

Laxman Sahu Vs. State of Orissa **1988 AIR 83 - referred to.**

2.2. It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record. [para 25] [392-F-G; 393-A]

Vidhya Singh Vs. State of Madhya Pradesh **1971 AIR 1857;** *Munshi Ram & Ors. Vs. Delhi Administration* **1968 SCR 408 =1968 AIR 702;** *The State of Gujarat Vs. Bai Fatima & Anr.* **1975 (3) SCR 933 =1975 AIR 1478 ;** and *Salim Zia Vs. State of Uttar Pradesh* **1979 (2) SCR 394 = 1979 AIR 391 – relied on.**

2.3. The plea of self-defence has been rejected by the trial court on the ground that on the date of occurrence,

the appellants had no right over the land in dispute, much less a right to be protected at the cost of life of other persons. The High Court has observed that except for a broomstick, neither the deceased nor any other member of the complainant party had any weapon in their hands; the deceased was not damaging the land nor was changing its nature; no overt act at all was committed by any of the persons on complainant's side; thus, there was no threat to the property or to life of the appellants necessitating exercise of right of private defence. The appellants were, in fact, aggressors and being members of the aggressor-party none of the appellants can claim right of self-defence. The appellants have failed to establish that they were exercising right of private defence. [para 28] [393-F-G; 394-A-D]

3.1. Non-explanation of injuries suffered by the accused cannot be held as an unqualified proposition of law that whenever the accused sustains an injury in the same occurrence, the prosecution is obliged to explain the injury and on its failure to do so, its case has to be disbelieved or that a presumption has to be raised that the accused caused injuries in exercise of right of private defence. In the case of *Takhaji Hiraji*,* a Bench of three Judges of this Court observed that before non-explanation of the injuries on the persons of the accused by the prosecution witnesses may affect prosecution case, the court has to be satisfied of existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of occurrence in question. [para 26 and 29] [393-C-D; 394-E-G]

*****Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Ors.* **2001 (6) SCC 145 - relied on.**

3.2. In the instant case, having regard to the nature of the injuries allegedly suffered by appellant 'SJ', the

case of the prosecution cannot be overthrown because of non-explanation of the said injuries. As per the medical report, the injuries allegedly suffered by the said appellant are simple and superficial in nature. In view of the fact that the evidence against the appellants for having committed the offences has been found to be cogent and creditworthy, it outweighs the effect of the omission on the part of the prosecution to explain the injuries. [para 30] [393-H; 394-A-C]

Sukhan Raut & Ors. Vs. State of Bihar 2001 Suppl. **(5) SCR 359 = 2001 (10) SCC 284;** *Basisth Roy & Ors. Vs. State of Bihar* **2003 (9) SCC 52;** *Shri Gopal & Anr. Vs. Subhash & Ors.* **2004 (1) SCR 1085 = 2004 (13) SCC 174;** and *Mohan Singh* Vs. *State of Punjab* **1962 Supp. (3) SCR 8;** *Lakshmi Singh & Ors. Vs. State of Bihar* **1976 (4) SCC 394;** *Dashrath Singh Vs. State of U.P* **2004 Suppl. (3) SCR 561 = 2004 (7) SCC 408 ;** *Shriram Vs. State of M.P.* **2003 Suppl. (6) SCR 129 = 2004 (9) SCC 292;** *Vijayee Singh & Ors. Vs. State of U.P.* **1990 (2) SCR 573 = 1990 (3) SCC 190** and *Bishna & Ors. Vs. State of W.B.* **2005 Suppl. (4) SCR 892 = 2005 (12) SCC 657 - cited.**

Case Law Reference:

2001 Suppl. (5) SCR 359	**cited**	**para 10**
2003 (9) SCC 52	**cited**	**para 10**
2004 (1) SCR 1085	**cited**	**para 10**
1962 Supp. (3) SCR 8	**cited**	**para 10**
1976 (4) SCC 394	**cited**	**para 10**
2004 Suppl. (3) SCR 561	**cited**	**para 10**
2003 Suppl. (6) SCR 129	**cited**	**para 10**
1990 (2) SCR 573	**cited**	**para 10**
2005 Suppl. (4) SCR 892	**cited**	**para 10**

1959 Suppl. SCR 940	**relied on**	**para 14**
1964 (8) S.C.R. 133	**relied on**	**para 17**
2009 (15) SCR 58	**referred to**	**para 18**
1962 SCR 489	**relied on**	**para 22**
1988 AIR 83	**referred to**	**para 23**
2006 (10) Suppl. SCR 391	**relied on**	**para 24**
1971 AIR 1857	**relied on**	**para 25**
1968 SCR 408	**relied on**	**para 25**
1975 (3) SCR 933	**relied on**	**para 25**
1979 (2) SCR 394	**relied on**	**para 25**
2001 (6) SCC 145	**relied on**	**para 29**

CIVIL APPELLATE JURISDICTION : Criminal Appeal No. 227 of 2007.

From the Judgment & Order dated 03.09.2004 of the High Court of Judicature at Patna in Criminal Appeal Nos. 268 of 2001 & 284 of 2001.

P.S. Mishra, Tathagat H. Vardhan, Ravi Ch. Prakash , Upendra Mishra, D.K. Jha, D.K. Pandey, Manu Shanker Mishra for the Appellants.

Anuj Prakash, Manish Kumar, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This criminal appeal, by special leave, arises out of a common judgment and order dated 3rd September 2004, delivered by the High Court of Judicature at Patna in three Criminal Appeals No.268, 284 and 384 of 2001, affirming the judgment and orders dated 7th June 2001 and 12th June 2001, passed by the Additional Sessions Judge, Bhojpur,

convicting and sentencing the present five appellants for various offences.

2. In all, eight persons, namely, Rajeshwar Singh @ Kamta Singh, Nagina Singh, Sheo Jee Singh @ Akshay Singh, Awadhesh Singh, Sikandar Singh, Harendra Singh, Shankar Singh @ Sheo Shankar Singh and Besh Lal Singh @ Bansh Lal Singh were put on trial for having committed the murder of Upendra Singh. Two of the accused, namely, Nagina Singh and Awadhesh Singh died during the course of the trial and were thus, dropped. The learned Additional Sessions Judge convicted accused Rajeshwar Singh under Sections 302 and 307 of the Indian Penal Code, 1860 ("IPC" for short) as well as under Section 27 of the Arms Act, 1959 and sentenced him to undergo rigorous imprisonment for life under Section 302; rigorous imprisonment for ten years under Section 307 IPC and rigorous imprisonment for three years under Section 27 of the Arms Act. Accused Sheo Jee Singh @ Akshay Singh, Sikandar Singh, Harendra Singh, Shankar Singh @ Sheo Shankar Singh were convicted and sentenced to undergo rigorous imprisonment for life under Section 302 read with Section 149 and rigorous imprisonment for five years under Section 307 read with Section 149 IPC. Accused Sheo Jee Singh was further convicted and sentenced to undergo rigorous imprisonment for three years under Section 27 of the Arms Act. Accused Besh Lal Singh was convicted and sentenced to undergo rigorous imprisonment for two years under Section 148 IPC and Sikandar Singh, Shankar Singh and Harendra Singh were also convicted and sentenced to undergo rigorous imprisonment for six months each under Section 147 IPC. The sentences awarded to all the accused were to run concurrently. All the six convicts preferred the afore-noted three appeals. As stated above, by the impugned judgment, the High Court has dismissed all the appeals. Being aggrieved, Sikandar Singh, Harendra Singh, Shankar Singh, Sheo Jee Singh and Besh Lal Singh have preferred this appeal. Convict Rajeshwar Singh seems to have accepted the verdict of the courts below.

3. Shorn of unnecessary details, the case of the prosecution may be summarized as follows:

There was a piece of land in front of the cattle shed of the deceased Upendra Singh where his cattle used to graze. There was dispute between the parties over the land and a title suit in respect thereof was pending. In the morning of 23rd December 1987 at about 9-10 a.m., when the deceased was cleaning the said land, accused Rajeshwar Singh happened to reach there and protested against the act of the deceased, saying that the land belonged to him. Ignoring the protest, the deceased continued cleaning the land. Some heated arguments ensued between them. Accused Nagina Singh (since dead), also happened to be at the spot. Having got infuriated and enraged, he exhorted Rajeshwar Singh to eliminate the deceased. Soon thereafter Rajeshwar Singh went to his house and came back with a gun. He was accompanied by Sheo Jee Singh, Awadhesh Singh (since dead), Sikandar Singh, Harendra Singh, Shankar Singh and Besh Lal Singh, all armed with lethal weapons such as spear, *farsa* and lathi. They exchanged hot and abusive language with the deceased. Accused Rajeshwar Singh fired at the deceased as a result of which he sustained injuries on his chest, abdomen, arm and forearm. In the meantime, Rajendra Singh (PW-4) came there and tried to save his brother Upendra Singh but he was also shot at by Rajeshwar Singh as a result of which he also sustained injuries on his head, forehead and cheek. Upendra Singh, the deceased, succumbed to the injuries and died instantaneously at the spot.

4. Overhearing the cries, certain villagers including Jagdish Singh (PW-1), Samhoot Singh (PW-2), Harihar Singh (PW-3) and Chandrama Singh rushed to the spot and witnessed the incident. PW-5-Gupteshwar Singh (uncle of the deceased) rushed to the police station and on the basis of his statement, a First Information Report (FIR) was recorded at about 1.00 p.m. on the same day. The autopsy was conducted by Dr.Kamta Prasad Rai (PW-7) on the body of Upendra Singh.

He noted the following injuries:

"(i) External injury – blood had come from both nostrils and mouth, eyes were open (sic). 41 pellets injuries on chest scattered all over the chest. Out of which 15 were penetrating on left side chest, 9 pellet injuries were on left arm and fore-arm.

(ii) On internal examination trachea was found full of blood clots. Oesophagus (sic) contained blood clots 10 pellets injuries on left lung causing laceration of lung-tissues and blood vessels inside it. 2 pellet injuries causing laceration and puncture of right lung tissue. Upper portion of diaphragm on left side was lacerated and haemorrhaging. 5 punctured wound by pellet on stomach causing illegible of its contents i.e. un-digested food. 7 pellet injuries on heart puncturing its chamber. All chambers of heart were empty and whole chest cavity was full of blood clots."

5. Rajendra Singh (PW-4) was examined by Dr.Vijai Pratap Singh (PW-6), who found the following injuries on his body:

"Three pin-head size holes over face-one over scalp, one over fore-head and one over cheek caused by pellet injuries. The injuries were caused by firearm within 12 hours and were simple in nature. In his cross-examination, he deposed that the patient was referred to him by the police. No pellets were found imbedded inside the patient's wound. He has further deposed that such injury can be self-inflicted if one undertakes the risk."

6. Appellant Sheo Jee Singh was also examined by Dr. Rameshwar Singh. Following injuries were found on his person:

"(i) One swelling covering around the lower 1/3 of right upper arm just above right elbow and fracture of underlying bone.

(ii) Complain of pain on right shoulder."

7. On completion of the investigation, chargesheet was submitted against all 0the eight afore-mentioned accused.

8. The accused denied their involvement in the murder of Upendra Singh. In their defence, it was stated that they had been falsely implicated due to enmity because of long drawn land dispute and a series of other litigations arising therefrom. Their defence was that the suits in respect of the disputed land and the proceedings under Section 144 of the Code of Criminal Procedure, 1973 ("Cr.P.C." for short) having been decided in their favour, there was no question of their picking up the quarrel with the deceased and in fact, it was the complainant party who were the aggressors in which Sheo Jee Singh was assaulted for which a case was also registered. A plea of exercise of right of private defence was also raised.

9. As already stated, the trial court convicted all the accused for the offences noted above. The appeal of the appellants having been dismissed by the High Court, they are before us in this appeal.

10. Mr. P.S. Misra, learned senior counsel appearing for the appellants has assailed the conviction of the appellants mainly on the grounds that: (i) there is no evidence on record to show the meeting of minds of the appellants as to the common object to do away with the deceased. It was thus, argued that all the appellants cannot be held guilty for having committed offence under Section 302 read with Section 149 IPC. In support of the proposition that at the most they could be convicted and sentenced for their individual acts, reliance was placed on the decisions of this Court in *Sukhan Raut & Ors. Vs. State of Bihar*[1], *Basisth Roy & Ors. Vs. State of Bihar*[2], *Shri Gopal & Anr. Vs. Subhash & Ors*[3]. and *Mohan Singh Vs. State of Punjab*[4]; (ii) the plea of self defence raised by the

1. (2001) 10 SCC 284.
2. (2003) 9 SCC 52.

appellants has not been properly appreciated by the courts below. It was strenuously urged that admittedly, there was long drawn land dispute between closely related parties who were locked in a series of proceedings and litigations in respect of the land on which the incident took place, the issue regarding ownership of the land being still pending, the deceased and his brother had no business to clean the land and, in fact by their action they instigated the appellants and, therefore, even if the version of the prosecution is taken at its face value, that the deceased died because of the injuries suffered in the brawl, the complainant party must be held to be the aggressors and whatever the appellants did was by way of self defence and (iii) that the prosecution has failed to explain the injuries on the person of appellant Sheo Jee Singh, which is fatal to the case of the prosecution, particularly when the conviction of the appellants is based on the evidence of the interested witnesses. In support of the proposition that the omission on the part of the prosecution to explain the injuries on the person of the accused is a very important circumstance from which the court can draw adverse inference against the prosecution for suppressing the relevant information regarding the incident, reliance was placed on the decisions of this Court in *Lakshmi Singh & Ors. Vs. State of Bihar*[5], *Dashrath Singh Vs. State of U.P.*[6], *Shriram Vs. State of M.P.*[7], *Vijayee Singh & Ors. Vs. State of U.P.*[8] and *Bishna & Ors. Vs. State of W.B.*[9].

11. As against this, Mr. Anuj Prakash, appearing for the State, while supporting the decisions of the courts below, submitted that the period of applicability of order under Section

3. (2004) 13 SCC 174.
4. [1962] Supp. 3 SCR 848.
5. (1976) 3 SCC 394.
6. (2004) 7 SCC 408.
7. (2004) 9 SCC 292.
8. (1990) 3 SCC 190.
9. (2005) 12 SCC 657..

144 Cr.P.C. having expired, the said order had no bearing in so far as the assembly of the accused was concerned. It was argued that the evidence of PW-4 and PW-5 is unimpeachable, which prove that after altercation with the deceased, Rajeshwar Singh went inside his house and brought with him the appellants, who all armed with deadly weapons, came out with the common object to do away with the deceased.

12. We shall now proceed to assess each of the contentions seriatim. The first question is, whether all the appellants can be convicted under Section 302 with the aid of Section 149 IPC?

13. Section 149 IPC reads as follows:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

14. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members

knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

15. In *Mizaji & Anr. Vs. State of U.P.*[10], explaining the scope of Section 149 IPC, this Court had observed thus:

> "This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under S. 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of S. 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in Sabed Ali's case, 20 Suth WR Cr 5 (supra) that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of S. 149, Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of S. 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part."

10. AIR 1959 SC 572.

16. A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

17. In *Masalti Vs. State of U.P.*[11], a Constitution Bench of this Court had observed that Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

18. In *Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra*[12], of which one of us (R.M. Lodha, J.) was the author had, however, relying on *Masalti* (supra) and a few other decisions of this Court, cautioned that where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, only those accused, whose presence was clearly established and an overt act by any one of them was proved, should be convicted by taking into consideration a particular fact situation.

19. Having examined the present case in the light of the evidence on record, particularly the testimony of PW-4 and PW-5, which has been relied upon by the courts below to come to the conclusion that all the appellants are liable to be convicted for offence punishable under Section 302 IPC with the aid of Section 149 IPC, we are of the opinion that both the courts below were correct in coming to the conclusion that the prosecution has established case against all the appellants under the said provision. It has come in evidence that all the appellants, when they came out of their house with Rajeshwar

11. (1964) 8 SCR 133.

12. (2009) 10 SCC 773.

Singh, they were armed with lethal weapons, like spear, *farsa* and lathi. Though it is true that as per the evidence, it was Rajeshwar Singh who had fired on the deceased and his brother (PW-4) with his gun, yet it is clear from the nature of the weapons that they possessed, as members of the unlawful assembly, that they were determined to teach a lesson to the complainant party for daring to assert their right on the plot in question. From their conduct it can safely be held that the murder of Upendra Singh and injuries to PW-4 were immediately connected with their common object and, therefore, their case falls within the ambit of Section 149 IPC and they are guilty of the offences for which they have been convicted and sentenced. In the FIR lodged by PW-5, it was recited that accused Rajeshwar Singh and Sheo Jee Singh were armed with guns while other accused were having various lethal weapons when they arrived at the scene. Being more than five in number, they did form an unlawful assembly with the common object of eliminating the deceased and his brother and in prosecution of the common object, the deceased was shot dead and an attempt on the life of his brother (PW-4) was made by one of the members of the unlawful assembly, namely, Rajeshwar Singh. Thus, all of them had knowledge of the common object of the assembly. The two courts below, having appreciated and assessed the evidence on the question, we are of the opinion that no ground is made out for a third review of the evidence on the issue. Hence, in our view, all the appellants were liable and had been rightly convicted with the aid of Section 149 IPC.

20. As regards the plea of exercise of their right of private defence, here again we do not find much substance in the submission.

21. Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence

which is done in the exercise of such right. Similarly, Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to which rule of self defence is subject. Section 100 IPC provides, *inter alia*, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

22. The scope and width of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions, the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (See: *Jai Dev Vs. State of Punjab*[13].)

23. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the

13. AIR 1963 SC 612.

necessity of averting an impending danger which is not self created. Necessity must be present, real or apparent. (See: *Laxman Sahu Vs. State of Orissa*[14].)

24. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. (See: *Dharam & Ors. Vs. State of Haryana*[15].)

25. It is well settled that the burden of establishing the plea of self defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material

14. AIR 1988 SC 83.

15. JT 2007 (1) SC 299.

on record. In *Vidhya Singh Vs. State of Madhya Pradesh*[16], this Court had observed that right of self defence should not be construed narrowly because it is a very valuable right and has a social purpose. (Also see: *Munshi Ram & Ors. Vs. Delhi Administration*[17]; *The State of Gujarat Vs. Bai Fatima & Anr*[18]. and *Salim Zia Vs. State of Uttar Pradesh*[19].)

26. In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had acted in exercise of his right of private defence. The defence has to further establish that the injury so caused on the accused probabilise the version of the right of private defence.

27. In the light of the afore-stated legal position, we will examine as to whether it could be said that the appellants had assaulted the deceased and one other member of his family in exercise of their right of private defence?

28. The plea of self defence has been rejected by the trial court on the ground that on the date of occurrence, the appellants had no right over the disputed land, much less a right to be protected at the cost of life of other persons. Dealing with the question, while rejecting the stand of the appellants, that they were in exclusive physical possession of the land, the High

16. 1971 (3) SCC 244.

17. AIR 1968 SC 702.

18. AIR 1975 SC 1478.

19. AIR 1979 SC 391.

Court has observed that except for a broomstick, neither the deceased nor any other member of the complainant party had any weapon in their hands; the deceased was neither taking away the land nor was changing its nature or damaging it; no overt act at all was committed by the deceased or any of the prosecution witnesses; no harm or injury was likely to be caused to the appellants or the land in dispute and thus, there was no threat to life or property of the appellants necessitating exercise of right of private defence. The High Court held that right of private defence of life and property cannot be exercised against an unarmed person. In the light of the evidence on record, we have no hesitation in holding that the appellants were in fact, aggressors and being members of the aggressors party none of the appellants can claim right of self defence. The right to defend does not include a right to launch an offensive or aggression. In our opinion, therefore, the appellants have failed to establish that they were exercising right of private defence.

29. Finally, the third question for consideration is as to what is the effect of non-explanation of injuries suffered by appellant Sheo Jee Singh. It cannot be held as an unqualified proposition of law that whenever the accused sustains an injury in the same occurrence, the prosecution is obliged to explain the injury and on failure of the prosecution to do so, the prosecution case has to be disbelieved. In *Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Ors.*[20], a Bench of three Judges of this Court, referring to earlier three-Judge Bench decisions, observed that before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect prosecution case, the Court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of occurrence in question.

30. In our view, in the present case, having regard to the

20. (2001) 6 SCC 145

nature of the injuries allegedly suffered by the said appellant, the case of the prosecution cannot be overthrown because of non-explanation of the said injuries. As per the medical report, the injuries allegedly suffered by Sheo Jee Singh were – '*swelling covering around the lower 1/3 of right upper arm just above right elbow and fracture of underlying bone'*. The injuries are simple and superficial in nature. In view of the fact that the evidence against the appellants for having committed the afore-stated offences has been found to be cogent and creditworthy, in our opinion, it outweighs the effect of the omission on the part of the prosecution to explain the injuries. We reject this ground as well.

31. For the afore-mentioned reasons, we do not find any merit in the appeal and the same is dismissed accordingly.

R.P. Appeal dismissed.

COMMISSIONER OF CENTRAL EXCISE, JAIPUR
v.
M/S. RAJASTHAN SPINNING AND WEAVING MILLS LTD.
(Civil Appeal No. 3760 of 2003)

JULY 9, 2010

[D.K. JAIN AND C.K. PRASAD, JJ.]

Central Excise Rules, 1944:

Rule 57Q – Steel plates and M.S. Channels used in the fabrication of chimney for the diesel generating set – Fall within the purview of serial no.5 of the Table below Rule 57Q and thus entitled to modvat credit under the said rule – Central Excise Tariff Act, 1985 – Chapter 85.

The question which arose for consideration in the present appeal was whether the tribunal was justified in holding that the assessee was entitled to avail Modvat Credit in respect of steel plates and M.S. channels used in the fabrication of chimney for the diesel generating set, by treating these items as capital goods in terms of Rule 57Q of the Central Excise Rules, 1944.

Dismissing the appeal, the Court

HELD: The Tribunal was correct in holding that the assessee was entitled to avail of MODVAT credit in respect of steel plates and M.S. channels used in the fabrication of the chimney for the diesel generating set, Applying the "user test" to the facts in hand, the steel plates and M.S. Channels, used in the fabrication of the chimney would fall within the ambit of "capital goods" as contemplated in Rule 57Q. It is not the case of the Revenue that both these items are not required to be used in the fabrication of the chimney, which is an

integral part of the diesel generating set, particularly when the Pollution Control laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for the said purpose was to be treated as an accessory in terms of serial No.5 of the goods described in column (2) of the Table below Rule 57Q. [Paras 13, 14] [402-H; 403-A-C]

Commissioner of central Excise, Coimbatore and Ors. v. Jawahar Mills Ltd. and Ors. **(2001) 6 SCC 274, relied on.**

Case Law Reference:

(2001) 6 SCC 274	**relied on**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3760 of 2003.

From the Judgment and Order dated 11.06.2002 of the Customs, Excise and Gold (Control) Appellate Tribunal, Northern Bench, New Delhi in Final Order No. A/740/02-NB/SM]

Harish Chandra, Anurag Gupta, Rama Rani, Binu Tamta, Rishab Sanchati and Anil Katiyar for the Appellant.

B.L. Narsimhan, Alok Yadav and M.P. Devanath for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in this appeal, by special leave, is to the order dated 11th June, 2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short "the Tribunal"), as it existed then, in Appeal No.E/725/2001-NB(SM). By the impugned order, the Tribunal has held that the respondent (for short "the assessee") is entitled to avail of MODVAT credit in respect of steel plates and M.S. channels

used in the fabrication of chimney for the diesel generating set, by treating these items as capital goods in terms of Rule 57Q of the Central Excise Rules, 1944 (for short "the Rules").

2. Briefly stated, the material facts, giving rise to the present appeal, are as follows:

The assessee is a public limited company engaged in the manufacture of yarn. They availed MODVAT credit on "capital goods" described in the Table given below Rule 57Q in respect of steel plates and M.S. channels used by them for erection of chimney for the diesel generating set, falling under Chapter 85 of the Central Excise Tariff Act, 1985 (for short "the Tariff Act").

3. A show cause notice, dated 20th August 1999, was issued to the assessee, alleging therein that MODVAT credit availed of on steel plates and M.S. channels used in the fabrication of chimney, was inadmissible as the subject items were not "capital goods", as described in the said Table. Therefore, MODVAT credit had been wrongly availed of by the assessee. In reply to the show cause notice, the assessee pleaded that the items in question being components of chimney which in turn was an accessory of the diesel generating set, falling under heading 85.02, they also qualify the test of "capital goods" specified against serial No.5 of the Table, and therefore, MODVAT credit in respect of the said items was clearly admissible. It was asserted that chimney was a vital part of the generating set for discharge of gases arising out of burnt fuel, mandatory under the Pollution Control laws.

4. The Assistant Commissioner was of the view that since steel plates and M.S. channels were not used as input in the manufacture of final product, these could not be covered under any of the chapter headings in the Table under Rule 57Q, MODVAT credit on the said items was inadmissible. He, accordingly, disallowed the MODVAT credit amounting to Rs.1,16,650/- availed of by the assessee and imposed a

penalty of Rs.2000/-. Being aggrieved, the assessee filed an appeal before the Commissioner (Appeals) but without any success on the question of MODVAT credit. The Commissioner (Appeals), however, deleted the penalty levied on the assessee. The assessee took the matter further in appeal to the Tribunal. The Tribunal has come to the conclusion that since the chimney is used as an accessory to the diesel generating set, and steel plates and M.S. channels were used in the fabrication of chimney these items also fall within the ambit of serial No.5 of the said Table and therefore, MODVAT credit on these items could not be denied. Not being satisfied with the order of the Tribunal, the Revenue is before us in this appeal.

5. Mr. Harish Chandra, learned Senior Counsel appearing for the Revenue submitted that the Tribunal has failed to appreciate that "capital goods" as described in the Table under Rule 57Q would include only those goods which are specified against serial Nos.1 to 4 of the said Table and, thus, the "capital goods" in the present context cover only the diesel generating set and its components, spares and accessories and not steel plates or M.S. channels, which are independently classifiable under Chapter Sub-heading 7208.11 and 7216.10 respectively. It was argued that both the subject items were not used as input in manufacture of final product so as to make them eligible for MODVAT credit in terms of serial No.5 of the said Table. Learned counsel thus, urged that the order of the Tribunal deserves to be set aside.

6. Per contra, Mr. B.L. Narsimhan, learned counsel appearing on behalf of the assessee supported the decision of the Tribunal. He submitted that the issue sought to be raised by the Revenue in this appeal stands concluded in favour of the assessee by a decision of this Court in *Commissioner of Central Excise, Coimbatore & Ors. Vs. Jawahar Mills Ltd. & Ors.*[1], wherein observing that the exemption notification must be so construed as to give due weight to the liberal language

1. (2001) 6 SCC 274

it uses and that any goods that may be used in the factory of the manufacturer of final product would be "capital goods" and would be entitled to MODVAT credit. It was, thus, asserted that the said items used in the fabrication of chimney, which in turn is an important component of diesel generating set, qualify the test of "capital goods" and would be entitled to MODVAT credit.

7. The short question arising for determination is whether the assessee was right in availing MODVAT credit in respect of the afore-stated items by treating them as "capital goods" in terms of Rule 57Q?

8. Rule 57Q was substituted by Notification No.6/97-C.E. (N.T.) dated 1st March, 1997. It enables the manufacturers of specified goods to claim MODVAT credit of duty paid on capital goods used by them in the factory for manufacture of final product. The Rule, insofar as it is relevant for this case, reads as under:

"RULE 57Q. **Applicability**.- (1) The provisions of this section shall apply to goods (hereafter in this section, referred to as the "final products") described in column (3) of the Table given below and to the goods (hereafter, in this section, referred to as "capital goods"), described in the corresponding entry in column (2) of the said Table, used in the factory of the manufacturer of final products.

TABLE

S.No.	Description of capital goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the factory of the manufacturer	Description of final products
(1)	(2)	(3)
1.	……	……
2.	……	
3.	All goods falling under chapter	

	85 (other than those falling under heading Nos. 85.09 to 85.13, 85. 16 to 85.31, 85.39 and 85.40);	
4.	……	
5.	Components, spares and accessories of the goods specified against S. Nos. 1 to 4 above;"	

9. The language of Rule 57Q is clear and unambiguous. It applies to the final products described in column (3) of the Table under the Rule as also to other goods, referred to as "capital goods", described in the corresponding entry in column (2) of the said Table, used in the factory of the manufacturer of final product. The parties are *ad idem* that diesel generating set falls under Chapter 85 under Heading No. 85.02, as described at serial No.3 of the afore-extracted Table. Similarly there is no dispute that chimney attached with the generating set is covered by the items described in serial No.5 thereof. However, the controversy centres around the question whether the steel plates and M.S. channels used in the fabrication of chimney would fall within the purview of serial No.5 of the Table below Rule 57Q.

10. Having examined the question in the light of the language employed in Rule 57Q and the case law on the point, we are of the opinion that the appeal is devoid of any merit.

11. In *Jawahar Mills Ltd.* (supra), heavily relied upon by the learned counsel for the assessee, the question which came up for consideration was whether the claim of MODVAT credit by some manufacturers in respect of certain items by treating them as capital goods in terms of Rule 57Q was in order. Some of the items under consideration were power cables, capacitors, control panels, cable distribution boards, air compressors, etc. The Court examined the question in the light of the definition

of capital goods given in Explanation to Rule 57Q, which read as follows:

"capital goods" means—

(a) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final products;

(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and

(c) moulds and dies, generating sets and weighbridges used in the factory of the manufacturer."

12. *Inter alia* observing that capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances if any of these goods is used for producing or processing of any goods or for bringing about any change in the substance for the manufacture of final product, although this view was expressed in the light of the afore-noted definition of "capital goods" in the said Rule, which is not there in Rule 57Q, as applicable in the instant case, yet the "user test" evolved in the judgment, which is required to be satisfied to find out whether or not particular goods could be said to be capital goods, would apply on all fours to the facts of the present case. In fact, in para 6 of the said judgment, the Court noted the stand of the learned Additional Solicitor General, appearing for the Revenue, to the effect that the question whether an item falls within the purview of "capital goods" would depend upon the user it is put to.

13. Applying the "user test" on the facts in hand, we have no hesitation in holding that the steel plates and M.S. Channels,

used in the fabrication of chimney would fall within the ambit of "capital goods" as contemplated in Rule 57Q. It is not the case of the Revenue that both these items are not required to be used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for the said purpose has to be treated as an accessory in terms of serial No.5 of the goods described in column (2) of the Table below Rule 57Q.

14. We are, therefore, of the opinion that the Tribunal was correct in law in holding that the assessee was entitled to avail of MODVAT credit in respect of the subject items viz. steel plates and M.S. channels used in the fabrication of chimney for the diesel generating set, by treating these items as capital goods in terms of Rule 57Q of the Rules.

15. For the foregoing reasons, we find no substance in the appeal preferred by the Revenue. The same is dismissed accordingly. Parties are left to bear their own costs.

D.G. Appeal dismissed.

COMMISSIONER OF INCOME TAX, GUJARAT

v.

M/S. SAURASHTRA CEMENT LTD.

(Civil Appeal No. 3702 of 2003)

JULY 09, 2010

[D.K. JAIN AND C.K. PRASAD, JJ.]

Income Tax Act, 1961 – Liquidated damages received by assessee from supplier of the cement plant and machinery on account of delay in supply of plant – Held: Is to be treated as capital receipt – The delay in procurement of capital asset i.e. the cement plant amounted to sterilization of the capital asset of the assessee – The amount received by the assessee towards compensation for sterilization of the profit earning source, being not in the ordinary course of their business, was a capital receipt in the hands of the assessee.

The respondent-assessee was engaged in manufacture of cement. It entered into an agreement for purchase of additional cement plant. The supplier defaulted and failed to supply the plant and machinery on the scheduled time and, therefore, as per the terms of agreement, the assessee received an amount from the supplier by way of liquidated damages.

In the instant appeal filed by Revenue, the question which arose for consideration was: "whether the liquidated damages received by the assessee from the supplier of the plant and machinery on account of delay in the supply of plant is a capital or a revenue receipt?".

Dismissing the appeal, the Court

HELD: It is clear from the agreement in question that the liquidated damages were to be calculated at 0.5% of

the price of the respective machinery and equipment for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damage to the assessee was directly and intimately linked with the procurement of a capital asset i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process. The delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as the supplier had failed to supply the plant within time as stipulated in the agreement. The amount received by the assessee towards compensation for sterilization of the profit earning source, being not in the ordinary course of their business, was a capital receipt in the hands of the assessee. [Para 13] [412-A-E]

Commissioner of Income Tax, Nagpur v. Rai Bahadur Jairam Valji and Others **(1959) 35 ITR 148 (SC) and** *Kettlewell Bullen and Co. Ltd. v. Commissioner of Income-Tax, Calcutta* **AIR 1965 SC 65, relied on.**

C.I.T., Gujarat v. M/s Elecon Engineering Co. Ltd. **(1987) 4 SCC 530 and** *E.I.D. Parry Ltd. v. Commissioner of Income Tax* **(1998) 233 ITR 335 (Mad), referred to.**

Case Law Reference:

(1987) 4 SCC 530	**referred to**	**Para 2**
(1959) 35 ITR 148 (SC)	**relied on**	**Para 5**
AIR 1965 SC 65	**relied on**	**Para 5**

(1998) 233 ITR 335 (Mad) referred to Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3702 of 2003.

From the Judgment and Order dated 27.06.2001 of the High Court of Gujarat at Ahmedabad in Income Tax Reference No. 44 of 1986.

R.P. Bhatt, H.R. Rao, B.V. Balaram Das for the Appellant.

Bhargava V. Desai, Rahul Gupta and Nikhil Sharma for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal, by special leave, at the instance of the Revenue is directed against the judgment and order dated 27th June, 2001 delivered by the High Court of Gujarat at Ahmedabad in Income Tax Reference No.44 of 1986. By the impugned judgment, the High Court has answered the following questions, referred to it by the Income Tax Appellate Tribunal, Ahmedabad (for short "the Tribunal") under Section 256(1) of the Income Tax Act, 1961 (for short "the Act"), in the affirmative and in favour of the assessee.

(i) Whether the Tribunal has not erred in law on facts in holding that the amount of Rs.8,50,000/- received by the assessee was not taxable as revenue receipt in the hands of the assessee?

(ii) Whether the finding of the Tribunal that the receipt relating to liquidated damages cannot be treated as a revenue receipt but must be held to be a capital receipt not exigible to tax is correct in law?

(iii) Whether the assessee is entitled to the addition made to the machinery during the year thus determining the capital employed for the purpose

of claim under Section 80J of the Income Tax Act, 1961?

2. At the outset, we may note that insofar as question No.(iii) is concerned, it was conceded on behalf of the Revenue before the High Court that answer to the said question stood concluded in favour of the assessee by the decision of this Court in *C.I.T., Gujarat Vs. M/s Elecon Engineering Co. Ltd.*[1]. Relying on the said decision, the High Court answered the question in favour of the assessee. Therefore, only question Nos. (i) and (ii), which in effect involve only one issue, survive for our consideration.

3. The reference pertains to the Assessment Year 1974-75 for which the relevant previous year ended on 30th June, 1973. The factual background in which the issue, covering both the questions, has arisen, is as follows :

The assessee, engaged in the manufacture of cement etc; entered into an agreement with M/s Walchandnagar Industries Limited, Bombay, (hereinafter referred to as "the supplier") on 1st September, 1967 for purchase of additional cement plant from them for a total consideration of Rs.1,70,00,000/-. As per the terms of contract, the amount of consideration was to be paid by the assessee in four instalments.

The agreement contained a condition with regard to the manner in which the machinery was to be delivered and the consequences of delay in delivery. Insofar as the present appeal is concerned, clause No.6 of the agreement is relevant and it reads as follows:

"6. xxx xxx xxx

Delayed Deliveries:

In the event of delays in deliveries except the reason

1. (1987) 4 SCC 530.

of Force Majeure at para 5 mentioned above, the Suppliers shall pay the Purchasers an agreed amount by way of liquidated damages without proof of damages actually suffered at the rate of 0.5% of the price of the respective machinery and equipment to which the items were delivered late (*sic*), for each month of delay in delivery completion. It is further agreed that the total amount of such agreed liquidated damages shall not exceed 5% of the total price of the plant and machinery."

As per the said clause in the agreement, in the event of delay caused in delivery of the machinery, the assessee was to be compensated at the rate of 0.5% of the price of the respective portion of the machinery for delay of each month by way of liquidated damages by the supplier, without proof of actual loss. However, the total amount of damages was not to exceed 5% of the total price of the plant and machinery.

4. The supplier defaulted and failed to supply the plant and machinery on the scheduled time and, therefore, as per the terms of contract, the assessee received an amount of Rs.8,50,000/- from the supplier by way of liquidated damages.

5. During the course of assessment proceedings for the relevant assessment Year, a question arose whether the said amount received by the assessee as damages was a capital or a revenue receipt. The Assessing Officer negatived the claim of the assessee that the said amount should be treated as a capital receipt. Accordingly, he included the said amount in the total income of the assessee. Aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), but without any success. The assessee carried the matter further in appeal to the Tribunal. Relying on the ratio of the decisions of this Court in *Commissioner of Income Tax, Nagpur Vs. Rai Bahadur Jairam Valji and Others*[2] and *Kettlewell Bullen and Co. Ltd. Vs. Commissioner of Income-*

2. (1959) 35 ITR 148 (SC)

Tax, Calcutta[3]*,* the Tribunal came to the conclusion that the said amount could not be treated as a revenue receipt. According to the Tribunal, the payment of liquidated damages to the assessee by the supplier was intimately linked with the supply of machinery i.e. a fixed asset on capital account, which could be said to be connected with the source of income or profit making apparatus rather than a receipt in course of profit earning process and, therefore, it could not be treated as part of receipt relating to a normal business activity of the assessee. The Tribunal also observed that the said receipt had no connection with loss or profit because the very source of income viz., the machinery was yet to be installed. Accordingly, the Tribunal allowed the appeal and deleted the addition made on this account.

6. Being dissatisfied with the decision of the Tribunal, as stated above, at the instance of the Revenue, the Tribunal referred the afore-noted questions of law for the opinion of the High Court. The reference having been answered against the Revenue and in favour of the assessee, the Revenue is before us in this appeal.

7. We have heard Mr. R.P. Bhatt, learned Senior Counsel appearing for the Revenue and Mr. Bhargava V. Desai on behalf of the assessee.

8. Mr. Bhatt submitted that although the said amount of damages had been received by the assessee under clause 6 of the agreement for breach of contract, yet the said amount had been received as compensation for the loss of profit, and therefore, it is in the nature of a revenue receipt. According to the learned counsel, it was on account of late commissioning of the plant that the assessee could not commence production as per its schedule and thereby suffered loss in its profits, which was compensated by the supplier and, therefore, the said amount should have been considered as revenue receipt.

3. AIR 1965 SC 65.

9. Per contra, Mr. Desai, learned counsel appearing for the assessee, while supporting the decision of the High Court submitted that the amount received by the assessee was by way of compensation for delay in the delivery and installation of the plant and had a direct nexus with the capital asset and therefore, it was in the nature of a capital receipt. Learned counsel also argued that answer to the questions stands concluded in favour of the assessee by the decision of the High court of Madras in *E.I.D. Parry Ltd. Vs. Commissioner of Income Tax*[4]*,* which has attained finality on account of dismissal of the Civil Appeal preferred by the Revenue against the said judgment.

10. Thus, the short question for determination is whether the liquidated damages received by the assessee from the supplier of the plant and machinery on account of delay in the supply of plant is a capital or a revenue receipt?

11. The question whether a particular receipt is capital or revenue has frequently engaged the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion. In *Rai Bahadur Jairam Valji* (supra), it was observed thus:

> "The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately

4. [1998] 233 ITR 335 (Mad)

depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. Vide *Van Den Berghs Ltd. v. Clark*[5]. That, however, is not to say that the question is one of fact, for, as observed in *Davies (H.M. Inspector of Taxes) v. Shell Company of China Ltd.*[6], "these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts."

12. In *Kettlewell Bullen and Co. Ltd.* (supra), dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in *Rai Bahadur Jairam Valji* (supra) and analysing numerous judgments on the point, this Court laid down the following broad principle, which may be taken into account in reaching a decision on the issue :

"Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

5. (1935 3 I.T.R. (Eng. Cas.) 17.

6. (1952) 22 I.T.R.(Suppl.) 1.

13. We have considered the matter in the light of the afore-noted broad principle. It is clear from clause No.6 of the agreement dated 1st September 1967, extracted above, that the liquidated damages were to be calculated at 0.5% of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No.6 thereof came into play. The afore-stated amount received by the assessee towards compensation for sterilization of the profit earning source, not in the ordinary course of their business, in our opinion, was a capital receipt in the hands of the assessee. We are, therefore, in agreement with the opinion recorded by the High Court on question Nos. (i) and (ii) extracted in Para 1 (supra) and hold that the amount of Rs.8,50,000/- received by the assessee from the suppliers of the plant was in the nature of a capital receipt.

14. We, therefore, dismiss the appeal with no order as to costs.

B.B.B. Appeal dismissed.

H. SRINIVAS PAI & ANR.
v.
H.V. PAI (D) THR. LRS. & ORS.
(Civil appeal No. 5220-5221 of 2010)

JULY 9, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Arbitration Act, 1940:

s.34 – Application for stay of proceedings in a civil suit – Rejected – Order upheld in appeal and revision – Thereafter application u/s 8 of Arbitration and Conciliation Act, 1996 filed – Application dismissed by trial court as also by High Court – However, High Court observing that the 1996 Act has got application to commercial matters and international commercial matters and the suit relating to partition of joint family properties, would not attract provisions of the Act – HELD: Order dismissing application u/s 34 having become final, High Court and trial court rightly negatived the attempt of appellants by filing the application u/s 8 of the 1996 Act – However, the observation of the High Court in para 4 of its judgment that the 1996 Act will not apply to civil disputes is set aside – Arbitration and Conciliation Act, 1996 – s.8.

Arbitration and Conciliation Act, 1996:

Applicability of the Act – HELD: There is no basis to hold that the Act will not apply to 'civil disputes', but will apply only to 'commercial disputes' or 'international commercial disputes' – The Act applies to domestic arbitrations, international commercial arbitrations and conciliations – The applicability of the Act does not depend upon the dispute being a commercial dispute – Reference to arbitration and arbitability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or

commercial dispute – There can be arbitration agreements in non-commercial civil disputes also – Arbitration Act, 1940 – s.34.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5220-21 of 2010.

From the Judgment & Order dated 03.11.2008 of the High Court of Karnataka in CRP No. 1710 of 2003 and final Judgment and Order dated 17.04.2009 in Review Petition No. 448 of 2008 in CRP No. 1710 of 2003.

Sampat Anand Shetty, Rameshwar Prasad Chandrashekar for the Appellants.

G.V. Chandrashekar, N.K. Verma, Anjana Chandrashekar for the Respondents.

The following order of the Court was delivered

O R D E R

1. Leave granted. Heard the counsel.

2. The first respondent filed a suit for partition in the year 1991. In the said suit, the appellant filed an application for stay of proceedings under Section 34 of the Arbitration Act, 1940 ('old Act' for short). The said application under Section 34 was dismissed on 15.3.1995 on the ground that the appellant had acquiesced to court's jurisdiction. The appeal filed by the appellants, as also a further revision by them, were dismissed in 2000 and 2001.

3. The suit, however, continued to be pending and the appellants thought fit to file an application under Section 8 of the Arbitration and Conciliation Act, 1996 ('Act', for short). That application was dismissed by the trial Court by order dated 29.3.2003. Feeling aggrieved, the appellants filed a revision which was referred by a learned single Judge of the High Court

to a Division Bench. The Division bench, by order dated 3.11.2008, dismissed the application under Section 8 of the Act but while so doing, observed thus:

> "In view of Section 1 (2) of the Act, the said Act has got application in respect of commercial agreement matters and international commercial matters. The right claimed by the respondent in the original suit for partition of the joint family properties, is a civil dispute, which does not attract the provisions of the Act."

The appellants filed a review petition which was dismissed on 17.4.2009. The said orders dated 3.11.2008 and 17.4.2009 are challenged in this appeal by special leave.

4. This court while issuing notice granted stay of the said observation and made it clear that there shall be no stay of the suit and that the suit shall proceed expeditiously as it has been pending for 18 years.

5. There is absolutely no basis for the observation of the High Court that Arbitration and Conciliation Act, 1996 will not apply to 'civil disputes', but will apply only to 'commercial disputes' or international commercial disputes. The Act applies to domestic arbitrations, international commercial arbitrations and conciliations. The applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also.

6. However, the said observation of the High Court does not, in any way, affect the correctness of the said order passed by the High Court. As already noticed, the application under Section 34 of the old Act was dismissed in the year 1995 and affirmed in appeal in 2000 and by the High Court in 2001 and attained finality. The subsequent attempt of the appellants by

filing an application under Section 8 of the Act has been rightly negatived by the trial Court and by the High Court.

7. In view of the above, we dispose of these appeals without disturbing the dismissal of the revision by the High Court. We, however, set aside the observation of the High Court in paragraph 4 of its Judgment (extracted in para 3 above) holding that the Act will not apply to 'civil disputes'. We request the trial Court to dispose of the suit expeditiously not later than three months from today.

R.P. Appeals disposed of.

SHYAMWATI SHARMA & ORS.
v.
KARAM SINGH & ORS.
(Civil Appeal No. 5316 of 2010)

JULY 13, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Motor Vehicles Act, 1988 – Motor accident – Death of 36 year old man – Claim for compensation by his six dependants – Awarded by Tribunal – Enhanced by High Court – On appeal, held: Compensation further enhanced recalculating the same by increasing salary by 50% towards future prospects; deducting 30% towards taxes and 25% towards personal expenses and by applying multiplier of 15.

Compensation – For motor accident – Deduction of 30% from the income of the deceased towards taxes – Propriety of – Held: If annual income is in taxable range, appropriate deduction towards taxes is proper.

After death of a Sub-Inspector of Police aged 36 years, in a motor accident, six of his dependants made a claim for compensation. The Tribunal awarded compensation of Rs. 14,44,600/- with 9% interest p.a. after deducting one third from his gross monthly salary towards personal and living expenses, and by applying multiplier of 13. High Court on appeal enhanced the compensation to Rs. 14,65,776/-. It reached the amount by making addition to income towards future prospects, deducting therefrom 30% towards deduction from salary; by deducting one fourth of income towards personal expenses, and by applying multiplier of 13.

The instant appeal was filed for enhancement of compensation contending that deduction of 30% towards

taxes was not warranted and that the court should have applied multiplier of 16.

Allowing the appeal, the Court

HELD: 1. Wherever the deceased is below 40 years of age and had a permanent job, the actual salary (less tax) should be increased by 50% towards future prospects, to arrive at the monthly income. Where the number of dependants of a deceased are in the range of 4 to 6, the deduction towards personal and living expenses of the deceased should be 25%. In regard to persons aged 36 to 40 years, the appropriate multiplier should be 15. Applying the said principles, compensation in the instant case is recalculated. The compensation is increased from Rs.14,66,600/- to Rs.19,70,250/-. The increased amount shall carry interest at the rate of 6% per annum from the date of claim petition to the date of payment. [Paras 6 and 9] [421-B-C; 422-E]

Sarla Verma vs. Delhi Transport Corporation **2009 (6) SCC 121, relied on.**

2. The deduction of 30% from the salary is correct. Where the annual income is in the taxable range, appropriate deduction should be made towards tax. In the instant case as the annual income has been worked out as Rs.2,48,292/-, appropriate deduction has to be made towards income-tax. The rate of income tax is a varying figure, with reference to taxable income after permissible deductions and the year of assessment. The High Court has rightly assessed the deduction as 30%. However, it is clarified that while ascertaining the income of the deceased, any deductions shown in the salary certificate as deductions towards GPF, life insurance premium, repayments of loans etc., should not be excluded from the income. The deduction towards income tax/surcharge alone should be considered to

arrive at the net income of the deceased. [Para 8] [421-H; 422-A-D]

Sarla Verma vs. Delhi Transport Corporation **2009 (6) SCC 121, distinguished.**

Case Law Reference:

2009 (6) SCC 121	**Relied on.**	**Para 6**
	Distinguished.	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5316 of 2010.

From the Judgment & Order daed 20.4.2007 of the HIgh Court of Delhi at New Delhi in F.A.O. No. 250 of 2003.

R.K. Khanna for the Appellant.

A.K. Raina, Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J. 1. Leave granted.

2. This is an appeal for enhancement of compensation, by the mother, widow, three children and father of Kuldeep Sharma, a Sub-Inspector of Police, aged 36 years, who died in a motor accident on 25.12.1990. According to the salary certificate, his basic pay was Rs.7425/-, the gross salary (pay and allowances) was Rs.13,794/-, the deductions aggregated to Rs.4,305/- and the net take home salary was Rs.9,489/- per month.

3. The Tribunal by its award dated 17.1.2003 held the respondents liable and directed the insurer to pay to the appellants, Rs.14,44,600/- as compensation, with simple interest at 9% per annum from the date of filing of the claim petition (21.2.2002) till realization. The Tribunal arrived at the said compensation in the following manner : It deducted one

third from the gross monthly salary of Rs.13,794/- towards the personal and living expenses of the deceased and determined the contribution to the family as Rs.9,196/- per month or Rs.1,10,352/- per annum. It applied the multiplier '13' and arrived at the loss of dependency as Rs.14,34,576/- rounded off to Rs.14,34,600/-.

4. Feeling aggrieved the claimants filed an appeal. The High Court started with the gross salary as Rs.13,794/- per month. Drawing an assumption that the deceased would have at least got one promotion or gone to the next higher grade if he had completed the remaining 24 years of service, and taking note of the recommendations of the Fifth Pay Commission and the annual increments, it inferred that by the time the deceased would have retired, he would have been earning a minimum gross income of Rs.22,000/- per month. The average of the actual monthly income (Rs.13794/-) and the projected monthly income at the time of retirement (Rs.22000), that is Rs.17,897/-, was taken as the monthly income. The High Court deducted 30% thereof towards 'deductions from salary' (income-tax etc.) and arrived at the net monthly income as Rs.12,528/-. It further deducted one fourth thereof towards the personal and living expenses of the deceased and arrived at the contribution to the family as Rs.9,396/- per month or Rs.1,12,752/- per annum. By applying the multiplier of 13, it calculated the loss of dependency as Rs.14,65,776/-. As a consequence, it increased the compensation awarded by the Tribunal by Rs.32,000/- with interest at the rate of 6% per annum from the date of claim petition till the date of payment.

5. The said judgment of the High Court is challenged in this appeal. The appellants urged the following two contentions:

(i) The High Court ought not to have made a 'deduction' of 30% from the salary towards taxes etc.; and

(ii) The High Court ought to have applied the multiplier

'16' instead of '13', having regard to the age of the deceased.

6. This Court in *Sarla Verma vs. Delhi Transport Corporation* – 2009 (6) SCC 121, has stated the principles relating to 'addition to income' towards future prospects. This Court held that wherever the deceased was below 40 years of age and had a permanent job, the actual salary (less tax) should be increased by 50% towards future prospects, to arrive at the monthly income. It also held that where the number of dependants of a deceased are in the range of 4 to 6, the deduction towards personal and living expenses of the deceased should be 25%. It further held that in regard to persons aged 36 to 40 years, the appropriate multiplier should be 15. We will re-calculate the compensation by applying the said principles.

7. As noticed above, the gross salary was Rs.13,794/- per month or Rs.1,65,528/- per annum. By adding 50% towards future prospects (as the deceased was less than 40 years of age), the deemed gross income would have been Rs.20,691/- per month or Rs.2,48,292/- per annum. The percentage of deduction towards income-tax and surcharge, taken as 30% by the High Court, does not require to be disturbed, having regard to the income. On such deduction, the net annual income of the deceased would have been Rs.1,73,800/-. From the said sum, one-fourth (25%) had to be deducted towards the personal and living expenses of the deceased. Thus the contribution of the deceased to his family would have been Rs.1,30,350/- per annum. By applying the multiplier of 15, the total loss of dependency will be Rs.19,55,250/-. By adding a sum of Rs.5,000/- each under the heads of loss of consortium, loss of estate and funeral expenses, the total compensation is determined as Rs.19,70,250/-.

8. The submission of the respondents that the deduction of 30% from the salary is not warranted in view of the decision in *Sarla Verma*, is not sound. In *Sarla Verma*, the monthly salary

of the deceased was only Rs.4004/- and the annual income even after taking note of future prospects was Rs.72072/-. The income was in a range which was exempt from tax, if the permissible deductions were applied. Therefore, this Court did not make any deduction towards income-tax. But this Court made it clear that where the annual income is in the taxable range, appropriate deduction should be made towards tax. In this case as the annual income has been worked out as Rs.2,48,292/-, appropriate deduction has to be made towards income-tax. The rate of income tax is a varying figure, with reference to taxable income after permissible deductions and the year of assessment. The High Court has assessed the deduction as 30% and on the facts, we do not propose to disturb it. We however make it clear that while ascertaining the income of the deceased, any deductions shown in the salary certificate as deductions towards GPF, life insurance premium, repayments of loans etc., should not be excluded from the income. The deduction towards income tax/surcharge alone should be considered to arrive at the net income of the deceased.

9. We accordingly allow the appeal and increase the compensation from Rs.14,66,600/- to Rs.19,70,250/-. The increased amount shall carry interest at the rate of 6% per annum from the date of claim petition to the date of payment. The parties to bear their respective costs.

K.K.T. Appeal allowed.

STATE OF A.P.
v.
GOURISHETTY MAHESH & ORS.
(Criminal appeal no.1252 of 2010)

JULY 15, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Code of Criminal Procedure, 1973:

s.482 – Scope of – Black jaggery transported for alleged preparation of illicit liquor – Seizure and confiscation – Upheld by Commissioner of Prohibition and Excise – Report of chemical examiner that the seized jaggery was "fit for fermentation, producing alcohol unfit for consumption" – Case registered against accused under ss.34(e), 41, 42 of the Andhra Pradesh Excise Act, 1968 – Order of High Court quashing the proceedings against accused – Held: Not justified – Complaint prima facie disclosed commission of the offence and involvement of accused – Exercise of inherent power u/s.482 – Explained – Andhra Pradesh Excise Act, 1968– ss.34(e), 41, 42.

Prosecution case was that the accused-respondents were transporting 5040 Kgs. of black jaggery and alum illegally in a van. The van and the black jaggery were seized and a case was registered under Sections 34(e), 41, 42 of the Andhra Pradesh Excise Act, 1968 against the accused-respondents. The government chemical examiner gave report that the sample of seized goods was jaggery "fit for fermentation producing alcohol unfit for consumption". High Court allowed the petition for quashing the proceedings against respondents. Aggrieved, the State filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. While exercising jurisdiction under Section 482 Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial judge/court. It is true that courts should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, otherwise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and bring about its closure without full-fledged enquiry. Though High Court may exercise its power relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice, the power should be exercised sparingly. The powers possessed by the High Court under Section 482 are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482. [Para 12] [432-H; 433-A-G]

1.2. In the case on hand, apart from specific allegations about the transportation of Jaggery for preparation of illicit distilled liquor, prosecution also placed reliance on laboratory analysis report which mentioned that the transported Jaggery was 'fit for

fermentation producing alcohol unfit for consumption'. It is also relevant that the Deputy Commissioner of Prohibition and Excise after finding that an offence under A.P. Excise Act, 1968 has been made out, seized the jaggery and confiscated it. The said order was confirmed by the Commissioner of Prohibition and Excise. In the circumstances, whether the material in existence would be sufficient for holding the accused persons concerned guilty or not has to be considered only at the time of trial. Further, at the time of framing the charge, it can be decided whether *prima facie* case has been made out showing the commission of offence and involvement of the charged persons. It is immaterial whether the case is based on direct or circumstantial evidence. That being so, the interference at the threshold quashing the FIR is to be exceptional and not like routine as ordered by the High Court in the instant case. It is not a case where it can be said that the complaint did not disclose commission of an offence. The High Court was not justified in quashing the FIR. [Para 13] [433-H; 434-A-D]

State of A.P. v. Golconda Linga Swamy and Another **(2004) 6 SCC 522;** *R.P. Kapur v.* State of Punjab AIR **1960 SC 866;** *State of Andhra Pradesh v. Bajjoori Kanthaiah and Another* **(2009) 1 SCC 114;** *State of Haryana* v. *Bhajan Lal* **1992 Supp (1) SCC 335 – relied on.**

Case law reference:

(2004) 6 SCC 522	**relied on**	**para 9**
AIR 1960 SC 866	**relied on**	**para 10**
(2009) 1 SCC 114	**relied on**	**para 11**
1992 Supp (1) SCC 335	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1252 of 2010.

From the Judgment & Order dated 27.01.2006 of the High Court of Andra Pradesh at Hyderabad in Criminal Petition No. 4362 of 2002.

C.K. Sucharita, N. Das and D. Bharathi Reddy for the Petitioner.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is preferred by the State of Andhra Pradesh against the judgment and order dated 27.01.2006 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Petition No. 4362 of 2002 whereby the High Court allowed the petition filed u/s 482 of the Criminal Procedure Code (hereinafter referred to as 'the Code') filed by the respondents herein and quashed the criminal proceedings in Crime No. 288/2002-03 of Prohibition & Excise Station, Huzurabad, Karimnagar initiated against them.

3. Brief facts:

a) On 12.09.2002, at about 4 p.m., on information about transportation of black Jaggery and Alum illegally, SDP&E along with other officials kept a watch at Molangur Cross Road. While conducting the route watch, an Eicher Van bearing Regn. No. AP 15 U 3123 was checked and the Investigating Officer found 5,040 kgs. of black Jaggery in 106 Gunny Bags. The Investigating Officer seized the vehicle and the black Jaggery under the cover of Panchnama, arrested the accused and registered a case in Crime No. 288/2002-03 under Sections 34(e), 41 and 42 of the Andhra Pradesh Excise Act, 1968. A

show cause notice was issued to the owner of the vehicle and the accused persons. On 21.09.2002, the Government chemical examiner gave his remarks stating that the sample contains sugar and extraneous matter and it is Jaggery fit for fermentation producing alcohol unfit for consumption.

b) On 16.09.2002, the respondents/accused persons preferred a petition before the High Court being Criminal Petition No. 4362 of 2002 along with Crl.M.P. No. 5639 of 2002 under Section 482 of the Code to quash the proceedings in Crime No. 288/2002-03. On 17.09.2002, the High Court passed an order in Crl.M.P. No. 5639 of 2002 in Crl. Pet. No. 4362 of 2002 giving the interim custody of the vehicle bearing No. AP15U-3123 to Petitioner No.4 therein subject to certain conditions. The Investigating Officer deposited the seized property in the office of the Deputy Commissioner of Prohibition and Excise, Karimnagar, along with proposals for initiating action for confiscation of the black Jaggery. The Deputy Commissioner, Karimnagar, issued a show cause notice to the owner of the contraband for confiscation of the seized property calling for objections, if any. The owner of the vehicle submitted the explanation in response to the show cause notice. The Deputy Commissioner, Karimnagar, by order dated 24.01.2003 confiscated the contraband. Against the order of confiscation, an appeal being Crl. A. No. 4843/2003/CPE/D4 was filed before the Commissioner of Prohibition & Excise, A.P. The Commissioner upheld the confiscation order passed by the Deputy Commissioner, Karimnagar. Aggrieved by the said order, the owner of the Jaggery filed W.P. No. 11647 of 2004 along with W.P.M.P. No. 14808 of 2004 before the High Court for the release of the seized goods. By an interim order dated 09.07.2007 in W.P.M.P. No. 14808 of 2004, the seized black Jaggery was released on furnishing Bank Guarantee by the petitioner therein to the value of the seized goods to the satisfaction of the Dy. Commissioner Prohibition & Excise,

Karimnagar (second respondent therein) but the same could not be done as the jaggery was already disposed of. On 27.01.2006, the High Court passed an order in Crl. Pet. No. 4362 of 2002 allowing the criminal petition quashing the proceedings against the respondents/accused in Crime No. 288/2002-03. Aggrieved by the said order, the State of Andhra Pradesh has filed this appeal by special leave.

4. There is no appearance on behalf of the respondents in spite of service of notice. Heard Mrs. C.K. Sucharita, learned counsel appearing for the State of A.P.

5. Mrs. C.K.Sucharita, learned counsel appearing for the State, after taking us through the complaint and other materials, submitted that the High Court misdirected itself in quashing the proceedings against the respondents in the light of the seizure of 5,040 kgs of black Jaggery and the investigating agency having ample evidence to prove that it was transported for manufacture of illicit liquor.

6. It is not in dispute that on 12.09.2002 at about 4 p.m. on information, the Excise officials of Prohibition and Excise Station, Huzurabad, Karimnagar District proceeded to Molangur cross road, stopped a van bearing No. AP-15-U 3123 and seized 5,040 kgs of black Jaggery in 106 gunny bags from the van under the cover of panchanama. Among the other accused A-1 is the clerk of A-4 and A2 and A3 are driver and cleaner of the van and A-4 is doing business in jaggery and other kirana (grocery) items. It is the case of the prosecution that after seizure of the vehicle, the sample of substance had been sent to the Prohibition and Excise Laboratory for testing. The Govt. Chemical Examiner gave the Laboratory Analysis Report (Annexure P-12) which reads as under:-

"PROHIBITION AND EXCISE DEPARTMENT,
ANDHRA PRADESH
C.E.No.10/02 LABORATORY ANALYSIS REPORT

The sample (s) of substance received with correct and intact from Proh. & Excise Inspector, Station Hazurabad with his letter Dis.No. /02/P&E/HZD dt. 21.09.2002 has been tested in the Laboratory with the following results.

S.No.	Description of the sample	Percentage of proof Spirit of Hydrometer Strength of Alcohol	Remarks
1	2	3	4
10415	A dark brownish coloured substance in a polythene cover kept in a paper cover weighing (200) Grams.Cr.No.288/ 2002-03 of Station Huzurabad. Test Conducted Test for Sugars: Positive		The sample is containing sugar and extraneous matter. It is Jaggery fit for fermentation producing alcohol unfit for consumption

2. The unexpended portion of the sample (s) is returned in securely sealed.

3. He is requested to depute a person with a letter of authority to take delivery of the enclosures from the Laboratory on any working day.

Signature of Asst. Examiner
Dt. 21.09.2002

K. Mahender Reddy)
Govt. Chemical Examiner
of Proh. & Excise Regl.
Proh. Excise Laboratory

To
The Proh. & Excise Inspector,
Huzurabad, Karimnagar Dist.
Copy submitted to the Proh. And Excise
Superintendent, Dist. Hyderabad."

7. The remarks offered in (column 4) of the said report shows that the seized substance is Jaggery fit for fermentation producing alcohol unfit for consumption. It is also relevant that the Deputy Commissioner of Prohibition and Excise, Karimnagar Division, by proceedings dated 24.01.2003, after finding that an offence under A.P. Excise Act, 1968 has been made out, seized the Jaggery involved in Crime No. PR 288/ 2002-03 dated 12.09.2002 and confiscated to the Government of A.P. The said order was confirmed by the Commissioner of Prohibition and Excise on 01.03.2004. In the light of the factual details, learned counsel for the State submitted that it is not a case of no material at all for taking action under the A.P. Excise Act and the High Court was not justified in quashing the proceedings under Section 482 of the Code when the material on record discloses commission of offence under the A.P. Excise Act. No doubt, before the High Court, learned Public Prosecutor who defended the Government has neither placed nor highlighted the above mentioned materials.

8. In a series of decisions, this Court has explained the power and jurisdiction of the High Court under Section 482 of the Code. Exercise of power under Section 482 of the Code, particularly, in a case of this nature is an exception and not the rule. The above provision only saves inherent power which the Court possessed before the enactment of the Code and does not confer any new powers on the High Court.

9. In *State of A.P. vs. Golconda Linga Swamy and Another***,** (2004) 6 SCC 522, while considering similar orders passed by the Andhra Pradesh High Court under the A.P. Excise Act, this Court has held as under:

"….It envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (*i*) to give effect to an order under the Code, (*ii*) to prevent abuse of the process of court, and (*iii*) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest* (when the law gives a person anything, it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it

amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

10. In *R.P. Kapur* v. State of Punjab, AIR 1960 SC 866 = 1960 Cri LJ 1239, this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings:

"(*i*) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(*ii*) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(*iii*) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

11. In *State of Andhra Pradesh* vs. *Bajjoori Kanthaiah and Another*, (2009) 1 SCC 114, again when the Andhra Pradesh High Court quashed similar complaint under the A.P. Excise Act and A.P. Prohibition Act in an appeal filed by the State of Andhra Pradesh, this Court after reiterating the principle laid down in *R.P. Kapur's* case (supra) and *State of Haryana* vs. *Bhajan Lal*, 1992 Supp (1) SCC 335 = 1992 SCC (Cri) 426 held that the interference at the threshold is not warranted and set aside the order of the High Court quashing the FIR and permitted the prosecution to proceed with the trial.

12. While exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an

enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge/Court. It is true that Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, other wise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and brings about its closure without full-fledged enquiry. Though High Court may exercise its power relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice, the power should be exercised sparingly. For example, where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused or allegations in the FIR do not disclose a cognizable offence or do not disclose commission of any offence and make out a case against the accused or where there is express legal bar provided in any of the provisions of the Code or in any other enactment under which a criminal proceeding is initiated or sufficient material to show that the criminal proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused due to private and personal grudge, the High Court may step in. Though the powers possessed by the High Court under Section 482 are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. We make it clear that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482.

13. In the case on hand, apart from specific allegations

about the transportation of Jaggery for preparation of illicit distilled liquor, prosecution also placed reliance on laboratory analysis report which mentions that the transported Jaggery is fit for fermentation, producing alcohol unfit for consumption. In those circumstances, whether the raw material in existence would be sufficient for holding the accused persons concerned guilty or not has to be considered only at the time of trial. Further, at the time of framing the charge, it can be decided whether *prima facie* case has been made out showing the commission of offence and involvement of the charged persons. It is immaterial whether the case is based on direct or circumstantial evidence. That being so, the interference at the threshold quashing the FIR is to be exceptional and not like routine as ordered by the High Court in the present case. It is not a case where it can be said that the complaint did not disclose commission of an offence. The acceptability of the materials to fasten culpability on the accused persons is a matter of trial.

14. In the light of the above principles and the materials placed by the prosecution, we are satisfied that the High Court was not justified in quashing the FIR in Crime No. 288/2002-03 of Excise and Prohibition Station, Hazurabad, Karimnagar District, accordingly the impugned judgment of the High Court is set aside. We make it clear that we have not expressed any opinion on the merits of the case except holding that interference by the High Court at the threshold is not warranted. We further make it clear that it is for the prosecution to establish its charge beyond reasonable doubt. With these observations, the State appeal is allowed.

D.G. Appeal allowed.

COMMISSIONER OF CUSTOMS, BANAGALORE

v.

M/S, N.I. SYSTEMS (INDIA) P. LTD.

(Civil Appeal No. 5394 of 2010)

JULY 15, 2010

[S.H. KAPADIA, CJI., K.S. RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Customs Tariff Act, 1975 – Chapter 90, CTH 9032 – PXI Controllers, Input/Output Modules, Signal Convertors and Chassis and its parts – Classification of – Held: Are classifiable under chapter 90 – On the basis of technical material including importer's own catalogue and webcast, Controllers (including embedded controllers) are not merely PCs/Automatic Data Processing Machines, but have a specialized structure and specific functions to perform – PACs/Programmable Process Controllers, I.O. Modules and Chassis by themselves are not measuring, regulating or controlling instrument (system) – They are meant to operate as part of an industrial process control equipment/system, like sensors – Thus, are correctly classifiable as a part of said machine, instrument or apparatus under CTH 9032.

The assessee imported computer based instrumentation products from their Principal/Holding Company. The items were PXI Controllers, Input/Output Modules, Signal Convertors and Chassis and its parts. It claimed the items to be computers and/or parts of computers and classified them under CTH 8471, 8473 and other headings falling under Chapter 84 of the Customs Tariff Act, 1975. The Original Authority held that the subject goods were not structurally designed to function as a computer. They are measuring/controlling instruments, specifically designed for industrial use which is indicated from the catalogue submitted by the

importer. The O.A. classified embedded controllers, Programmable Automation Controllers, Data acquisition Boards, Digital Input Output Boards, PXI Chassis under Chapter 90. The Commissioner (Appeal) upheld the order. The tribunal held that the PXI Controller and other Controllers are Automatic Data Processing Machine. PXI Controller is not a measuring instrument and can be used only in conjunction with an independent measuring instrument with suitable interface, thus not classified under chapter 90 of the Act. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 On the basis of technical material (including the importer's own catalogue and webcast) it is held that Controllers (including embedded controllers) are not merely PCs/ Automatic Data Processing Machine, but have a specialized structure and specific functions to perform and are therefore, classifiable under Chapter 90. The I.O. Modules and Chassis are meant to operate as parts of Industrial Process Control equipments like sensors. These I.O. Modules come with software tailored to their specific pre-defined functions. Therefore, one has to see the package in the holistic manner. The package as a whole-both hardware and software, constitutes one single functional unit. Thus, I.O. Modules and Chassis are classifiable as parts and accessories of Automatic Regulating or Controlling Instruments/Apparatus under CTH 9032.90.00. Thus, the order passed by the Department was correct. [Paras 28, 29 and 46] [463-D-G; 474-D]

2.1 On examination of the technical write-up, the purpose of Controllers whether embedded or not, is to control industrial processes. Programmable Automation Controller is the combination of PLC and PC technology and this means the ruggedness of PLCs, software stability of a PC and the independence to incorporate

modular and diverse I/O. PAC is an improvement over PLC. PAC is capable of being controlled by a PC/Laptop but it is not a PC/Laptop. The principal function of Controllers is executing Control Algorithms for the Real-time monitoring and control of devices, processes or systems whereas the principal function of a PC by itself is acquisition, analysis and display of data. A controller performs functions in addition to data processing. The webcast presentation also shows the difference in the structure and functions of a Controller vis-à-vis a PC (simpliciter). The hardware in the Controller is dedicated to perform Measurement and Control Applications. Basically, PACs are Programmable Process Controllers which are suitable for use principally in conjunction with Industrial Process Control equipment like sensors which measures temperature, pressure etc. The programmable process controller, though distinct from sensors, is an individual component intended to perform a specific function. The programmable process controller is a part and accessory of a controlling apparatus. [Para 31] [464-B-F]

2.2 The purpose of Data Acquisition Boards is to acquire data from external sensors, usually in the form of Analog Voltage of +/- 10 volts, which is then converted into digital signals, which the personal computer can understand. Similarly, Analog Output Boards are meant for converting signals from external units such as PXI controller. Similarly, Network Interface Module is used to connect measuring instruments to a PC by sending and receiving messages, two ways. The Chassis of PXI provides connectivity and housing for embedded controllers and data acquisition modules, allowing them to communicate with each other. Thus, the I.O. Module is tailored to a specific function. Each of the Boards (cards) is inserted into the slots of PXI. Each of the I.O. Modules is tailored to a specific function and is, therefore, a part

of a regulating and controlling apparatus like a sensor, thermostat etc. Therefore, one has to look at the machine (PXI Machine) holistically. [Para 33] [465-D-G]

2.3 Chapter 90 includes measuring and checking instruments and apparatus; parts and accessories thereof. In view of Section Note 1(m) of Chapter 84, it is first to be seen whether or not PACs fall within Chapter 90. Keeping in mind the scheme of Chapter 84 and Chapter 90, in the instant case, the correct approach would be to examine the scope of Chapter 90 first and foremost and only the scope of Chapter 84 is to be examined. Chapter Note 1(h) of Chapter 90 does not exclude CTH 8471. Hence, even if an item falls under CTH 8471, it could still come under Chapter 90, however, in view of Section Note 1(m) Chapter 84 would stand excluded. This is because the application of Chapter 84 is subject to the applicability of Chapter 90. [Para 37] [467-E-G]

2.4 Note 2(a) to Chapter 90 inter alia states that what is otherwise parts or accessories, but is classifiable as goods under Chapter 84, shall be classified in their respective headings. The effect of Note 2(a) is that if it can be shown that Programmable Process Controllers/PACs are classifiable as "goods" under Chapter 84 then such a classification would include the same for being considered as parts or accessories of goods under Chapter 90. However, in the instant case, Note 2(a) is not attracted as PACs are not classifiable as "goods" under Chapter 84. [Para 38] [467-H; 468-A-B]

2.5 The submission that PACs/Programmable Process Controllers by themselves are not measuring, regulating or control instruments; that physical variables such as temperature and voltage are measured by sensors which could be classified under Chapter 90, but this does not extend to PACs/Programmable Process

Controllers; that automatic control apparatus referred to in Chapter 90 must consist of a device for measuring a control device and a starting-stopping/operating device, all of which should form a "single entity" and since a PAC does not fulfil the said test, CTH 9032 is not attracted in the case of PAC/Programmable Process Controllers is unsustainable. [Paras 38 and 39] [468-C-F]

2.6 In view of Chapter Note 2(b) to Chapter 90 r/w Note 3 of the same Chapter, PACs/Programmable Process Controllers are parts and accessories of a system/instrument which are suitable for use solely or mainly with a number of machines, instruments, apparatus of the same Heading, i.e., 9032 like sensors, thermostats etc. Thus, PACs/Programmable Process Controllers imported by the assessee are suitable for use principally with Industrial Process Control Equipment like sensors, thermostats etc. which measures temperature, process etc. Therefore, they are correctly classifiable as a part of the said machine, instrument or apparatus. [Para 39] [468-F-H; 469-A]

2.7 A "control system" generally refers to the control of a device, process or system by monitoring one or more of its characteristics. It ensures that output processing remains within the desired parameters over a period of time. Controllers are generally connected to other computing apparatus. The principle function of controllers is to execute control algorithm for real time monitoring and for controlling devices, processes or systems. [Para 39] [469-B-C]

2.8 With regard to the classification of Input-Output Modules and Chassis, one has therefore to take into account all the imported items as constituting a complete System which performs the work of measurement. PXI is a system. It is composed of three basic components-chassis, system controller and peripheral modules. These

modules are also imported by the importer in the instant case. One such module is Network Interface Module. This module is used to connect to a network for distributed control applications. It interconnects a PC to a measuring instrument by sending and receiving messages from the two units. In the chassis of the PXI there are slots in which Analog Output Boards (Cards); Digital Input-Output Boards, Image Acquisition Boards, Distributed Input-Output Boards, NIM etc. are inserted. Each I.O. Module imported by the assessee is tailored to a specific function and therefore such I.O. Module is a part of a regulating or controlling apparatus. NIM is a hardware device. It may be in the form of a network interface card or a network adapter or in the form of Network Interface Controller. It provides connectivity between the industrial network and the I.O. Module. A network interface module works as a connector and adapter unit in order to provide a two way interconnection between external sensor unit and the ADP. Thus, I.O. Module is a hardware. It is also known as I.O. device or I.O. Point. It may be in the form of I.O. Cards or I.O. Boards. When I.O. Module is used to accept data (input) from sensors, transducers, Programmable Logic Controllers computers etc. and then distributes the data (output) to other devices in the system, then I.O. Module is called as Distributed I.O. Module. Such system is also called as Distributed Control System which is a control system used normally in a manufacturing plant or in any other kind of dynamic system. DCS, therefore, is used in a variety of industries to monitor and control distributed equipments. An I.O. Module also converts readings from sensors and provides output signals which are used for operating actuators via Network Interface Module. [Para 39] [469-F-H; 470-A-E]

2.9 Programmable Logic Controller is a control device. It is normally used in industrial control

applications. It is a Programmable Microprocessor based device which is used to control assembly lines and machinery on the shop floor as well as to control many other types of mechanical, electrical and electronic equipment in a plant. A PLC is designed for real-time use in rugged industrial environments, connected to sensors and actuators. PLCs are characterized by the number of I.O. Ports which they provide. PLCs are also categorized by their I.O. scan rates. Thus, a PAC does not replace the traditional PLCs but it expands the role of a PLC. A PAC has features found in Programmable Logic Controllers, Distributed Control Systems, Remote Terminal Units and PCs. [Para 39] [470-G-H; 471-A-C]

2.10 PACs/Programmable Process Controllers and I.O. Modules by themselves are not measuring, regulating or controlling instrument (system). Physical variables such as temperature and voltage are measured by device, like sensors which constitute measuring and control systems. Controllers and I.O.Modules each have a specific function to perform being parts of a measuring and control system i.e. sensors. As such, PAC/PPC is a part of an industrial process control equipment/system and accordingly such controllers are classifiable as a part of instrument or apparatus (Chapter Note 2(b) read with Note 3 of Chapter 90). [Paras 39 and 40] [471-D-E; 469-D]

2.11 There is no merit in the submission of the importer that the Explanatory Notes, the Measuring Device, the Control Device and the Operating Device has to form a "single entity". There is no dispute that if all the three devices are found in one "single entity" then classification will fall under Chapter 90. However, the test of "single entity" containing three devices is not a pre-condition for classification under CTH 9032. On the contrary, the test is not that of single entity, but of the

device being capable of working as a functional unit. Note 3 of Chapter 90 is to be read. Note 3 incorporates Note 4 to Section XVI. Note 4 inter alia provides for a machine consisting of individual components which may be separate as long as they are intended to contribute to a clear defined function. The PACs/Programmable Process Controller, though separate from sensors, is an individual component intended to contribute to a clearly defined function. Note 3 of Chapter 90 has to be read with Note 2(b) of Chapter 90 and if so read then it becomes clear that PAC/Programmable Process Controllers, being parts and accessories and a regulating or controlling apparatus like sensors have got to be classified under CTH 9032.89.10. Thus, PACs(including embedded Controllers/Programmable Process Controllers) have been rightly classified by the Department under CTH 9032. [Paras 41 and 42] [471-F-H; 472-A-B]

2.12 On the question of Input-Output (I.O.) Modules and Chassis, the tribunal has not given any finding whatsoever thereon. However, on going through the technical material and the demonstration given in Court, I.O. Modules and Chassis have also been rightly classified by the Department as parts and accessories of regulating and controlling apparatus classifiable under Chapter 90. The primary function of I.O. Modules (Boards) is to function as a part of measuring and control System. It is for this reason that such Modules are required to be classified as parts and accessories of regulating and measuring System. For this purpose, it is necessary to examine each of the imported items apart from Controllers in order to see whether the hardware coupled with the pre-installed software gives it a definite identity and function. From the catalogue and technological write-ups it is found that each and every I.O. Module imported by the assessee is configured with a sensor at one end. This aspect is very important. [Para 43] [472-C-G]

2.13 The purpose of DAQ Boards is to acquire data from external sensor, usually in the form of analog voltage of +/- 10 volts. This data is converted by DAQ Boards into digital signals which the personal computer can understand. Instrument Control Boards which are placed inside the computer allow data required from external sensors to be communicated directly to the computer. This is called as handling of information (Explanatory Notes of HSN p 1575) which is different from controlling temperature, pressure etc. (Explanatory Notes of HSN p 1856). Analog Output Boards which are meant for converting signals from external units such as PXI. Similarly, the Chassis provides connectivity and housing for embedded controller and the data acquisition modules, allowing them to communicate with each other. A network interface module is used to connect to a network for distributed control applications. It interconnects measuring instruments to a PC by sending and receiving messages from the two units. Thus, each I.O. Module is tailored to a specific function and is therefore a part of regulating and controlling apparatus. Handling of information under the HSN Notes is separate and distinct from regulating and measuring temperature, pressure etc. [Para 43] [472-H; 473-A-D]

2.14 Once a machine incorporating an ADPM performs a specific function other than data processing then that machine is classifiable in the heading corresponding to the function of that machine (Note 4 of Section XVI and Note 3 to Chapter 90). Further, HSN clearly indicates that Heading 8478 is excluded where the case is of a clearly defined function to which separate components contribute. [Para 44] [473-E-G]

2.15 In order to attract Note 5(E) the real test is whether or not the machine imported is performing a specific function relatable to the functional unit as a

whole. The said machine should be seen as a System. As a functional unit, the imported machine should perform a function other than data processing or it should perform a function in addition to data processing. Industrial Process Controllers and I.O. Modules, which are part of a functional unit, the function of which is to be judged as a whole are therefore classifiable in Chapter 90. The sentence in Chapter Note 5(E) "incorporating or working in conjunction with an ADPM" merely indicates that the overall package, which is presented before the Department, had an ADP Machine in it. In other words, what is imported is a System containing an ADPM. The said interpretation stands to reason because if the contention of the importer is accepted, it would mean that every machine that contains an element of ADP would be classifiable as an ADP Machine under Chapter 84. This would completely obliterate the specific function test and the concept of functional unit. [Para 45] [473-H; 474-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5394 of 2010.

From the Judgment & Order dated 29.06.2009 of the Customs Excise and Service Tax Appellate Tribunal, Bangalore (CESTAT) in Final Order No. 846 of 2009 in Appeal No. Customs 1678 of 2007.

Gourab Banerji, ASG, K. Swami, Rajiv Nanda, B. Krishna Prasad for the Appellant.

V. Lakshmikumaran, Badri Narayan, Sunil Kumar, Ravinder Singhania, A.M. Ranjan, K.C. Dua for the Respondents.

The Judgment of the Court was delivered by

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

Facts:

2. M/s. N.I. Systems (India) Private Limited (hereinafter referred to as "importer") is a 100% subsidiary of N.I. Corporation at Austin, Texas, USA.

3. Assessee imports various products from its Holding Company and supplies the same to its customers in India. During the relevant assessment year, the assessee imported various products from their Principal. The products were computer based instrumentation products. The importer filed 64 bills of entries. The importer claimed the items to be computers and/ or parts of computers. The importer grouped the items in accordance with similar/ identical functions broadly under CTH 8471, 8473 and other headings falling under Chapter 84. Broadly, the importer categorized the imported items as follows:

(i) PXI Controllers

(ii) Input/Output Modules (also known as Modem or Control/Adaptor Units)

(iii) Signal Converters.

(iv) Chassis and its parts.

4. On verification of the technical data (including the catalogue and the webcast of the importer), the Original Authority ("O.A.") vide its decision dated 15.11.2006 held that the subject goods were not structurally designed to function as a computer. Further, according to the O.A., in the ordinary course of trade no buyer will purchase the subject goods as computers on account of price differential between the price of the subject goods and the price of the computer. According to the O.A., the subject goods stood manufactured for a special purpose and that purpose was either measurement or control. According to the O.A., the importer, in this case, had conceded before it that a complete system performs the function of

measurement whereas if one looks at the subject goods item-wise, it shows that each item performs a sub-function of data acquisition processing. On the basis of the said concession, the O.A. concluded that each imported item constituted a part of a complete Measurement System. According to the O.A., if one applies the test of common parlance then the subject goods are measuring/controlling instruments and even in trade parlance they are not known as computers. Lastly, the subject goods are costlier than ordinary computer and the trader buys them because of their enhanced capabilities for the purposes of measuring/controlling instruments. According to the O.A., the subject goods are specially designed for industrial use which is indicated by the catalogue submitted by the importer. The embedded controllers may perform all functions of a CPU but, according to the O.A., the embedded controllers are not CPUs. According to the O.A., one more concession is made by the importer. In its reply to the show cause, the importer stated that they use real-time operating systems (software) and not the standard operating systems such as Microsoft Windows. Accordingly, the O.A. held that controllers are manufactured for a specific purpose and not as ADP Machines. The specific purpose being controlling/measurement as enumerated in the catalogue. In the circumstances, the O.A. has broadly classified embedded Controllers, Programmable Automation Controllers ("PACs"), Data Acquisition Boards, Digital Input Output Boards, PXI Chassis etc. under Chapter 90. The O.A. has rejected the classification sought by the importer under CTH 8471.

5. Aggrieved by the decision of the Additional Commissioner dated 15.11.2006, the importer preferred Appeal No. 98/07-CUS(B) before Commissioner of Customs (Appeals). Vide decision dated 31.7.2007, the Commissioner (A) dismissed the appeal preferred by the importer.

6. Against decision dated 31.7.2007, the importer preferred Customs Appeal No. 678/07 before CESTAT. Vide its decision dated 29.6.2009, the Tribunal held that the main

item of import was PXI Controller and other Controllers. According to the Tribunal, these imported Controllers were nothing but ADP Machines. According to the Tribunal, the importer had placed before it the sample of imported items with enormous data including a diagram which read as follows:

"PXI Controllers = Computers = Data Processing Machines"

[See page 10 of presentation of the importer company]

7. According to the Tribunal, the diagram, on which reliance was placed by the importer, indicated that both PC and PXI Controller had a structure/ design which was common to Automatic Data Processing Machines. According to the Tribunal, PXI controller in itself is not a measuring instrument; that the input of PXI Controller is only in the digital form as in the case of a PC; that PXI Controller is in turn connected with the processors, motherboard, hard drive with Windows XP, Serial Port, USB Port, Video Port, Ethernet Port, etc. According to the Tribunal, since the PXI Controller is identical in function to the normal home computer, both the items are comparable. According to the Tribunal, a PXI Controller acts as a Central Processing Unit for the entire PXI system. According to the Tribunal, a PXI Controller processes the data that enters from the external peripherals such as a mouse and a keyboard as well as from the internal peripherals such as PXI Signal Converting Modules (Cards). There is no difference between a PXI Controller and a PC. Thus, according to the Tribunal, a PXI Controller and other Controllers imported by the assessee are all ADP Machines. According to the Tribunal, all the imported Controllers carry out the functions of ADP Machines. According to the Tribunal, each and every imported Controller retains the characteristics of ADP Machine. According to the Tribunal, a PXI Controller can be used for a variety of applications ranging from advanced data acquisition to automatic manufacturing which clearly indicated that the

imported items were not measuring instruments or their parts as claimed by the Department. According to the Tribunal, the imported items cannot be categorized as measuring instruments. According to the Tribunal, PXI Controller per se is not a measuring instrument. It can be used only in conjunction with an independent measuring instrument with suitable interface, hence, the PXI Controller/ other Controllers imported by the assessee cannot be classified under Chapter 90 of the Customs Tariff Act, 1975. Hence, this Civil Appeal is filed by the Department against the decision of the Tribunal dated 29.6.2009 in favour of the importer.

Relevant Provisions of CTA:

8. Before proceeding further, we need to quote hereinbelow the relevant entries referred to in the Customs Tariff (2004-2005). At the outset, it may be mentioned that Chapter 84 finds place in Section XVI which deals with machinery and electrical equipments. The Section Note to Section XVI states that Section XVI does not cover articles falling in Chapter 90.

Notes 3 and 4 to Section XVI read as under:

"3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function."

"4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission

devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."

9. Note 5(A) to Chapter 84 defines the expression "automatic data processing machines". Note 5(B) to Chapter 84 clarifies that an ADP may be in the form of systems consisting of variable number of separate units. We quote hereinbelow, Notes 5(A) and 5(B) to Chapter 84, which read as follows:

"5.(A) For the purposes of heading 8471, the expression "automatic data processing machines" means:

(a) digital machines, capable of (1) storing the processing programme or programmes and at least the data immediately necessary for the execution of the programme; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing programme which requires them to modify their execution, by logical decision during the processing run;

(b) analogue machines capable of simulating mathematical models and comprising at least: analogue elements, control elements and programming elements;

(c) hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.

5(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is

to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) it is of a kind solely or principally used in an automatic data processing system;

(b) it is connectable to the central processing unit either directly or through one or more other units; and

(c) it is able to accept or deliver data in a form (codes or signals) which can be used by the system."

(emphasis supplied)

10. We quote hereinbelow Note 5(E) to Chapter 84, which reads as follows:

"5(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings."

(emphasis supplied)

11. Similarly, Note 7 to Chapter 84 is also relevant and it reads as follows:

"7. A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose.

Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine, the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 8479. Heading 8479

also covers machines for making rope or cable (for example, stranding, twisting or cabling machines) from metal wire, textile yarn or any other material or from a combination of such materials."

12. We also quote hereinbelow for the sake of clarity Chapter Heading 8471, which reads as follows:

> "**Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form and machines for processing such data, not elsewhere specified or included"**

Chapter Sub-Heading 8471 50 00 reads as follows:

> "**Digital processing units other than those of sub-headings 8471 41 or 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units"**

13. Chapter 90 falls in Section XVIII which refers to "measuring and checking instruments/apparatus as also parts and accessories thereof."

Chapter Notes 1(h), 2 and 3 of Chapter 90 read as under:

"1 This Chapter does not cover:

(h) searchlights or spotlights of a kind used for cycles or motor vehicles (heading 8512); portable electric lamps of heading 8513; cinematographic sound recording, reproducing or re-recording apparatus (heading 8519 or 8520); sound-heads (heading 8522); still image video cameras, other video camera recorders and digital cameras (heading 8525); radar apparatus, radio

navigational aid apparatus or radio remote control apparatus (heading 8526); numerical control apparatus of heading 8537; sealed beam lamp units of heading 8539; optical fibre cables of heading 8544;"

"2. Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this Chapter are to be classified according to the following rules:

(a) parts and accessories which are goods included in any of the headings of this Chapter or of Chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;

(b) other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind;

(c) all other parts and accessories are to be classified in heading 9033."

14. We quote hereinbelow CTH 9031 which refers to measuring or checking instruments, appliances and machines, not specified or included elsewhere in Chapter 90. The Department seeks to place reliance on Chapter Sub-Heading 9031 80 00, which reads as under:

"Other instruments, appliances and machines"

15. The Department also places reliance on Chapter Sub-

Heading 9031 90 00, which refers to **"parts and accessories"**.

16. For some of the items, the Department places reliance on Chapter Sub-Headings 9032 89 10 and 9032 90 00 which read as follows:

"9032 89 10 Electronic automatic regulators

9032 90 00 Parts and accessories"

17. At this stage, we may deal hereinbelow the Explanatory Notes from HSN. Our customs tariff is basically based on HSN. Even the HSN makes it clear vide Section Note 1(m) that Section XVI which refers to Chapter 84 will not cover articles mentioned in Chapter 90. Similarly, Section Note 3 to Section XVI states that multi-function machines are to be classified according to the principal function of the machine. According to the Explanatory Notes, a printing machine with a subsidiary machine for holding the paper or an industrial furnace combined with lifting or handling machinery is a composite machine in terms of Section Note 3. Further, referring to Functional Units, the Explanatory Note, referring to Section Note 4, inter alia states that when a machine including a combination of machines consists of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 then the whole shall fall for classification in the heading appropriate to that function, whether the various components remain separate or are inter-connected by devices used to transmit power, either by electrical cables or by other devices. At this stage, we quote hereinbelow Chapter Sub-Heading 8471 49 00, which reads as follows:

"Other, presented in the form of systems"

18. According to HSN, the word "systems" in Chapter Sub-Heading 8471.49 means ADP machines whose units satisfy

the conditions of Note 5(B) to Chapter 84 and which comprises of a CPU, one input unit (for example, a keyboard or a scanner), and one output unit (for example, a visual display unit or a printer).

19. According to HSN, the following classification principles have to be applied in accordance with Note 5(E) to Chapter 84 in the case of machine incorporating or working in conjunction with ADPM and performing a specific function. These principles are as follows:

"(1) A machine incorporating an automatic data processing machine and performing a specific function other than data processing is classifiable in the heading corresponding to the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71.

(2) Machines presented with an automatic data processing machine and intended to work in conjunction therewith to perform a specific function other than data processing, are to be classified as follows:

The automatic data processing machine must be classified separately in heading 84.71 and the other machines in the heading corresponding to the function which they perform unless, by application of Note 4 to Section XVI or Note 3 to Chapter 90, the whole is classified in another heading of Chapter 84, Chapter 85 or of Chapter 90."

20. The most important aspect which needs to be emphasized in this case is that, according to HSN, data processing consists of **handling information** of all kinds, in pre-established logical sequences and for a specific purpose(s). According to HSN, ADP machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such or, in some cases, serve in

turn as data for other data processing operations. The important thing to be noted is that there is a wide difference between **handling information**, referred to at page 1575 of HSN in the context of CTH 8471 and **automatically controlling the flow, level, pressure or other variables of liquids or gases**, referred to at page 1856 of HSN in the context of CTH 90.32.

21. To complete the chronology of the paragraphs used in the Explanatory Notes, the HSN has stated in the context of CTH 84.71 that a CPU incorporates storage, arithmetical and logical elements and control elements, an input unit which receives input data and converts them into signals which can be processed by machines and an output unit which converts the signals provided by the machine into an intelligible form (printed text, displays, etc.) or into a coded data for further use (processing, controlling, etc.). [See page 1577 of HSN] In this connection, we quote hereinbelow the conditions laid down by the HSN for classifying a unit as a part of digital data processing system. These conditions are laid down at page 1577 of HSN, which read as follows:

> "A unit is to be regarded as being a part of a complete digital data processing system, if it satisfies the following conditions:
>
> (a) It is of a kind solely or principally used in an automatic data processing system;
>
> (b) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.
>
> The interconnections may be made by material

> means (e.g. cables) or by non-material means (e.g., radio or optical links).
>
> In accordance with Note 5(D) to this Chapter, printers, keyboards, X-Y co-ordinate input devices and disc storage units which satisfy the conditions of items (b) and (c) above, are in all cases to be classified as constituent units of data processing systems.
>
> The foregoing provision is, however, to be considered in the overall context of Note 5 to Chapter 84 and is therefore applicable subject to the provisions of paragraph (E) of that Note, by virtue of the introductory part of paragraph (B) thereof. Thus, ink-jet printers working in conjunction with an automatic data processing machine but having, particularly in terms of their size, technical capabilities and particular applications, the characteristics of a printing machine designed to perform a specific function in the printing or graphics industry (production of pre-press colour proofs, for example) are to be regarded as machines having a specific function classifiable in heading 84.43.
>
> Furthermore, appliances such as measuring or checking instruments adapted by the addition of devices (signal converters, for example), which enable them to be connected directly to a data processing machine, are, in particular, not to be regarded as of a kind solely or principally used in automatic data processing systems. Such appliances fall to be classified in their own appropriate heading.
>
> Digital data processing machines are put to many uses, for example, in industry, in trade, in scientific research and in public or private administrations."

22. Further, at page 1578 of HSN, it is stipulated that Chapter Heading 84.71 also covers constituent units of data

processing systems. These may be in the form of units having a separate housing and designed to be connected, for example, by cables or in the form of units not having a separate housing and designed to be inserted into a machine. Display units of ADP machines provide a graphical presentation of the data processed. (See page 1579 of HSN).

23. Coming to Section XVIII, in which Chapter 90 falls, the Explanatory Notes in HSN amongst other things indicate that instruments and apparatus for automatically controlling the flow, level, pressure or other variables of liquids or gases, or for automatically controlling temperature fall in CTH 90.32. (See Note 7 to Chapter 90 at pages 1766 and 1856)

Case of the Department:

24. Based on the technological write-ups given by the importer read with the description provided in the catalogue and the website it was argued on behalf of the Department that a complete system performs the work of measurement whereas the item imported by the assessee forms a sub-function of data acquisition and processing. According to the Department, the terms "control" and "control systems" generally refer to the control of a device, process or system by monitoring one or more of its characteristics. This is used to ensure that output, processing, quality and/or efficiency remain within the parameters over the duration of time. According to the Department, in several control systems, digital data processing monitors a device, process or system and automatically adjusts its operational parameters. In other control systems, such an apparatus only monitors the device, process or system and displays alarm leaving responsibility for adjustment to the operator. Thus, process control is typically employed in the manufacturing sector for process and discrete manufactures. According to the Department, field devices include temperature, flow and other sensors that measure characteristics of the device, process or system being

controlled. On the other hand, control devices include valves, actuators which control the devise, process or system itself. According to the Department, controllers generate settings for the control devices based on measurements from the field devices. Controller operation is typically based on control algorithm that maintains a control system at a desired level by minimizing differences between the values measure by the sensors. According to the Department, controllers may be connected to other computing apparatus that facilitates monitoring or administration. According to the Department, the principal function of controllers is to execute control algorithms for the real time monitoring and to control devices, processes or systems. They have neither the computing power nor user interfaces required to facilitate the design of a control algorithm. Historically, the process control industry has used manual operations, such as manually reading level and pressure gauges, turning valve wheels, etc. in order to operate the measurement and control field devices within a process. However, with the emergence of the microprocessor-based Distributed Control System ("DCS"), the distributed electronic process control came into existence in the process control industry. A DCS includes an analog or a digital computer, such as a Programmable Logic Controller ("PLC"), connected to numerous electronic monitoring and control devices like electronic sensors, transmitters, transducers etc. located throughout a process. The DCS computer stores and implements a centralized and complex control scheme in order to effect measurement and control of devices within the process so as to control process parameters according to the overall control scheme. According to the Department, PACs are not meant to be used as personal computers. The purpose of controllers is to control industrial processes. Thus, according to the Department, a controller by its very name performs functions distinct from data processing. Moreover, according to the Department, there are differences in the structure and the function of a controller and the function of a PAC vis-a-vis the PC. According to the Department, PAC cannot be equated

to a PC as is sought to be done by the Tribunal. A PAC combines a PLC and a PC. The Department also placed reliance on the webcast to show that a processor is separated from FPGA by a high-speed bus. According to the Department, the webcast further shows that a processor is separate and distinct from the main controller wherein the hardware is dedicated to perform measurement and control applications. According to the Department, the software used in order to programme the processor is designed using a proprietary software known as Lab View. The catalogue is relied upon by the Department to show that the controller, in the present case, has been designed and made for a specific function and regulating and controlling industrial processes. According to the Department, none of the above aspects have been duly considered by the Tribunal. The entire case of the Department before us was that the Programmable Process Controllers when imported were suitable for use principally with industrial process control equipment, i.e., sensors which measure temperature, pressure, flow etc. and therefore such programmable process controllers were classifiable as a part of the said equipment, instrument or apparatus. The programmable process controller, though separate from sensors, is necessarily an individual component intended to contribute to a clearly defined function. According to the Department, the programmable process controllers being parts and accessories of a regulating or controlling apparatus have been classified rightly by the adjudicating authorities under CTH 9032 89 10. According to the Department, PACs whether embedded or otherwise are in essence Programmable Process Controllers. In support thereof, the Department has placed reliance on two circulars issued by Central Board dated 2.9.1996 and 9.5.1997.

25. As regards Input-Output ("I.O.") Modules and Chassis, the Department contended that I.O. modules and chassis have been rightly classified by the adjudicating authorities as parts and accessories of regulating and controlling apparatus classifiable under CTH 9031 90 00/9032 90 00. In this

connection, the Department submitted on the basis of the catalogue and technical write-ups that each and every imported I.O. Modules is configured primarily to match with a sensor. In this connection, the Department has demonstrated by way of an illustration that one of the items imported by the assessee is Instrument Control Boards (Cards). Instrument Control Board (Card) is a stand-alone instrument. It acquires data from external sensors, but it is unable to send the data directly to a computer. Therefore, a suitable board like instrument control board is required to be placed inside the computer to allow the data to be sent directly to the computer. Similarly, another example given by the Department is concerning Data Acquisition Board. The purpose of a Data Acquisition Board is to acquire data from external sensor and convert it to digital sensors which the PC can understand. Thus I.O. Module is tailored to a specific function and is therefore a part of regulating a controlling apparatus. According to the Department, a signal converting device or I.O. unit has got to be properly aligned with the measuring or checking instrument. According to the Department, industrial process controllers and I.O. modules are parts of a functional unit, the function of which is to be judged as a whole and is therefore classifiable in Chapter 90. According to the Department, for the abovestated reasons Controllers imported by the assessee including embedded controllers are not merely PCs. They have a specialized structure. They have a specialized function to perform. Moreover, I.O. modules and chassis, which are the subject matter of import are also specialized to operate with specific sensors and devices. The data available from sensors is transmitted to the controller for the execution of control functions. Therefore, the package as a whole – both hardware and software – must be seen as one functional unit. Hence, the imported goods, according to the Department, have been rightly classified by the adjudicating authorities under Chapter 90. According to the Department, I.O. modules and chassis have been rightly classified by the adjudicating authorities as parts

and accessories of Automatic Regulating or Controlling Instruments and apparatus under CTH 9032 90 00.

Case of the Importer:

26. Briefly, the case of the importer before us was that imported items cannot perform any specific function unless the end-users have an appropriate programming software. According to the importer, the input for the above items is digital signals captured by sensors. According to the importer, just because the imported items were to be used with measuring instruments, it cannot be said that such items are to be classified under Chapter 90. According to the importer, PXI controller, I.O. modules and signal converters are all varieties of ADP Machines. They all run on operating systems like linux, windows etc. According to the importer, no ADP Machine can capture an electrical signal such as temperature, voltage, pressure etc. on its own as a stand-alone item. According to the importer, an ADP Machine requires various types of interface boards/units which are required to be installed in it and connected to sensors so that temperature, voltage and pressure can be received by the interface boards/units and converted into digital signals and then sent to ADPM processing. Therefore, according to the importer, it is the sensor which measures the real world phenomena as ADPM cannot interface by itself directly with the sensors. Thus, assessee imports a variety of such interface boards/units which are then installed into ADPM. According to the importer, these boards/units meet the criteria mentioned in Chapter Note 5(B) as well as Explanatory Notes (I)(D)(4) & (5) which inter alia state that such boards/units when imported should be classified under CTH 8471 as units of ADPM. According to the importer, an ADPM when imported has only an operating software which cannot perform any specific function without application of software. For example, a PXI Controller is incapable of processing the digital data fed to its CPU unless a specific software is written for such processing. At the time of import

no software is written or provided. It is the end-user who uses a programming language or an appropriate tool such as Lab View software to write a specific software for its own stand-alone instrument or application like thermostat, spectrum analyzer, oscilloscopes etc.. According to the importer, at the time of import, the assessee is not aware of what application the end-user may put the PXI controller to use. Moreover, a PXI controller is not dedicated to a single type of machine or operator. It is capable of being connected to multiple apparatuses simultaneously which apparatuses can be changed continuously. As such, the PXI controller is freely programmable as per the requirements of the user. This end-user developed software or programme is stored in the memory and is executed by PXI controller. It is according to the software and the data fed to the CPU that the PXI controller processes the data and provides the required processed output. According to the importer, as the PXI controller satisfies the requirement of free programmability, storing and processing of programmes, performance and arithmetical computation and execution of programmes, the PXI controller qualifies as ADP Machine in terms of Chapter Note 5(A) to Chapter 84 of Customs Tariff.

27. According to the importer, the above position has not been disputed by the Department. That, the Department has not disputed that the Controllers imported by the assessee satisfy all the requirements of Chapter Note 5(A). According to the importer, the only reason why the Department was to classify the imported items under Chapter 90 is because according to the Department, in addition to Chapter Note 5(A), Chapter Note 5(E) also applies. The same test is applied by the Department to I.O. Modules. According to the importer, even the Department accepts that these modules satisfy the definition of ADP given in Chapter Note 5(B). However, the Department has classified the said modules under Chapter 9031 by virtue of Chapter Note 5(E). The same test is also applied by the Department in the context of signal convertors. According to the

importer, even the signal convertors satisfy the definition of units of ADP as provided in Chapter Note 5(B). However, the Department has classified the said items under Chapter 9031 only by virtue of Chapter Note 5(E) of Chapter 84. In short, the Department has classified the Controllers under heading 9031 or 9032 as measuring, checking or controlling instruments. They have classified signal converter units and I.O. modules under heading 9031 as parts of measuring and checking instruments which is objected to by the importer. The basis for the Department case has always been that the imported goods, though ADPM, are meant for use with checking or controlling instruments are therefore classifiable under heading 9031 and 9032.

Findings:

28. For the reasons given hereinafter, we hold on the basis of technical material (including the importer's own catalogue and webcast) that Controllers (including embedded controllers) are not merely PCs/ADPMs, but have a specialized structure and specific functions to perform and are therefore classifiable under Chapter 90.

29. Similarly, I.O. Modules and Chassis, which are the subject matter of import in this civil appeal are meant to operate as parts of Industrial Process Control equipments like sensors. These I.O. Modules come with software tailored to their specific pre-defined functions. Therefore, one has to see the package in the holistic manner. The package as a whole – both hardware and software – constitutes one single functional unit. Accordingly, we hold that I.O. Modules and Chassis are classifiable as parts and accessories of Automatic Regulating or Controlling Instruments/Apparatus under CTH 9032.90.00.

Reasons:

(A) Based on Technical Material:

30. Whether a PXI Controller = PC Controller = ADPM?

This is the basic issue which we need to answer in this civil appeal.

31. On examination of the technical write-up, before going into the analysis of the classification principles, we are of the view that the purpose of Controllers whether embedded or not, is to control industrial processes. Programmable Automation Controller is the combination of PLC and PC technology and this means the ruggedness of PLCs, software stability of a PC and the independence to incorporate modular and diverse I/O. PAC is an improvement over PLC. PAC is capable of being controlled by a PC/Laptop but it is not a PC/Laptop. The principal function of Controllers is executing Control Algorithms for the Real-time monitoring and control of devices, processes or systems whereas the principal function of a PC by itself is acquisition, analysis and display of data. A controller performs functions in addition to data processing. The webcast presentation also shows the difference in the structure and functions of a Controller vis-à-vis a PC (simpliciter). The hardware in the Controller is dedicated to perform Measurement and Control Applications. Basically, PACs are Programmable Process Controllers which are suitable for use principally in conjunction with Industrial Process Control equipment like sensors which measures temperature, pressure etc. The programmable process controller, though distinct from sensors, is an individual component intended to perform a specific function. The programmable process controller is a part and accessory of a controlling apparatus.

32. A word about PXI, PAC, Sensor and FPGA.

(i) PXI: PXI is designed for measurement and automation applications which require high performance and a rugged industrial form. In the Chassis of PXI, there are about 8 slots. PXI is a system. It consists of three components, namely, chassis, system controller and peripheral modules. One can select the modules to be installed in the PXI System. PXI uses PCI-based technology. There are PXI Modules, including those

which are imported herein, available for almost every conceivable measurement and automation application.

(ii) PAC: PAC stands for Programmable Automation Controller. PAC is a Controller. PAC is an improvement on PLC. Various characteristics of PAC includes multi-domain functionality – ability of handling logic, motion and process control – all on a single control platform. Every computational algorithm cannot be solved with a PC. PAC is meant for a wide variety of applications. PAC incorporates multiple disciplines such as logic control, process control and motion control all on a single open platform with a single data base.

A classic example of the uses of a PAC would be in a large bakery with multiple ovens. The ovens must stay within a specific temperature range in order to properly bake the products; this can be accomplished by someone physically inspecting thermometers on each oven, then manually adjusting the burners on each as needed. A PAC could automate these tasks by monitoring temperature remotely, then sending instructions to the burners to either increase or decrease the heat until the temperature returns to the acceptable range. A person in an office overlooking the ovens can view all of the temperature data in real-time from their Personal Computer, which can be connected to the PAC's by serial cable, Ethernet or a wireless modem.

(iii) Sensor: In the field of measurement and instrumentation, the parameter to be measured (motion, pressure, temperature, etc.) is first detected with the help of a sensor. The sensor converts the detected information into a suitable form (measurable currents and voltages) for acceptance in the later stages for decision-making. There are many types of sensors. Example: Photo electric sensor, motion detector, pressure sensors etc..

(iv) FPGA: FPGA stands for a Field-programmable Gate Array. FPGAs are integrated circuits which are used in

electronic equipments. It is a special kind of chip on which there is embedded software. FPGA receives signals (information) from devices like sensors or any other input device. Such information is processed by FPGA. After processing, the processed data/command is sent to the required destination like a computer, actuator, thermostat, motor etc. to perform a specific function like Controlling. For example, on receiving the command the motor can start or stop. Similarly, on receipt of the command the thermostat can regulate the temperature.

33. At this stage, it is required to examine each of the imported items, including I.O. Modules, to see whether the hardware coupled with pre-installed software gives a definite identity and function. For example, the purpose of Data Acquisition Boards ("DAQ") is to acquire data from external sensors, usually in the form of Analog Voltage of +/- 10 volts, which is then converted into digital signals, which the personal computer can understand. Similarly, Analog Output Boards are meant for converting signals from external units such as PXI controller. Similarly, Network Interface Module ("NIM") is used to connect measuring instruments to a PC by sending and receiving messages, two ways. The Chassis of PXI provides connectivity and housing for embedded controllers and data acquisition modules, allowing them to communicate with each other. To sum up, the I.O. Module is tailored to a specific function. Each of the abovementioned Boards (cards) is inserted into the slots of PXI. Each of the I.O. Modules is tailored to a specific function and is, therefore, a part of a regulating and controlling apparatus like a sensor, thermostat etc. Therefore, one has to look at the machine (PXI Machine) holistically.

(B)Application of above technical material to the relevant Tariff Entries:

34. At the outset, it needs to be stated that PACs, whether embedded or otherwise, are in essence Programmable Process Controllers.

35. In the matter of classification, we need to discuss "PACs" and "Input/Output (I.O.) Modules and Chassis" in two separate parts.

36. Chapter 84 is located in Section XVI. Note 1(m) shows that if an article falls in Chapter 90, regardless of whether or not it may otherwise fall within Chapter 84, that Chapter (No. 84) stands excluded. There are eight Chapter Notes to Chapter 84. The key Chapter Notes for deciding the present Civil Appeal are Notes 5(E), and 7, which are quoted hereinabove. Chapter Note 5(E) inter alia refers to machines performing specific functions other than data processing and incorporating in it a data processing machine or it may be working in conjunction with ADPM in which event the said machines performing specific functions are to be classified in the heading appropriate to their respective functions. Under Note 7, a machine which is used for more than one purpose is, for the purpose of classification, to be treated as if its principal purpose is its sole purpose.

37. Chapter 90 includes measuring and checking instruments and apparatus; parts and accessories thereof. In view of Section Note 1(m) of Chapter 84, quoted above, it is first to be seen whether or not PACs fall within Chapter 90. Keeping in mind the scheme of Chapter 84 and Chapter 90, we are of the view that, in the present case, the correct approach would be to examine the scope of Chapter 90 first and foremost and only then we need to examine the scope of Chapter 84. At this stage, we need to state that Chapter Note 1(h) of Chapter 90 does not exclude CTH 8471. Hence, even if an item falls under CTH 8471, it could still come under Chapter 90, however, in view of Section Note 1(m) Chapter 84 would stand excluded. This is because the application of Chapter 84 is subject to the applicability of Chapter 90.

38. At this stage, we may refer to Chapter Note 2 to Chapter 90 which is in two parts. Note 2(a) inter alia states that

what is otherwise parts or accessories, but is classifiable as goods under Chapter 84, shall be classified in their respective headings. The effect of Note 2(a) is that if it can be shown that Programmable Process Controllers/PACs are classifiable as "goods" under Chapter 84 then such a classification would include the same for being considered as parts or accessories of goods under Chapter 90. However, in this case, Note 2(a) is not attracted as PACs are not classifiable as "goods" under Chapter 84. It has been argued on behalf of the importer itself that PACs/Programmable Process Controllers by themselves are not measuring, regulating or control instruments and hence CTH 9032 classification relied upon by the Department was unsustainable. It was further argued on behalf of the importer that physical variables such as temperature and voltage are measured by sensors which could be classified under Chapter 90, but this does not extend to PACs/Programmable Process Controllers. It had been further argued on behalf of the importer that automatic control apparatus referred to in Chapter 90 must consist of a device for measuring a control device and a starting-stopping/operating device, all of which should form a "single entity" and since a PAC does not fulfil the said test, CTH 9032 is not attracted in the case of PAC/Programmable Process Controllers.

39. In our view, the above argument of the importer is unsustainable for the following reasons. Firstly, it is nobody's case that a PAC/Programmable Process Controller by itself is an automatic regulating, controlling instrument or apparatus in terms of Chapter 90. On the contrary, in view of Chapter Note 2(b) to Chapter 90 read with Note 3 of the same Chapter, PACs/Programmable Process Controllers are parts and accessories of a system/instrument which are suitable for use solely or mainly with a number of machines, instruments, apparatus of the same Heading, i.e., 9032 like sensors, thermostats etc. In our view, PACs/Programmable Process Controllers imported by the assessee herein are suitable for use principally with Industrial Process Control Equipment like

sensors, thermostats etc. which measures temperature, process etc. Therefore, they are correctly classifiable as a part of the said machine, instrument or apparatus. Secondly, a "control system" generally refers to the control of a device, process or system by monitoring one or more of its characteristics. It ensures that output processing remains within the desired parameters over a period of time. Controllers are generally connected to other computing apparatus. The principle function of controllers is to execute control algorithm for real time monitoring and for controlling devices, processes or systems. In this connection, it may be noted that, a PAC/Programmable Process Controller ("PPC") is not by itself an automatic regulating, controlling instrument or apparatus. A PAC/PPC when imported is suitable for use mainly with an industrial process control equipment like sensors, which measures temperature, pressure etc. As such, a PAC/PPC is a part of an industrial process control equipment/system and accordingly such controllers are classifiable as a part of instrument or apparatus (see Chapter Note 2(b) read with Note 3 of Chapter 90). Thirdly, in this case, we are concerned with not only classification of PXI Controller and other controllers, we are also concerned with classification of Input-Output Modules and Chassis. The key aspect, therefore, concerns the nature and function of I.O. Modules and Chassis along with controllers. One has therefore to take into account all the imported items as constituting a complete System which performs the work of measurement. PXI is a system. It is composed of three basic components – chassis, system controller and peripheral modules. These modules are also imported by the importer in this case. One such module is Network Interface Module. This module is used to connect to a network for distributed control applications. It interconnects a PC to a measuring instrument by sending and receiving messages from the two units. It is important to note that in the chassis of the PXI there are slots in which Analog Output Boards (Cards); Digital Input-Output Boards, Image Acquisition Boards, Distributed Input-Output Boards, NIM etc. are inserted. Each I.O. Module imported by

the assessee is tailored to a specific function and therefore such I.O. Module is a part of a regulating or controlling apparatus. Take the case of NIM. It is a hardware device. It may be in the form of a network interface card or a network adapter or in the form of Network Interface Controller ("NIC"). NIM is a computer hardware component designed to allow computers to communicate over a computer network. It provides connectivity between the industrial network and the I.O. Module. A network interface module works as a connector and adapter unit in order to provide a two way interconnection between external sensor unit and the ADP. Thus, I.O. Module is a hardware. It is also known as I.O. device or I.O. Point. It may be in the form of I.O. Cards or I.O. Boards. When I.O. Module is used to accept data (input) from sensors, transducers, Programmable Logic Controllers ("PLC"), computers etc. and then distributes the data (output) to other devices in the system, then I.O. Module is called as Distributed I.O. Module. Such system is also called as Distributed Control System ("DCS"), which is a control system used normally in a manufacturing plant or in any other kind of dynamic system. DCS, therefore, is used in a variety of industries to monitor and control distributed equipments. *An I.O. Module is important from another angle also. It converts readings from sensors and provides output signals which are used for operating actuators (which make a device move or start working) via Network Interface Module*. A Modular Distributed I.O. System which is also known as a Field Point provides for industrial monitoring and control applications. Thus, the Field Point System includes Analog and Digital I.O. Modules, terminal bases and network modules which connect I.O. Modules to industrial networks and software tools. Field Point Systems are ideal for use in industrial environment. Fourthly, Programmable Logic Controller ("PLC") is a control device. It is normally used in industrial control applications. It is a Programmable Microprocessor based device which is used to control assembly lines and machinery on the shop floor as well as to control many other types of

mechanical, electrical and electronic equipment in a plant. A PLC is designed for real-time use in rugged industrial environments, connected to sensors and actuators. PLCs are characterized by the number of I.O. Ports which they provide. PLCs are also categorized by their I.O. scan rates. As stated, PACs, which expands the role of PLCs and, at the same time, combines the capabilities of several traditional controls and monitoring systems, offers several benefits in the form of enhanced functionalities. Thus, a PAC does not replace the traditional PLCs but it expands the role of a PLC. A PAC has features found in Programmable Logic Controllers, Distributed Control Systems, Remote Terminal Units and PCs.

40. The summary of what we have stated above is that PACs/Programmable Process Controllers and I.O. Modules by themselves are not measuring, regulating or controlling instrument (system). Physical variables such as temperature and voltage are measured by device, like sensors which constitute measuring and control systems. In other words, controllers and I.O. Modules each have a specific function to perform being parts of a measuring and control system i.e. sensors.

41. We also do not find any merit in the submission of the importer that in view of the Explanatory Notes, the Measuring Device, the Control Device and the Operating Device has to form a "single entity". There is no dispute that if all the above three devices are found in one "single entity" then classification will fall under Chapter 90. However, the test of "single entity" containing three devices is not a pre-condition for classification under CTH 9032. On the contrary, the test is not that of single entity, but of the device being capable of working as a functional unit. In this connection, Note 3 of Chapter 90 is to be read. Note 3 incorporates Note 4 to Section XVI. Note 4 inter alia provides for a machine consisting of individual components which may be separate as long as they are intended to contribute to a clear defined function. The PACs/Programmable Process

Controller, though separate from sensors, is an individual component intended to contribute to a clearly defined function. Note 3 of Chapter 90 has to be read with Note 2(b) of Chapter 90 and if so read then it becomes clear that PAC/ Programmable Process Controllers, being parts and accessories and a regulating or controlling apparatus like sensors have got to be classified under CTH 9032.89.10.

42. For the above reasons, we hold that PACs (including embedded Controllers/Programmable Process Controllers) have been rightly classified by the Department under CTH 9032.

43. On the question of Input-Output (I.O.) Modules and Chassis, the Tribunal has not given any finding whatsoever thereon. However, on going through the technical material and the demonstration given to us in Court, we are of the view that I.O. Modules and Chassis have also been rightly classified by the Department as parts and accessories of regulating and controlling apparatus classifiable under Chapter 90. In this connection, one needs to examine the nature and function of I.O. Modules and Chassis which we have already discussed hereinabove. To put it briefly, at the cost of repetition we may say that the primary function of I.O. Modules (Boards) is to function as a part of measuring and control System. It is for this reason that such Modules are required to be classified as parts and accessories of regulating and measuring System. For this purpose, it is necessary to examine each of the imported items apart from Controllers in order to see whether the hardware coupled with the pre-installed software gives it a definite identity and function. From the catalogue and technological write-ups we find that each and every I.O. Module imported by the assessee is configured with a sensor at one end. This aspect is very important. Take the example of Data Acquisition Boards (DAQ). The purpose of DAQ Boards is to acquire data from external sensor, usually in the form of analog voltage of +/- 10 volts. This data is converted by DAQ Boards into digital signals

which the personal computer can understand. On the other hand, Instrument Control Boards which are placed inside the computer allow data required from external sensors to be communicated directly to the computer. This is called as handling of information (see Explanatory Notes of HSN at page 1575) which is different from controlling temperature, pressure etc. (see Explanatory Notes of HSN at page 1856). On the other hand, we have what is called as Analog Output Boards which are meant for converting signals from external units such as PXI. Similarly, the Chassis provides connectivity and housing for embedded controller and the data acquisition modules, allowing them to communicate with each other. A network interface module is used to connect to a network for distributed control applications. It interconnects measuring instruments to a PC by sending and receiving messages from the two units. Thus, each I.O. Module is tailored to a specific function and is therefore a part of regulating and controlling apparatus. Handling of information under the HSN Notes is separate and distinct from regulating and measuring temperature, pressure etc.

44. Lastly, we need to analyse Chapter Note 5(E) to Chapter 84. In our view, once a machine incorporating an ADPM performs a specific function other than data processing then that machine is classifiable in the heading corresponding to the function of that machine (see Note 4 of Section XVI and Note 3 to Chapter 90, the scope whereof has already been explained hereinabove). Further, HSN clearly indicates that Heading 8478 is excluded where the case is of a clearly defined function to which separate components contribute.

45. In our view, in order to attract Note 5(E) the real test is whether or not the machine imported is performing a specific function relatable to the functional unit as a whole. The said machine should be seen as a System. As a functional unit, the imported machine should perform a function other than data processing or it should perform a function in addition to data

processing. In our view, Industrial Process Controllers and I.O. Modules, which are part of a functional unit, the function of which is to be judged as a whole are therefore classifiable in Chapter 90. The sentence in Chapter Note 5(E) "incorporating or working in conjunction with an ADPM" merely indicates that the overall package, which is presented before the Department, had an ADP Machine in it. In other words, what is imported is a System containing an ADPM. Our above interpretation stands to reason because if the contention of the importer herein is accepted, it would mean that every machine that contains an element of ADP would be classifiable as an ADP Machine under Chapter 84. This would completely obliterate the specific function test and the concept of functional unit.

46. For the aforestated reasons, we are of the view that the imported goods were rightly classified by the Department under Chapter 90. We are also of the view that the Department was right in classifying the I.O. Modules and Chassis as parts and accessories of Automatic Regulating or Controlling Instruments and Apparatus in terms of CTH 9032.90.00.

47. For the aforestated reasons, the impugned order of CESTAT is hereby set aside and the Civil Appeal filed by the Department stands allowed with no order as to costs.

N.J. Appeal allowed.

MAHARSHI DAYANAND UNIVERSITY

v.

SURJEET KAUR

(Civil Appeal No.6807 of 2008)

JULY 19, 2010

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

Consumer Protection Act, 1986 – Complaint by a student against University – Maintainability – Student pursuing two courses simultaneously – The University finding the same to be in violation of the Examination Rules – The student withdrawing from one course – University issuing a Notification giving opportunity to ex-students to appear in supplementary examination for completing their incomplete courses – The student, in view of the Notification appearing in the examination for the withdrawn course and passing the same – Refusal to confer the degree – Complaint before Consumer Disputes Redressal Forum – The District Forum directing the University to confer the degree – State Commission deciding in favour of University – National Commission restoring the order of District Forum – On appeal, held: The direction to confer the degree is in violation of the statutory provision i.e. Examination Rules – Court has no competence to issue a direction contrary to law – The notification was not meant for the candidates like the student in the instant case – Rules and Regulations cannot be allowed to be defeated merely because the University erroneously allowed the student to appear in the examination – The fact that the student was allowed to appear in the exam does not create estoppel against the University – There can be no estoppel/promissory estoppel against an authority from enforcing a statutory prohibition – The student is neither a consumer nor the University is rendering any service – Therefore, consumer court was not right in entertaining the complaint – Education – General Rules of Examination of Maharshi Dayanand

University – Clause 17 – Estoppel/Promissory Estoppel.

Estoppel – Estoppel/Primissory estoppel – There can be no estoppel against Legislature – Promissory estoppel must yield when the equity so requires – Equity.

The respondent was pursuing the course of M.A. with the appellant-University. At the time of preparation of the result of M.A., the University discovered that the respondent-student had also been pursuing her B.Ed. course simultaneously, which was in violation of Clause 17(b) of the General Rules of Examination of the University. The University informed the respondent to exercise her option to choose any one of the courses. The respondent opted to pursue the course of M.A. and forewent the B.Ed. course and the results in respect of her B.Ed examination was cancelled by the University.

Subsequently, the University issued the Notification, dated 16.3.1998, giving a further chance to such ex-students who had not been able to complete their post graduation/B.Ed. courses within prescribed time span, to appear in the supplementary examination for the same. Taking advantage of the Notification, the respondent-student applied for and succeeded in appearing in the B.Ed examination and also passed the same. Appellant-University refused to confer degree of B.Ed to her.

The respondent-student filed complaint before District Consumer Disputes Redressal Forum. Appellant-University questioned the jurisdiction of the District Forum to entertain the complaint. The District Forum directed the University to issue B.Ed degree to the respondent. The appeal against the order was allowed by the State Consumer Disputes Redressal Commission holding that the District Forum should not have entertained the complaint. The revision petition against the order of the State Commission was allowed by National Consumer Disputes Redressal Commission

holding that imparting of education by educational institution falls within the ambit of service as defined under Consumer Protection Act. Therefore, instant appeal was filed by the appellant-University.

Allowing the appeal, the Court

HELD: 1. The General Rules of Examination of the appellant-University leave no room for doubt that a candidate who is pursuing a regular course for an examination in full subjects of the University cannot be simultaneously permitted to appear in another regular course of the same University or of another University or Board. This prohibition, therefore, did not allow the respondent to even apply for admission in the B.Ed. correspondence course. The appellant was, therefore, absolutely right in withholding this privilege from the respondent. Thus, the Rule being prohibitory in nature, the District Forum or the National Commission could not have issued a direction which violates the statutory provision i.e. clause 17 of the Rules of Examination. Neither the court nor any tribunal has the competence to issue a direction contrary to law and to act in contravention of a statutory provision. The court has no competence to issue a direction contrary to law nor the court can direct an authority to act in contravention of statutory provisions. [Paras 9 and 10] [484-A-D]

State of Punjab and Ors. vs. Renuka Singla and Ors. **(1994) 1 SCC 175;** *Karnataka State Road Transport Corporation vs. Ashrafulla Khan and Ors.* **AIR 2002 SC 629;** *Manish Goel vs. Rohini Goel* **AIR 2010 SC 1099 – relied on.**

2.1 There can be no estoppel/promissory estoppel against the Legislature in the exercise of the legislative function nor can the Government or public authority be debarred from enforcing a statutory prohibition. Promissory estoppel being an equitable doctrine, must yield when the equity so requires. [Para 17] [486-C-D]

2.2 The notification dated 16.3.1998 issued by the

appellant-University was not meant for the candidates like the respondent. As a matter of fact, under the garb of the said notification, the respondent managed to get her form registered with the appellant and when this discrepancy was discovered, the appellant chose to set it right which was perfectly justified. The respondent cannot plead any estoppel either by conduct or against a statute so as to gain any advantage of the fact that she was allowed to appear in the examination. The respondent abused the privilege of appearing in the B.Ed. examination though she was not entitled to avail of the benefit of notification dated 16.3.1998. [Paras 15 and 20] [485-E-F; 488-G]

2.3 The conduct of the respondent was such that even though she had no statutory right or any vested right to pursue her B.Ed. course, the mistake on the part of the appellant to allow her to appear in the examination cannot be by any logic treated to be a conduct of the appellant to confer any such right on the respondent. The rules and regulations cannot be allowed to be defeated merely because the appellant erroneously allowed the respondent to appear in the B.Ed. examination. The records reveal that the respondent did not challenge the cancellation of her results in respect of the B.Ed examination which were held in 1995 The said order attained finality. The Respondent straightaway approached the District Forum in the year 2000 for the conferment of B.Ed. degree in pursuance of the examinations conducted under the Notification dated 16.3.1998. This, was a totally misdirected approach and the District Forum fell into error by granting the relief. [Para 18] [486-F-H; 487-A-B]

Union Territory, Chandigarh, Admn. and Ors. vs. Managing Society, Goswami, ***GDSDC*** **(1996) 7 SCC 665;** *Dr. H.S. Rikhy etc. vs. The New Delhi Municipal Committee* **AIR 1962 SC 554;** *M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and Ors.* **(1999) 6 SCC 464;** *Shish Ram and Ors. vs. State*

of Haryana and Ors. **(2000) 6 SCC 84;** *Chandra Prakash Tiwari and Ors. vs. Shakuntala Shukl]a and Ors.* **(2002) 6 SCC 127;** *I.T.C. Ltd. vs. Person Incharge AMC, Kakinada and Ors.* **AIR 2004 SC 1796;** *State of U.P. and Anr. vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti and* Ors. **(2008) 12 SCC 675;** *Sneh Gupta vs. Devi Sarup and Ors.* **(2009) 6 SCC 194 – relied on.**

3. The respondent as a student is neither a consumer nor is the appellant university rendering any service. The claim of the respondent to award B.Ed. degree was almost in the nature of a relief praying for a direction to the appellant to act contrary to its own rules. The entire exercise of entertaining the complaint by the District Forum and the award of relief which has been approved by the National Commission do not conform to law and, therefore, the same is set aside. [Para 20] [489-A-C]

Bihar School Examination Board vs. Suresh Prasad Sinha **(2009) 8 SCC 483 – relied on.**

Bangalore Water Supply and Severage Board vs. A. Rajappa and Ors., **AIR 1978 SC 548 – held inapplicable.**

Case Law Reference:

AIR 1978 SC 548	**held inapplicable**	**Para 6**
(1994) 1 SCC 175	**Relied on.**	**Para 10**
AIR 2002 SC 629	**Relied on.**	**Para 11**
AIR 2010 SC 1099	**Relied on.**	**Para 12**
(1996) 7 SCC 665	**Relied on.**	**Para 16**
AIR 1962 SC 554	**Relied on.**	**Para 17**
(1999) 6 SCC 464	**Relied on.**	**Para 17**
(2000) 6 SCC 84	**Relied on.**	**Para 17**
(2002) 6 SCC 127	**Relied on.**	**Para 17**
AIR 2004 SC 1796	**Relied on.**	**Para 17**
(2008) 12 SCC 675	**Relied on.**	**Para 17**
(2009) 6 SCC 194	**Relied on.**	**Para 17**
(2009) 8 SCC 483	**Relied on.**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6807 of 2008.

From the Judgment & Order dated 27.4.2007 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 132 of 2006.

Tarun Gupta (for S. Janani) for the Appellant.

Surjeet Kaur Respondent-In-Person through her father Amrik Singh.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The Maharshi Dayanand University (hereinafter referred to as "the appellant") has questioned the correctness of the order in Revision Petition No.132/06 passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter called "National Commission") dated 27.4.2007 whereby the National Commission has allowed the Revision Petition and the order passed by the State Consumer Disputes Redressal Commission (hereinafter referred to as "State Commission") has been set aside simultaneously restoring the order passed by the District Consumer Disputes Redressal Forum, Gurgaon (hereinafter called as "District Forum"). A further direction has been issued to the appellant to issue the B.Ed. Degree to the respondent on the basis of the results of her examinations which were held in December, 1998.

2. The dispute arose when the respondent felt aggrieved by the action of the appellant refusing to confer the degree of B.Ed. on her. The background of the facts giving rise to the case was that the respondent took admission in the academic session of 1994-95 as a regular student to pursue the course of M.A. in Political Science from Government College, Gurgaon. The respondent appeared in the Part-II Examination in May, 1995 as a regular candidate and in the same academic session of 1994-95 she also applied for admission in the B.Ed.

(correspondence course) without disclosing the fact that she was already pursuing the regular course of M.A. in Political Science. The University at the time of preparation of the results of M.A. in Political Science discovered that the respondent had been pursuing her B.Ed. course in violation of Clause 17(b) of the General Rules of Examination and accordingly the respondent was informed that in view of the aforesaid rules she should exercise her option to choose anyone of the courses.

3. The respondent voluntarily and consciously opted for pursuing her course of M.A. in Political Science and forewent her B.Ed. Degree course.

4. Subsequently, the University as a general measure of benefit granted an indulgence through Notification dated 16.3.1998 giving a further chance to such Ex. students who had not been able to complete their post-graduation/B.Ed. courses within the span of prescribed period as provided for under the rules. The supplementary examinations in this regard were announced by the University in the month of December, 1998.

5. The respondent applied under the said Notification for appearing in B.Ed. examination and succeeded in appearing in the examinations and also passed the same. The Appellant-University refused to confer the degree of B.Ed. on the respondent. Aggrieved, the respondent approached the District Forum in the year 2000 praying for the relief which has now been ultimately awarded in the impugned order of National Commission. The District Forum passed an order in favour of the respondent vide judgment and order dated 24.9.2004 and directed the appellant to issue the B.Ed. degree and also award Rs.1,000/- as compensation to the respondent. This order was passed by the District Forum despite a specific objection taken by the appellant that the District Forum had no jurisdiction to entertain such a complaint and award any such relief.

6. Aggrieved, the appellant filed an appeal before the State Commission and the same was allowed vide judgment dated

19.10.2005. The judgment of the District Forum was set aside holding that the District Forum should not have entertained the complaint. The respondent aggrieved by the order of the State Commission preferred a revision under Section 21 of the Consumer Protection Act, 1986 (hereinafter referred to 'Act 1986') before the National Commission which has been allowed by way of the impugned order. The National Commission took notice of the issue relating to the entertaining of the complaint and the jurisdiction of the District Forum to hear the same. The National Commission relying on its larger Bench judgment in F.A. No.643 of 1994 dated 31.5.2001 held that imparting of education by the educational institutions for consideration falls within the ambit of service as defined under the Act and further relying on the judgment of this Court in the case of *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & Ors.* AIR 1978 SC 548 held that in view of the ratio of the said decision and the peculiar facts of the case, the respondent was entitled for the relief claimed and accordingly the appellant was directed to issue the B.Ed. degree.

7. Shri Tarun Gupta, Ld. counsel appearing for the appellant has made three pronged submissions. He contends that the complaint could not have been entertained as the refusal of the appellant not to award the B.Ed. degree was well within its jurisdiction and it was not service much less a consumer service as defined under the Act for the District Forum to entertain the complaint. The second submission of Shri Gupta is that the rules as noted hereinabove did not allow a student to pursue two courses simultaneously and therefore, the attempt made by the respondent without disclosing the fact of having already taken up another course i.e. Political Science in post-graduation disentitled her from any relief. As a corollary to the said submission, he submits that non-disclosure of this fact, therefore, did not entitle her to the award of B.Ed. degree more so, when her examination had already been cancelled and the order cancelling her examination had not been properly challenged. The third submission of Shri Gupta is that the

National Commission has taken too sympathetic view for the respondent and while doing so the National Commission has not correctly appreciated the impact of the General Rules of Examination as quoted hereinabove and the Notification dated 16.3.1998 which even otherwise did not allow the respondent to qualify to appear in the B.Ed. examination.

8. The respondent alongwith her father appeared in person and vehemently tried to persuade us to believe that the respondent would be loosing her career and that she should not be declined the benefits of her academic pursuits on any technicality keeping in view the fact that the University itself had allowed the respondent to appear in the examination and the order cancelling her result had been passed in violation of principle of natural justice without giving her any notice or opportunity. The other submissions that were raised are borrowed from the finding recorded by the National Commission which had been reiterated before us.

9. Before we embark upon the assessment of the rival submissions, it would be appropriate to reproduce Clause 17 of the General Rules of Examination as well as the Notification dated 16.3.1998 which are directly involved in the present context.

"17 Unless otherwise provided, a person who :-

(a) has already passed an examination of this or any other university shall not be permitted to re-appear in that examination for a corresponding examination.

(b) is a candidate for an examination in full subjects of this University can not simultaneously read for, or appear at another examination of this University or of another University/Board. The bar shall not apply to a candidate appearing in an examination of the University for passing/re-appear papers or for improvement of division/result or for additional subject."

A perusal of the General Rules of Examination leave no room for doubt that a candidate who is pursuing a regular course for an examination in full subjects of the University cannot be simultaneously permitted to appear in another regular course of the same University or of another University or Board. This prohibition, therefore, did not allow the respondent to even apply for admission in the B.Ed. correspondence course. The appellant was, therefore, absolutely right in withholding this privilege from the respondent. The contention of Ld. counsel for the appellant has, therefore, to be accepted that the Rule being prohibitory in nature, the District Forum or the National Commission could not have issued a direction which violates the aforesaid statutory provision. It is settled legal proposition that neither the Court nor any tribunal has the competence to issue a direction contrary to law and to act in contravention of a statutory provision.

10. The Court has no competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of statutory provisions. In *State of Punjab & Ors. Vs. Renuka Singla & Ors.,* (1994) 1 SCC 175, dealing with a similar situation, this Court observed as under:–

"We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations……."

11. Similarly, in *Karnataka State Road Transport Corporation Vs. Ashrafulla Khan & Ors.,* AIR 2002 SC 629, this Court held as under:–

"The High Court under Article 226 of the Constitution is required to enforce rule of law and not pass order or direction which is contrary to what has been injuncted by law."

12. Similar view has been reiterated by this Court in

Manish Goel Vs. Rohini Goel AIR 2010 SC 1099.

13. It is worth noting that the respondent at the time of filling up of her form for B.Ed. course at the first instance had not made any disclosure about her pursuit of post-graduate student in Political Science.

14. The Notification dated 16.3.1998 read as under:-

> "It is notified that the University has granted last mercy chance to the candidates of Under-graduate (Under Pattern 10+2+3) as well as post-graduate examination (s) (Annual system after discontinuation of Semester system) except MBBS/BDS/MD/PG Diplomas Courses, who could not clear their re-appear paper (s) within stipulated chances and have been declared as fail and those who could not pass/complete the degree within the stipulated period e.g. within six years of Under-graduate and four years for post-graduate courses, as per the latest syllabi. The examination fee will be Rs. 1,000/-."

15. A bare perusal of the same would demonstrably make it clear that the said provision was not meant for candidates like the respondent. As a matter of fact, under the garb of the said Notification, the respondent managed to get her form registered with the appellant and when this discrepancy was discovered, the appellant chose to set it right which in our opinion was perfectly justified. The respondent cannot plead any estoppel either by conduct or against a Statute so as to gain any advantage of the fact that she was allowed to appear in the examination.

16. In *Union Territory, Chandigarh, Admn. & Ors. Vs. Managing Society, Goswami, GDSDC,* (1996) 7 SCC 665, this Court considered the case under the provisions of the Punjab (Development and Regulation) Act, 1952, wherein a demand had been challenged on the ground of equitable estoppel. This Court held that promissory estoppel does not apply against the Statute. Therefore, the authority had a right

to make recovery of outstanding dues in accordance with law. The Court held as under :-

> "(The Administration) only corrected a patent mistake which could not be permitted to subsist…….A contract in violation of the mandatory provisions of law can only be read and enforced in terms of the law and in no other way. The question of equitable estoppel does not arise in this case because there can be no estoppel against a statute."

17. There can be no estoppel/promissory estoppel against the Legislature in the exercise of the legislative function nor can the Government or public authority be debarred from enforcing a statutory prohibition. Promissory estoppel being an equitable doctrine, must yield when the equity so requires. (vide *Dr. H.S. Rikhy etc. Vs. The New Delhi Municipal Committee,* AIR 1962 SC 554; *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu & Ors.,* (1999) 6 SCC 464; *Shish Ram & Ors. Vs. State of Haryana & Ors.,* (2000) 6 SCC 84; *Chandra Prakash Tiwari & Ors. Vs. Shakuntala Shukla & Ors.,* (2002) 6 SCC 127; *I.T.C. Ltd. Vs. Person Incharge, AMC, Kakinada & Ors.,* AIR 2004 SC 1796; *State of U.P. & Anr. Vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti & Ors.,* (2008) 12 SCC 675; and *Sneh Gupta Vs. Devi Sarup & Ors.,* (2009) 6 SCC 194).

18. On the other hand, the conduct of the respondent was such that even though she had no statutory right or any vested right to pursue her B.Ed. course, the mistake on the part of the appellant to allow her to appear in the examination cannot be by any logic treated to be a conduct of the appellant to confer any such right on the respondent. The rules and regulations cannot be allowed to be defeated merely because the appellant erroneously allowed the respondent to appear in the B.Ed. examination. The records reveal that the respondent did not challenge the cancellation of her results in respect of 1995 examination. The said order attained finality. Respondent straightaway approached the District Forum in the year 2000

for the conferment of B.Ed. degree in pursuance of the examinations conducted under the Notification dated 16.3.1998. This, in the opinion of the court, was a totally misdirected approach and the District Forum fell into error by granting the relief.

19. The third and the most important issue that deserves to be answered is the competence of the District Forum and the hierarchy of the Tribunals constituted under the Act 1986 to entertain such a complaint. In our opinion, this issue is no longer *res integra* and has been extensively discussed by a recent judgment of this Court in the case of *Bihar School Examination Board Vs. Suresh Prasad Sinha,* (2009) 8 SCC 483, where it has been held as under :-

> "11. The Board is a statutory authority established under the Bihar School Examination Board Act, 1952. The function of the Board is to conduct school examinations. This statutory function involves holding periodical examinations, evaluating the answer scripts, declaring the results and issuing certificates. The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory *non-commercial function*. It is not possible to divide this function as partly statutory and partly administrative.
>
> 12.When the Examination Board conducts an examination in discharge of its statutory function, *it does not offer its services" to any candidate. Nor does a student* who participates in the examination conducted by the Board, *hires or avails of any service from the Board for a consideration.* On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of

> education; and if so, determine his position or rank or competence vis-a-vis other examinees. *The process is not therefore availment of a service by a student,* but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.
>
> 13. *The object of the Act is to cover in its net, services offered or rendered for a consideration.* Any service rendered for a consideration is presumed to be a commercial activity in its broadest sense (including professional activity or quasi-commercial activity). But the Act does not intend to cover discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination. The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-sheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service-provider for a consideration, nor convert the examinee into a consumer who can make a complaint under the Act. We are clearly of the view that *the Board is not a 'service provider' and a student* who takes an examination *is not a 'consumer' and consequently, complaint under the Act will not be maintainable* against the Board." (Emphasis added)

20. The respondent abused the privilege of appearing in the B.Ed. examination though she was not entitled to avail of the benefit of notification dated 16.3.1998.

The National Commission appears to have been swayed by observations made in the *Bangalore Water Supply case* (supra). The respondent as a student is neither a consumer nor

is the appellant rendering any service. The claim of the respondent to award B.Ed. degree was almost in the nature of a relief praying for a direction to the appellant to act contrary to its own rules. The National Commission, in our opinion, with the utmost respect to the reasoning given therein did not take into consideration the aforesaid aspect of the matter and thus, arrived at a wrong conclusion. The case decided by this Court in *Bihar School Examination Board* (supra) clearly lays down the law in this regard with which we find ourselves in full agreement with. Accordingly, the entire exercise of entertaining the complaint by the District Forum and the award of relief which has been approved by the National Commission do not conform to law and we, therefore, set aside the same. We wish to make it clear that the National Commission felt that the respondent had been "harassed" and has also gone to the extent of using the word "torture" against an officer of the appellant. The appellant is an autonomous body and the decision of the appellant and the statutory provisions have to be implemented through its officers. This also includes the implementation of all such measures which have a statutory backing and if they are implemented honestly through a correct interpretation, the same, in our opinion, cannot extend to the degree of torture or harassment. The appellant had to be battle out this litigation upto this Court to establish the very fundamental of the case that the District Forum had no jurisdiction to entertain any such complaint and, in our opinion, they have done so successfully.

21. The appeal is accordingly allowed. The judgment and order of the District Forum and the National Commission are set aside. No costs.

K.K.T. Appeal dismissed.

OM PRAKASH SINGH

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 5655 of 2010)

JULY 20, 2010

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Pension Regulations for the Army 1961 – Part I – Regulation 173

Disability Pension– Recommendation of Medical Board that the sepoy-appellant was suffering from disease not attributable to nor aggravated by the military service – Sepoy invalided from service – Entitlement to disability pension – Held: Not entitled – Medical Board being an expert body, its opinion is entitled to be given due weight and value – Service law – Military service.

The question which arose for consideration in the instant appeal was whether the appellant, who was invalided out from service on the recommendation of the Medical Board, which assessed the appellant's disability as not attributable to nor aggravated by the military service, was entitled to the disability pension.

Dismissing the appeal, the Court

HELD: The Medical Board is an expert body and they take into consideration all relevant factors and essential practice before arriving at any opinion and its opinion is entitled to be given due weight, merit credence and value. In the instant case, the Medical Board had given unanimous opinion that the disease of the appellant was neither attributable to nor aggravated by the military service. The findings of the Medical Board was accepted by the High Court. Thus, no interference is called for. The appellant is not entitled to the disability pension.

However, in case some amount has ever been paid to the appellant towards the disability pension, the same may not be recovered from him. [Paras 20, 21] [503-F-H; 504-A]

Union of India & Others v. Baljit Singh **(1996) 11 SCC 315;** *Union of India & Others v. Dhir Singh China, Colonel (Retd.)* **(2003) 2 SCC 382;** *Union of India & Others v. Keshar Singh* **(2007) 12 SCC 675, relied on.**

Ex-Sepoy Gopal Singh Dadwal v. Union of India & Others **(2007) 1 SLR 616;** *Ex-Cfn Sugna Ram Ranoliya v. Union of India & Others* **(2006) DLT 544 (DB), referred to.**

Case Law Reference:

(2007) 1 SLR 616	**referred to**	**Para 5**
(2006) DLT 544 (DB)	**referred to**	**Para 5**
(1996) 11 SCC 315	**relied on**	**Para 16**
(2003) 2 SCC 382	**relied on**	**Para 17**
(2007) 12 SCC 675	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5655 of 2010.

From the Judgment & Order dated 27.03.2009 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 7834 of 2009.

S.M. Dalal (for Rameshwar Prasad Goyal) for the Appellant.

Harin Raval, ASG, Vipul Maheshwari, Anil Katiyar, Anirudh Sharma for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 27.3.2009 passed by the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 7834 of 2009.

3. The short question involved in this appeal pertains to the controversy whether the appellant is entitled to disability pension?

4. Brief facts which are necessary to dispose of the matter are recapitulated as under:

The appellant was enrolled in the Territorial Army on 28.9.1975 as a Sepoy. At the time of joining service the appellant was put through the medical test and was found medically fit. According to the appellant, while serving in the Army, he had contacted the disease known as "Unspecified Psychosis" on 26.6.1985, which is a psychiatric disorder. The appellant was treated in the Army Hospital at Delhi Cantt. On the recommendations of the Medical Board which assessed the appellant's disability as 40%, he was invalided out from the service. According to the Medical Board the disease of the appellant was neither attributable to nor aggravated by the military service.

5. The claim of the appellant for grant of disability pension was rejected by the competent authority. The appellant filed a Writ Petition (Civil) No. 838 of 2008 in the High Court of Delhi. There was a similar matter pending with the High Court and the High Court by a common order dated 30.4.2008 directed the respondents to hold the Appeal Medical Boasrd with further direction that the parameters laid down by the High Court in the cases of *Ex-Sepoy Gopal Singh Dadwal v. Union of India & Others* (2007) 1 SLR 616 and *Ex-Cfn Sugna Ram Ranoliya v. Union of India & Others* 132 (2006) DLT 544 (DB) be taken into consideration.

6. The Appeal Medical Board opined that the disease of the appellant was neither attributable to nor aggravated by the

military service because it was contracted in peace area. Aggrieved thereby, the appellant filed Writ Petition (Civil) No. 7834 of 2009 which was dismissed by the High Court. Hence, the present appeal by special leave.

7. We deem it appropriate to set out the relevant part of the opinion of the Medical Board. The same is as under:

"PART V
OPINION OF THE MEDICAL BOARD

Individual's Relationship of the Disability with Service conditions or otherwise

Disability	Attributable to service (Y/N)	Aggravated by service (Y/N)	Not connected with service (Y/N)	Reason/ cause/ specific condition and period in service
UNSPECIFIED PSYCHOSIS	No	No	Yes	*

* As per medical consensus, unspecified psychosis, like schizophrenia is caused by interaction of multiple genetic vulnerabilities coupled with environmental, biological, psychological and psychosocial stressors during early childhood development or structural and neuro-chemical damage to the brain in infancy manifesting in adult life as psychosis, hence it cannot be considered as attributable to military service. However, despite being a constitutional psychiatric disease benefit of doubt is given to an individual on possibility of stress and strain of service in war like situations, threat to life by enemy action in CIOPs or extreme environmental conditions of prolonged field/high altitude service, hastening the onset or aggravating

it (as specified in Annexure I to Encirclement Rules – Classification of Diseases). However, no such stress/strain of military service as defined in Para 54 of Chapter VI of Guide to medical officers (military Pensions) 2002, which is considered stressful enough to hasten onset or aggravate the invaliding disease (ID), is evident in this instant case as individual did not serve in any field/CIOPs/High altitude areas or extreme environmental conditions and served only in peace stations (Cannanore and Delhi). In view of the above, as per the principles of military medicine, invaliding disease (ID) is considered neither attributable to nor aggravated by military service

Sd/- Sd/-

Col. A.T. Kalghargi
Director (Pension)
Dir AFMS (Pension)
Office of DGAFMS
Min. of Defence, New Delhi

Brig.V.K. Kataria
Dy. DGAFMS(Pens)
Office of DGAFMS
Min. of Defence
New Delhi.

Sd/-

NEATU NARANG
Lt. Col. AMC
Classified Spl (Psychiatry)
Base Hospital Delhi Cantt."

8. The appellant asserted that the entitlement to the disability pension flows from Regulation 173 of the Pension Regulations for the Army 1961 – Part I (hereinafter referred to as the Regulation). He further asserted that the High Court fell in grave error of law in not considering this mandatory provision. The relevant Regulation 173 of the Regulation reads as under:

"173. Unless otherwise specifically provided a

disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 percent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix-II."

9. According to the appellant, it is clear from the above-said Regulation that two conditions decide the entitlement to disability pension. The first condition is that he should be invalided out of service on account of disability which is attributable to or aggravated by military service. The second condition is that the disability should be assessed at 20% or more. The assessment of percentage of disability is in the domain of the medical board which examines the physical conditions of the concerned official. In deciding the percentage of disability the medical board is guided by the Medical Regulations.

10. The appellant also submitted that whether a disability is attributable to or aggravated by the military service, has to be determined under the Entitlement Rules for Casualty Pensionary Awards 1982 (hereinafter referred to as the "Entitlement Rules"). According to the appellant, the opinion of the medical board in respect of attributability does not get supremacy and it is to be treated only of recommendatory nature. He submitted that the Entitlement Rules have to be applied to the facts and circumstances of each case to determine the attributability of a disease.

11. The appellant submitted that the Entitlement Rules are beneficial provisions and, therefore, to be interpreted liberally. These rules are made with the object of granting disability pension and not of denying it. He relied upon Rules 5, 9, 14 & 15 of the Entitlement Rules. The same are extracted as under:

"Rule 5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following:-

Prior to and During Service

(a) member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.

Rule 9. Onus of Proof. The claimant shall not be called upon to prove the conditions of entitlement. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimant in field/afloat service cases.

Rule 14. In respect of diseases, the following rule will be observed:-

(a) Cases in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds for reasons to be stated, that the disease could not have been

detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(c) If a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service.

Rule 15. The onset and progress of some diseases are affected by environmental factors related to service conditions, dietary compulsions, exposure to noise, physical and mental stress and strain. Diseases due to infection arising in service will merit entitlement of attributability. Nevertheless, attention must be given to the possibility of pre-service history of such condition which, if proved, could rule out entitlement of attributability but would require consideration regarding aggravation. For clinical discretion of common diseases reference shall be made to the Guide to Medical Officers (Military Pension) 1980, as amended from time to time. The classification of diseases affected by environmental factors in service is given in Annexure III to these rules."

12. According to the appellant, the High Court fell in grave error in not considering the above stated rules. The rules are statutory in character and, therefore, were mandatorily required to be considered in deciding the attributability aspect. The appellant submitted that since none of the above stated rules or regulation were considered by the High Court, the impugned judgment and order of the High Court is required to be set aside.

13. The appellant further submitted that at the time of entering into the service, on both occasions, he was found

medically fit in all respects. Neither the appellant had any past psychiatric history prior to 26.6.1985 nor his family had any background of psychiatric history. Thus the invaliding disease arose during service and did not exist before joining the army service. The appellant submitted that his case is covered by Rules 5 and 14(b) of the Entitlement Rules. According to him, the High Court was wrong in not giving the benefit of Rule 15 of the Entitlement Rules.

14. The question whether a disability is attributable to or aggravated by military service shall be determined under the Rules in Appendix II. Relevant portion in Appendix II reads as follows:

"2. Disablement or death shall be accepted as due to military service provided it is certified that—

(*a*) the disablement is due to wound, injury or disease which—

(*i*) is attributable to military service; or

(*ii*) existed before or arose during military service and has been and remains aggravated thereby;

(*b*) the death was due to or hastened by—

(*i*) a wound, injury or disease which was attributable to military service; or

(*ii*) the aggravation by military service of a wound, injury or disease which existed before or arose during military service.

Note.— The rule also covers cases of death after discharge/invaliding from service.

3. There must be a causal connection between

disablement or death and military service for attributability or aggravation to be conceded.

4. In deciding on the issue of entitlement all the evidence, both direct and circumstantial, will be taken into account and the benefit of reasonable doubt will be given to the claimant. This benefit will be given more liberally to the claimant in field service case."

15. Regulation 423 deals with "Attributability to service" and reads as under:

"423. *Attributability to service*.—(*a*) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence, both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions, should be of a degree of cogency, which though not reaching certainty, nevertheless carry the high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of doubt could be given more liberally to the individual, in cases occurring in field

service/active service areas.

(*b*) The cause of a disability or death resulting from wound or injury, will be regarded as attributable to service if the wound/injury was sustained during the actual performance of 'duty' in armed forces. In case of injuries which were self-inflicted or due to an individual's own serious negligence or misconduct, the Board will also comment how far the disability resulted from self-infliction, negligence or misconduct.

(*c*) The cause of a disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the armed forces determined and contributed to the onset of the disease. Cases, in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for service in the armed forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(*d*) The question, whether a disability or death is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the death certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officer, insofar as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question

whether the cause and the attendant circumstances can be attributed to service will, however, be decided by the pension sanctioning authority.

(*e*) To assist the medical officer who signs the death certificate or the Medical Board in the case of an invalid, the CO Unit will furnish a report on:

(i) AFMSF 81 in all cases other than those due to injuries.

(ii) IAFY-2006 in all cases of injuries other than battle injuries.

(*f*) In cases where award of disability pension or reassessment of disabilities is concerned, a Medical Board is always necessary and the certificate of a single medical officer will not be accepted except in case of stations where it is not possible or feasible to assemble a regular Medical Board for such purposes. The certificate of a single medical officer in the latter case will be furnished on a Medical Board form and countersigned by the ADMS (Army)/DMS (Navy)/DMS (Air)."

16. In *Union of India & Others v. Baljit Singh* (1996) 11 SCC 315 this Court observed as under:

"*6*. ... It is seen that various criteria have been prescribed in the guidelines under the Regulations as to when the disease or injury is attributable to the military service. It is seen that under Rule 173 disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. If these conditions are satisfied, necessarily the incumbent is entitled to the disability pension. This is made amply clear from Clauses (*a*) to (*d*) of Para 7 which contemplates that in respect of a disease the Rules

enumerated thereunder require to be observed. Clause (*c*) provides that if a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. Unless these conditions are satisfied, it cannot be said that the sustenance of injury per se is on account of military service. In view of the report of the Medical Board of doctors, it is not due to military service. The conclusion may not have been satisfactorily reached that the injury though sustained while in service, it was not on account of military service. In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service."

17. A similar question came up for adjudication in the case of *Union of India & Others v. Dhir Singh China, Colonel (Retd.)* (2003) 2 SCC 382, wherein this Court in para 7 of the said judgment observed as under:

"*7*. That leaves for consideration Regulation 53. The said Regulation provides that on an officer being compulsorily retired on account of age or on completion of tenure, if suffering on retirement from a disability attributable to or aggravated by military service and recorded by service medical authority, he may be granted, in addition to retiring pension, a disability element as if he had been retired on account of disability. It is not in dispute that the respondent was compulsorily retired on attaining the age of superannuation. The question, therefore, which arises for consideration is whether he was suffering, on retirement, from a disability attributable to or aggravated by military service and recorded by service medical authority. We have already referred to the opinion of the

Medical Board which found that the two disabilities from which the respondent was suffering were not attributable to or aggravated by military service. Clearly therefore, the opinion of the Medical Board ruled out the applicability of Regulation 53 to the case of the respondent. The diseases from which he was suffering were not found to be attributable to or aggravated by military service, and were in the nature of constitutional diseases. Such being the opinion of the Medical Board, in our view the respondent can derive no benefit from Regulation 53. The opinion of the Medical Board has not been assailed in this proceeding and, therefore, must be accepted."

18. A similar controversy came up before this Court in *Union of India & Others* v. *Keshar Singh* (2007) 12 SCC 675, in which this Court relied upon the Medical Board's opinion to the effect that the illness suffered by the respondent was not attributable to military service.

19. In the instant case, the records reveal that, in the opinion of the Medical Board, the condition of the appellant cannot be said to have triggered on account of the military service. In the opinion of the Medical Board, the disease was not at all attributable to the military service.

20. We have heard learned counsel for the parties at length. We are clearly of the view that the Medical Board is an expert body and they take into consideration all relevant factors and essential practice before arriving at any opinion and its opinion is entitled to be given due weight, merit credence and value.

21. In the instant case, the Medical Board has given unanimous opinion that the disease of the appellant was neither attributable to nor aggravated by the military service. The findings of the Medical Board has been accepted by the Division Bench of the High Court. Thus, in our considered

opinion, no interference is called for. The appellant is not entitled to the disability pension. However, in case some amount has ever been paid to the appellant towards the disability pension, the same may not be recovered from him.

22. The appeal being devoid of any merit is accordingly dismissed. However, in the facts and circumstances of the case, we direct the parties to bear their own costs.

D.G. Appeal dismissed.

NEETA RAKESH JAIN
v.
RAKESH JEETMAL JAIN
(Civil Appeal No. 5660 of 2010)

JULY 20, 2010

[AFTAB ALAM AND R.M. LODHA, JJ.]

Hindu Marriage Act, 1955:

s. 24 – Interim maintenance of Rs. 12000/-p.m. to wife by High Court – Enhancement of – Held: High Court did not consider the vital aspects that wife does not have any settled job and husband is highly qualified – Husband has worked with renowned companies and left the job not due to any compulsion but because he wanted to grow big – Hence, High Court directed to reconsider the wife's application for interim maintenance.

s. 24 – Maintenance pendent lite and expenses of proceedings – Exercise of discretion by courts – Explained.

In the appeal before this Court, the appellant-wife has challenged the order passed by High Court which fixed the interim maintenance at the rate of Rs. 12000/- per month, pending appeal.

Partly allowing the appeal, the Court

HELD: 1.1 Section 24 of the Hindu Marriage Act, 1955 provides that in any proceeding under the Act, the spouse who has no independent income sufficient for her or his support may apply to the court to direct the respondent to pay the monthly maintenance as the court may think reasonable, regard being had to the petitioner's own income and the income of the respondent. The very

language in which Section is couched indicates that wide discretion has been conferred on the court in the matter of an order for interim maintenance. Although the discretion conferred on the court is wide, the Section provides guideline inasmuch as while fixing the interim maintenance the court has to give due regard to the income of the respondent and the petitioner's own income. In other words, in the matter of making an order for interim maintenance, the discretion of the court must be guided by the criterion provided in the Section, namely, the means of the parties and also after taking into account incidental and other relevant factors like social status; the background from which both the parties come from and the economical dependence of the petitioner. Since an order for interim maintenance by its very nature is temporary, a detailed and elaborate exercise by the court may not be necessary, but, at the same time, the court has got to take all the relevant factors into account and arrive at a proper amount having regard to the factors which are mentioned in the statute. [Para 8] [510-E-H; 511-A-B]

1.2 In the instant case, the stand of the husband that he is drawing salary of Rs. 30,000/- per month from the company since August 2005 is inherently improbable. The husband is highly qualified; he is CA, ICWA, CIMA and has also completed course of Computer Information Technology. He has worked with renowned and big companies as Finance Manager and Senior SAP Consultant respectively before he started on his own in January, 2000. He did not leave the job due to any compulsion but because he wanted to grow big. He has admitted that having worked for six years, he decided to do his own business and started the company-PCL in which he sought financial/administrative help of his brother and one NA. It cannot be believed that a person who has started his own business leaving the job in 2000

would start drawing the salary of Rs. 30,000/- per month from the company from August, 2005. The High Court has not taken into consideration these vital aspects and accepted the statement of the husband that he was drawing salary of Rs. 30,000/- per month as a gospel truth. It appears that wife does not have any settled job; she has worked at few places for few months. This is eminently a case in which the High Court must reconsider the wife's application for interim maintenance. [Para 9] [511-C-G]

1.3 The impugned order is set aside and the application made by the wife for interim maintenance is restored to the file of the High Court for fresh consideration. The cost of the appeal is quantified at Rs. 20,000/- which the respondent would pay to the appellant. [Para 10] [511-H; 512-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5660 of 2010.

From the Judgment and Order dated 21.09.2006 of the High Court of Judicature at Bombay in Civil Application No. 107/2006 in family Court Appeal No. 10 of 2006.

Shekhar Naphade, Vinay Navare and Abha R. Sharma for the Appellant.

Pallav Shishodia, H.D. Thanvi and Sarad Kumar Singhania for the Respondent.

The Judgment of the Court was delivered by

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

2. The order dated September 21, 2006 passed by the High Court of Judicature at Bombay (Appellate Side), which fixes the interim maintenance at the rate of Rs. 12000/- per

month pending appeal, is under challenge at the instance of the wife – appellant in this appeal by special leave.

3. The parties were married on May 8, 1995. The respondent-husband petitioned for divorce under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act, 1955 (for short, 'the Act') on the ground of cruelty and desertion against the wife. The Principal Judge, Family Court No. 5, Pune, passed an ex-parte decree on April 7, 2005 dissolving the marriage between the parties on the ground of cruelty. The wife has preferred an appeal before the Bombay High Court challenging the ex-parte decree. The appeal has been admitted. On July 18, 2005 an ad-interim order was granted staying the operation of the ex-parte decree. The husband was also restrained from re-marrying until further orders. The ad-interim stay order is operative although the husband has informed the High Court that on July 22, 2005 he had re-married. The factum of re-marriage has been disputed by the wife before the High Court.

4. The wife made an application (Civil Application No. 107 of 2006) for direction to the husband to pay to her interim maintenance of Rs. 50,000/- per month. In that application it was stated that husband's income is Rs. 2,00,000/- per month approximately. It was stated that the husband is a highly qualified person; he is Chartered Accountant (CA) and has also passed Cost and Works Accounts of India (ICWA). He passed Chartered Institute of Management Accountants (CIMA), U.K., examination in May, 1999 and also completed course of Computer Information Technology. According to wife, at the time of marriage the husband was working with M/s. Kalpataru Constructions at Mumbai drawing a salary of Rs. 40,000/- per month; in 1996 he changed his job and was appointed as Finance Manager with M/s. Kimberly Clark, Pune (a multi-national company) at double the salary and in May, 1998 he joined a highly reputed software company, namely, M/s. Tata Technology on substantially increased salary. In 1999, the husband was sent to Sri Lanka by the company as a Senior

SAP Consultant where he was entitled to a chauffeur driven Toyota Van and a large bungalow to live. He returned to Pune in August 1999. At that time his monthly income was about Rs. 1,50,000/-. The wife averred that somewhere in the month of January, 2000 the husband started his own company in the name and style of M/s. Paysquare Consultancy Limited at Pune and engaged several computer and IT engineers, chartered accountants and MBAs as employees. As regards her own income, the wife stated that she did not have any independent source of income and was pursuing her studies of Ph.D. at the mercy of her elder sister who has been supporting her since 2001.

5. The husband responded to the application by filing his affidavit. Substantial part of the reply affidavit deals with the proceedings before the Family Court. As regards his income, he stated that he joined the service with M/s. Kalpataru Constructions as an entry level job with a total income of Rs. 7,000/- per month. According to him, his salary in M/s. Kimberly Clark was Rs. 15,000/- per month while his salary in M/s. Tata Technology was Rs. 20,000/- per month. He stated that having worked for six years, he decided to start on his own and put all his savings in the company – M/s. Paysquare Consultancy Limited. He also stated that he was not the sole owner or proprietor of the company and that from August 2005 he has started drawing the salary of Rs. 30,000/- per month from the company.

6. The Division Bench in the impugned judgment observed that since an application for interim maintenance was being considered, it was not inclined to deal with the submissions advanced by the counsel for the parties on the earning capacity of the husband in extenso and accepting the husband's statement that he was getting Rs. 30,000/- per month, fixed an amount of Rs. 12,000/- per month as interim maintenance to the wife.

7. Section 24 of the Act makes a provision for maintenance *pendent lite* and expenses of proceedings. It reads thus:-

> "S.24.- *Maintenance pendent lite and expenses of proceedings.*- Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.
>
> Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be."

8. Section 24 thus provides that in any proceeding under the Act, the spouse who has no independent income sufficient for her or his support may apply to the court to direct the respondent to pay the monthly maintenance as the court may think reasonable, regard being had to the petitioner's own income and the income of the respondent. The very language in which Section is couched indicates that wide discretion has been conferred on the court in the matter of an order for interim maintenance. Although the discretion conferred on the court is wide, the Section provides guideline inasmuch as while fixing the interim maintenance the court has to give due regard to the income of the respondent and the petitioner's own income. In other words, in the matter of making an order for interim maintenance, the discretion of the court must be guided by the criterion provided in the Section, namely, the means of the

parties and also after taking into account incidental and other relevant factors like social status; the background from which both the parties come from and the economical dependence of the petitioner. Since an order for interim maintenance by its very nature is temporary, a detailed and elaborate exercise by the court may not be necessary, but, at the same time, the court has got to take all the relevant factors into account and arrive at a proper amount having regard to the factors which are mentioned in the statute.

9. In a case such as the present one, the stand of the husband that he is drawing salary of Rs. 30,000/- per month from the company since August 2005 is inherently improbable. The husband is highly qualified; he is CA, ICWA, CIMA and has also completed course of Computer Information Technology. He has worked with renowned and big companies like M/s. Kimberly Clark and M/s. Tata Technology as Finance Manager and Senior SAP Consultant respectively before he started on his own in January, 2000. He did not leave the job due to any compulsion but because he wanted to grow big. He has admitted that having worked for six years, he decided to do his own business and started the company, namely, M/s. Paysquare Consultancy Limited in which he has sought financial/administrative help of his brother and one Ms. Nilima Apte. How can it be believed that a person who has started his own business leaving the job in 2000 would start drawing the salary of Rs. 30,000/- per month from the company from August, 2005? The High Court has not taken into consideration these vital aspects and accepted the statement of the husband that he was drawing salary of Rs. 30,000/- per month as a gospel truth. Insofar as wife is concerned, it appears that she does not have any settled job; she has worked at few places for few months. We think this is eminently a case in which the High Court must reconsider the wife's application for interim maintenance.

10. Accordingly, this appeal is partly allowed, the impugned

order dated Septebmer 21, 2006 is set aside and Civil Application No. 107 of 2006 made by the wife for interim maintenance is restored to the file of the High Court for fresh consideration. We expect the High Court to dispose of the application for interim maintenance expeditiously and before it proceeds with the hearing of the main appeal, being Family Court Appeal No. 10 of 2006. The cost of the appeal is quantified at Rs. 20,000/- (Rupees twenty thousand) which the respondent shall pay to the appellant within one month from today.

N.J. Appeal Partly allowed.

RAMESH GAJENDRA JADHAV
v.
SECRETARY, LATE S.G.S.P. MANDAL & ORS.
(Civil Appeal No. 7215 of 2008)

JULY 22, 2010

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

Service law – Termination – Advertisement for post of regular lecturer of Geography – Post approved by University – Appointment of appellant to the post – Mistake of fact in relation to implementation of roaster of reservation – Rectification of error by terminating services of appellant – Issuance of fresh advertisement – Post reserved for SC category – Appointment of respondent no. 5 to the said post – Challenge to, by appellant – Held: Collective error on part of the University and College led to the instant situation – Mistake of fact cannot vest indefeasible legal right in appellant to be appointed or deemed to have been appointed against a reserve category while he is a candidate belonging to the open category and was so appointed by the Selection Committee – Order of High Court upholding the termination order of appellant, is correct – Maharashtra Universities Act, 1994 – s. 59(1).

The appellant was appointed as a regular lecturer of Geography in the respondent college. The principal terminated the services of the appellant. The appellant then filed an appeal on the ground that the oral termination was unjustified. The tribunal quashed the termination order and directed reinstatement. However, the High Court set aside the order of the tribunal. It held that the post of the lecturer in Geography was reserved for SC category alone and was not meant for open category candidates; that advantage could not be given to the appellant on account of any mistake of the

authorities; and that on mere selection, the appellant did not have an indefeasible right to the post. The Division Bench of High Court upheld the order. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1 A post is determined to be part time or full time depending on the work load in a particular college. The University, vide its letter dated 5th December, 1998, had referred to the requirements which a college ought to satisfy. In response thereto, the College had completed the requirement and had clearly stated that in Geography, there was one vacancy of part time lecturer which was for open category. This had been approved by the University, but subsequently it was noticed that the University by mistake had granted approval for full time lecturer in English and Geography, while the advertisement had indicated the vacancy of a part time lecturer in Geography. It is expected and desirable of the Authorities concerned to have corrected the mistake at that juncture itself. However, because of *inter se* correspondence between the University, College and the Director of Education, the matter got delayed and in the meanwhile the Selection Committee, on the basis of the approval letter issued by the University, selected the appellant as full time lecturer to the post vide letter dated 3rd March, 1999. The University had informed the College that as per the roaster, the full time regular vacancy of the College has to be given to SC category candidate and, therefore, earlier advertisement should be cancelled and fresh advertisement should be issued. [Para 7] [522-B-F]

1.2 A vacancy which has been reserved for SC category cannot be converted to an open category unless and only if specified and that too only if the rules permit. Nothing of this kind has been placed on record and in fact no submission in that behalf has been made by any of the parties. Once the post was reserved for SC

category, the Authorities could only fill up the said post by a reserved category candidate. No advertisement for reserve candidate had been issued earlier, as such, none would have applied for the same being a post for open category and this mistake vitiated the entire selection process. The fresh advertisement was issued and Respondent No. 5 was appointed to the said post, resulting in termination of services of the appellant. Of course, to some extent, this mistake was ought to be corrected at least partially by University by giving the approval to the full time post for one academic year 1999-2000 in favour of the appellant. No doubt, appellant has been subjected to some inconvenience and prejudice and his remedy for damages or any other relief, as he may deem fit and proper, are open to be taken but this is not a case where interference of this Court is called for under Article 136 of the Constitution. [Para 7] [522-F-H; 523-A-C]

1.3 In the needs of employments, particularly, in the Institutions which are aided and are under the control of the State or statutory bodies, adherence to the concept of equality and avoidance of discrimination is an essential feature. In other words, the respondents were expected to act in consonance with the constitutional mandate contained under Articles 14 and 16 of the Constitution of India. The Selection Committee was at fault in selecting the candidate as full time lecturer, while admittedly the advertisement had been given for a post of part time lecturer in Geography. It is a matter of common knowledge that the eligible candidates, if knew, that the post was that of 'full time lecturer in Geography' would have applied in larger number and even with better qualifications. In other words, number of candidates have been denied an opportunity of competing for this post. It would add arbitrariness or unfairness to the entire process of selection. The appointment of the appellant,

even if otherwise, in accordance with procedure would stand vitiated on this ground alone. It is a matter of concern that the post which was advertised as part time was treated as full time, that too under the general category only on the pretext that the University had written a letter that the post of Geography lecturer was full time while completely ignoring the stand of the College when it had sought clarification from the University to remove the confusion created by this stand. Thus, it was not a case where post of full time lecturer in Geography in general category was available. It was neither desirable nor fair for all the Authorities concerned to make this appointment in the manner in which it has been done, even if the Selection Committee had recorded it minutes to that effect. It was not a case, where any error can be found in the judgment of the High Court. [Para 7] [523-F-H; 524-A-B]

1.4 There was a collective error on the part of the University and College and more on the part of the University that led to the instant situation. But this mistake cannot vest indefeasible legal right in the appellant to be appointed or deemed to have been appointed against a reserve category while he is a candidate, admittedly, belonging to the open category and was so appointed by the Selection Committee. [Para 8] [524-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7215 of 2008.

From the Judgment & Order dated 06.06.2007 of the High Court of Judicature at Bombay in Letters Patent Appeal No. 98 of 2007.

Manish Patil (for Chander Shekhar Ashri) for the Appellant.

Vinay Navare (for Abha R. Sharma), Anshuman Ashok (for K.N. Rai), Vishwajit Singh for the Respondents.

The judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The services of Ramesh Gajendra Jadhav, the appellant herein, were terminated by Principal of the respondent college on 18th August, 1999 who, then filed an appeal before Shivaji University & College Tribunal, Pune, University Campus under Section 59(1) of Maharashtra Universities Act, 1994. The grievance of the appellant was that he had been appointed as a regular lecturer of Geography in the said College and the oral termination was unjustified, contrary to Rules and without any basis. On the contrary, the College as well as University ought to have permitted him to continue as a regular lecturer in the College. The Tribunal, vide its judgment dated 21st July, 2004 found substance in the case of the appellant and while accepting his appeal the order of termination was quashed and set aside and he was ordered to be reinstated w.e.f. 15th September 2000 with full back wages. The College as well as the Secretary of Sambhaji Rao Garad Shikshan Prasarak Mandal, Mohol, Solapur District, filed a Writ Petition in the High Court of Judicature at Bombay being Writ Petition No. 9935 of 2004, which the learned Single Judge, after hearing the parties and vide a detailed judgment accepted the Writ Petition by setting aside the order of the Tribunal and issuing certain directions. The High Court held that the post of the lecturer in Geography was not meant for open category candidates but was reserved for SC category alone. The Court also declined to give advantage to the present appellant on account of any mistake of the authorities concerned. Merely, because the appellant was selected, the Court declined to accept the contention that the appellant had an indefeasible right to the post. Resultantly, the Court sustained the order passed by the College and the University authorities.

2. Aggrieved by the judgment of the High Court dated 7th December, 2006, the appellant filed an appeal before the Division Bench of the High Court of Judicature at Bombay, which was also dismissed vide order dated 6th June, 2007.

The Division Bench held as under.

> "6. The finding arrived at by the learned Single Judge was based on the record, which clearly indicates that the post of lecturer in Geography was reserved for S.C. candidate and not for the candidate from open category and, therefore, the Single Judge held that the decision of the Tribunal was not justified while allowing the appeal of the Management.
>
> 7. The learned counsel for the appellant, submitted that for no fault of the appellant, his services could not have been discontinued and the findings of the School Tribunal are findings of fact, which cannot be held to be perverse so as to call for interference in exercise of writ jurisdiction.
>
> 8. We find that the view taken by the learned Single Judge is based on the correct state of affairs which was ignored by the Tribunal, which based its findings on the advertisement, pursuant to which the appellant was selected, however, the said advertisement was not correct.
>
> 9. The learned Single Judge has rightly observed that merely because the Authorities have committed an error in the matter of the advertisement of the post and though it was approved by the University, was also not correct and the University, subsequently, rectified its error by canceling the approval of the appellant. The appellant has no case. Therefore, we do not find any merit in the appeal. The appeal is accordingly dismissed."

3. Aggrieved by the reasoning and decision of the Division Bench, the appellant filed the present appeal.

4. The controversy in the present case falls in a very narrow campus: Whether a mistake of fact rectified subsequently in relation to implementation of roaster of reservation would be a sufficient reason for terminating the services of a person appointed under that mistaken impression? To answer this

question, we need to notice the facts which have given rise to the present appeal.

5. The college in question was established in the year 1991. The Joint Director of Higher Education, Kohlapur Division had sent a letter approving the schedule of appointment of lecturer wherein one additional post of part time lecturer was sanctioned vide letter dated 6th October, 1998. On the basis of this letter, the College had written to the University on 5th December,1998 seeking its approval for the draft advertisement to be published for filling up the vacancy including the post of lecturer of Geography. However, in the letter issued by the University granting approval to the post of lecturer for the subject of Geography was shown as part time in open category. On that basis, advertisement was issued, which appeared in the newspaper, for filling up the vacant posts. On 24th December, 1998, the college sent a letter to the University forwarding the copies of the advertisement and requesting for names of the persons to be appointed by Selection Committee. The University granted approval to the schedule of posts as proposed by the management but in the letter dated 1st January,1999 approval was shown to be granted for the post of lecturer for the subject of Geography as full time lecturer. After receiving this letter, the management of the college again wrote to the University bringing out this fact that there was a vacancy of part time lecturer in Geography, while the University granted approval to full time lecturer in that subject leading to some confusion. In the meanwhile, pursuant to the advertisement issued, candidates including the appellant had applied for the post and interviews were held on 22nd February, 1999. On 23rd February, 1999, the Selection Committee prepared its detailed proceedings clearly demonstrating that the post for which the appellant was selected was a permanent post in open category. On the recommendation of the Selection Committee, the appellant was appointed as lecturer in the subject of Geography on probation vide letter of appointment dated 3rd March, 1999. The appellant joined the post. However, the

University on 15th March, 1999, sent a letter stating therein that earlier advertisement was to be cancelled and new advertisement showing the post of lecturer in Geography as full time and reserved for SC category, is required to be issued. In fact, at that point of time, the University also asked the College as to how the advertisement for appointment of part time lecturer was issued as the post was full time and reserved for SC category. Vide their letter dated 12th July, 1999, the College sent a detailed reply giving reference to all the events in response to which, the University, vide letter dated 18.8.1999 stated that those appointed on the post including the appellant must be treated as full time lecturer but only for the academic year 1999-2000 and in the meanwhile steps should be taken to fill up the vacancy keeping in view the direction that the post was reserved for SC category and it was a full time post of lecturer in Geography. The appellant had made a request in the meanwhile, submitting that he had been selected by a properly constituted Selection Committee and he should be given the appointment against a full time lecturer post. No response to the same was received. The appellant filed a Writ Petition No. 1689/2000 praying for quashing and setting aside the letter dated 18th August,1999 issued by the University giving approval only for the academic year 1999-2000. This Writ Petition, when came up for hearing before the High Court, was dismissed vide order dated 22nd August, 2000. In furtherance to the advertisement, which appeared in the newspaper on 1st January 2001, amongst other persons Respondent No. 5 also submitted his application. Respondent No.5 belonged to a reserved category (SC), was selected and appointed as lecturer in Geography in the respondent college. Approval thereto was granted by the University on 2nd February, 2001. Thereafter, the appellant was not permitted to serve which resulted in filing of the appeal before the Tribunal, as already noticed.

6. There is no dispute before us that the post in question was full time post and was reserved for SC. Once this fact is

not disputed, the only question that remains is whether an indefeasible right was vested in the appellant by his selection against the advertisement issued earlier by the College. The learned Single Judge of the Bombay High Court while setting aside the order of Tribunal held as under:

> "20. It is then sought to be contended that no fault can be found with the respondent no. 1 who had bonafide believed in the advertisement issued by the petitioners on 11th December, 1998 and had applied for the post and on being interviewed, was issued the order of the appointment and even the initial appointment disclosed that his appointment was on probation for two years which disclosed that the appointment was in permanent vacancy. Undoubtedly, there was a mistake on the part of the petitioners in that regard which was immediately brought to the notice by the respondent No. 4.
>
> 21 Question then arises whether on account of mistake of the petitioners, can the respondent no. 1 be penalized? It is well settled law that in case of entry in service it has to be a lawful entry. Any irregularity in that respect cannot create any vested right in favour of the employee illegally appointed, irrespective of the fact whether the fault in that regard lies with the employee or the employer. Otherwise, under the pretext of fault on the part of the employer, every employee seeking back door entry may illegally seek to regularize such entry in the service. Being so, merely because there was a fault on the part of the petitioners in following the procedure, on that count the respondent no. 1's services cannot be regularized. That will not ensure to benefit of the respondent no. 1 to content that he cannot be penalized for the fault on the part of the petitioners in not following the proper procedure while filling up the vacancy in relation to the post of Lecturer in the subject of Geography. In fact, it is not a matter of penalizing the respondent no. 1; rather the respondent no. 1 cannot seek to regularize an illegal act to have benefit on the pretext that the fault lies with the petitioner in not following the regular procedure. The respondent no. 1 is to be absolutely blamed for illegally availing the benefit of such acts on the part of the petitioner."

7. There can be no doubt that a post is determined to be part time or full time depending on the work load in a particular college. The University, vide its letter dated 5th December, 1998, had referred to the requirements which a college ought to satisfy. In response thereto, the College had completed the requirement and had clearly stated that in Geography, there was one vacancy of part time lecturer which was for open category. This had been approved by the University, but subsequently it was noticed that the University by mistake had granted approval for full time lecturer in English and Geography, while the advertisement had indicated the vacancy of a part time lecturer in Geography. It is expected and desirable of the Authorities concerned to have corrected the mistake at that juncture itself. However, because of *inter se* correspondence between the University, College and the Director of Education, the matter got delayed and in the meanwhile the Selection Committee, on the basis of the approval letter issued by the University, selected the appellant as full time lecturer to the post vide letter dated 3rd March, 1999. The University had informed the College that as per the roaster, the full time regular vacancy of the College has to be given to SC category candidate and, therefore, earlier advertisement should be cancelled and fresh advertisement should be issued. It is a settled principle of law that a vacancy which has been reserved for SC category cannot be converted to an open category unless and only if specified and that too only if the rules permit. Nothing of this kind has been placed on record and in fact no submission in that behalf has been made by any of the parties before us. Once the post was reserved for SC category, the Authorities could only fill up the said post by a reserved category candidate. No advertisement for reserve candidate had been issued earlier, as such, none

would have applied for the same being a post for open category and this mistake vitiated the entire selection process. As already noticed, fresh advertisement was issued and Respondent No. 5 was appointed to the said post, resulting in termination of services of the present appellant. Of course, to some extent, this mistake was ought to be corrected at least partially by University by giving the approval to the full time post for one academic year 1999-2000 in favour of the appellant. No doubt, appellant has been subjected to some inconvenience and prejudice and his remedy for damages or any other relief, as he may deem fit and proper, are open to be taken but this is not a case where interference of this Court is called for under Article 136 of the Constitution. We must notice that in the needs of employments, particularly, in the Institutions which are aided and are under the control of the State or statutory bodies, adherence to the concept of equality and avoidance of discrimination is an essential feature. In other words, the respondents were expected to act in consonance with the constitutional mandate contained under Articles 14 and 16 of the Constitution of India. We find that the Selection Committee was at fault in selecting the candidate as full time lecturer, while admittedly the advertisement had been given for a post of part time lecturer in Geography. It is a matter of common knowledge that the eligible candidates, if knew, that the post was that of 'full time lecturer in Geography' would have applied in larger number and even with better qualifications. In other words, number of candidates have been denied an opportunity of competing for this post. It would add arbitrariness or unfairness to the entire process of selection. The appointment of the appellant, even if otherwise, in accordance with procedure would stand vitiated on this ground alone. It is a matter of concern that the post which was advertised as part time was treated as full time, that too under the general category only on the pretext that the University had written a letter that the post of Geography lecturer was full time while completely ignoring the stand of the College when it had sought clarification from

the University to remove the confusion created by this stand. Thus, it was not a case where post of full time lecturer in Geography in general category was available. It was neither desirable nor fair for all the Authorities concerned to make this appointment in the manner in which it has been done, even if the Selection Committee had recorded it 8 minutes to that effect. Viewed from this angle as well, we do not think it was a case, where we can find any error in the judgment of the High Court.

8. Another factor, which has to be considered by the Court, is that in the Writ Petition No. 1689 of 2000 filed by the appellant, which was dismissed by the High Court, he could have raised these issues in that Writ Petition but the point of resjudicata/constructive resjudicata had not been decided against the appellant by the learned Single Judge. The appellant could have challenged the order of High Court and even raised the issue with regard to reservation or his deemed regular appointment as full time lecturer in Geography in that writ petition itself. However, the advertisement was issued for filling up the reserve vacancy on 1st January, 2001. Therefore, we cannot find fault with the appellant to the extent that appeal filed by him could be dismissed on that ground. Be that as it may, a detailed discussion on this subject would be uncalled for in the facts and circumstances of the present case. The fact of the matter remains that there was a collective error on the part of the University and College and more on the part of the University that led to this situation. But this mistake cannot vest indefeasible legal right in the appellant to be appointed or deemed to have been appointed against a reserve category while he is a candidate, admittedly, belonging to the open category and was so appointed by the Selection Committee.

9. For these reasons, we find no merit in the appeal and the same is dismissed. Parties are left to bear their own costs.

N.J. Appeal dismissed.

MD. ALAUDDIN KHAN
v.
KARAM THAMARJIT SINGH
(Civil Appeal No. 5851 of 2010)

JULY 22, 2010

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

Representation of the People Act, 1951*: ss.97, 100(1)(d)(iii) – Election petition – Allegation that some impersonators voted in the name of dead persons in named polling station – Prayer to order recount of votes cast in the named polling station and to declare election of returned candidate as void – By way of defence, the returned candidate in the written statement stated that even the petitioner had not secured the votes shown to have been cast in his favour as even in his case there were void votes and prayed for recount of votes of all the candidates – High Court ordered to delete the paragraphs in written statement on the ground that they were in the nature of counter claim and held that only the votes cast in the named polling stations would be liable to be counted and not those which were named in the paragraphs ordered to be deleted from the written statement – **HELD: Per Dr. Mukundakam Sharma, J**: In view of specific provision of s.97, the returned candidate cannot resort to file counter claim or recrimination petition under Order VIII rule 6A – Only votes cast in the named polling station liable to be counted and not those named in paras ordered to be deleted from written statement – **Per V.S. Sirpurkar, J**: Pleas raised by returned candidate were not in the nature of recrimination – By virtue of Order VIII, Rule 6 CPC, the returned candidate, could still raise his defence by way of a counter claim – The language of s.97 of the Act which is in the nature of positive language, does not bar raising of*

any such defence – Recount should be of the votes of all the candidates.

In view of difference of opinion, the matter is referred to larger bench – Code of Civil procedure, 1908 – Order VIII r.6A – Elections laws – Reference to larger bench.

In the legislative assembly elections, appellant defeated the respondent-election petitioner by margin of two votes. Respondent challenged the election of appellant under Section 100(1)(d)(iii) and (iv) of the Representation of the People Act, 1951 on the ground that number of impersonators voted in the name of dead persons in named polling stations and prayed that the election of the appellant be declared void. The appellant filed a written statement in which apart from contesting the allegations made in the election petition, the appellant-returned candidate made several statements in the nature of counter claim/recrimination in paras 22-31. It was contended therein that the votes were cast in the name of dead persons in all the polling stations and prayed for direction to recount of votes of all the candidates. The respondent thereafter filed an application under Order VI Rule 16 CPC praying for striking off these paras allegedly made by way of counter claim/recrimination. The said application was allowed by Election Judge. Aggrieved appellant filed the appeal.

Referring the matter to larger bench, the Court

Held:

Per: DR. MUKUNDAKAM SHARMA, J:

1.1. In the present case since there was no prayer in the election petition to declare the election petitioner or any other candidate as elected candidate, therefore, the provisions of Section 97 of the Representation of the People Act, 1951 would not be applicable or attracted. In

fact, statements which are intended and could be made in the light of Section 97 of the Act are counter-claims. When the specific provision which provides for raising a counter-claim is excluded and is not attracted, it cannot be said that such counter-claim could be raised in terms of the provisions of Order VIII Rule 6A, CPC. The Representation of People Act, 1951 is a self contained code. Under the Act, a specific provision is incorporated in the form of Section 97 providing for considering recrimination petition/counter-claim under certain circumstances, and therefore, the same being a provision under a special Act, would prevail over the provisions of Order VIII Rule 6A, CPC which is a general law. The said legal principle is based on the latin maxim *generalia specialibus non derogant* which means general words do not derogate from special. In view of this mandate, permitting the returned candidate to file a counter claim in terms of Order VIII Rule 6A, CPC when the same cannot be done under Section 97 of the Act would tantamount to completely obliterating the effect of Section 97 of the Act. If Section 97 of the Act expressly allows a recrimination petition when an election petition is filed seeking a declaration that the election petitioner or any other candidate is the returned candidate, then there is an implied bar on filing a recrimination petition in the absence of such a declaration. As the principle of statutory construction, *Expressio Unius Est Exclusio Alterius* states, the express inclusion of one thing is the exclusion of all others. In this case, the specific inclusion of a condition for filing a recriminatory petition under Section 97 of the Act, namely that a declaration that the election petitioner or any other candidate is the returned candidate should be filed, excludes its filing in all other cases. Section 97 of the Act bars filing of a counter-claim by way of a recrimination petition when an election petition is filed without seeking for a declaration that the election petitioner or any other candidate is the returned

candidate. In such a case, the application of Order VIII Rule 6A, CPC would not be permissible, as permitting the same would amount to allowing indirectly, what is prohibited by law to be done directly. It is settled law that whatever is prohibited by law to be done directly cannot be allowed to be done indirectly. [Paras 18, 19] [543-F-G; 544-F-H; 545-A-D]

Jyoti Basu v. Debi Ghosal **AIR 1982 SC 983, held applicable.**

1.2. Section 87 of the Act opens with the expression *"subject to the provisions of this Act and any other rules made thereunder".* This definitely means that Section 87 is subject to the provisions of Section 97 of the Act. Section 87 also specifically provides that the procedure under the Code would be applicable *"as nearly as may be"* meaning thereby that only those provisions for which there is no corresponding provision in the Act could be made applicable. Therefore, the provisions of the Code are not wholly applicable to the trial of the election petitions. Accordingly, if there is no scope for filing a recrimination petition under Section 97 of the Act, this limitation cannot be sought to be removed or overcome by taking resort to another provision of the Code which will be explicitly and impliedly inconsistent with the provisions of Section 97 of the Act. A similar view was taken by the Constitution Bench of this Court in the case of *Jabar Singh. In view of the fact that there was a pronouncement of the Constitution Bench of this Court in *Jabar Singh and also the decision of this Court in **T.A. Ahammed Kabeer which on an interpretation of Section 97 of the Act, had carved out a settled position of law, a different view cannot be taken. So long the Legislature does not change the law to obliterate the discrepancy, if any, the Court cannot do so on its own. It would not be appropriate for the Court to go beyond the

legislative intent as derived from the existing provisions and lay down its views on a particular matter although such a view could be a possible view. The judiciary does not have any power to legislate and that is to be strictly adhered to. [Paras 20, 22] [545-G-H; 546-A-D]

Jabar Singh v. Genda Lal* **(1964) 6 SCR 54; ***T.A. Ahammed Kabeer v. A.A. Azees and Others* **(2003) 5 SCC 650, relied on.**

Dr. Rajendra Kumari Bajpai v. Ram Adhar Yadav and Others **(1975) 2 SCC 447;** *N. Gopal Reddy v. Bonala Krishnamurthy and Others* **(1987) 2 SCC 58, distinguished.**

Bachan Singh v. State of Punjab **(1982) 3 SCC 24, referred to.**

2. The concept of counter-claim was for the first time inserted in the Code of Civil Procedure in the year 1976. Though it is true that there was no specific provision for raising a counter-claim by the defendant in the written statement prior to the amendment of the Code in 1976 but claims by way of counter claims were in fact raised and considered by all the Courts including the Supreme Court of India which would be apparent from a bare reference of the decision in the case of Jabar Singh. Section 97 of the Act bestows a right upon the returned candidate to raise a defence when an additional claim under Section 84 of the Act is made by the election petitioner. Recrimination, as envisaged under Section 97 of the Act, is nothing else but a counter-claim and this concept was incorporated in the Act, which is a special Act, even prior to 1976 when the provision of counter claim now contained in Order VIII Rule 6A was inserted in the Code. Therefore, the said change brought in the Code, which is a general common law, would not have any consequential effect so far as the present case is concerned. Thus, the concept of counter-claim was not

foreign or totally absent prior to 1976. In view of the said position and also in view of the fact that there is a specific provision in the Act to raise counter-claim with certain pre-conditions and on certain specific conditions the provisions of Order VIII Rule 6A, CPC cannot be invoked in view of the bar and prohibition enforced by Section 97 of the Act. [Paras 24-25] [550-E-H; 551-A-B]

Virendra Kumar Saklecha v. Jagjiwan & Others **(1972) 1 SCC 826, referred to.**

Per: V.S. SIRPURKAR, J.

1. The plea raised in the paragraphs 22 to 31 of the written statement of elected candidate was not in the nature of recrimination, but, thereby the elected candidate was setting up a valid defence and was suggesting that it was a case of the election petitioner that in particular number of polling stations, some impersonators had voted in the name of dead persons. Such things had happened in other constituencies also and, therefore, the votes cast in the name of dead persons in all the polling stations, more particularly, the named polling stations should also be deleted or held to be void votes. This could not be viewed as a recriminatory plea which was barred under Section 97 of the Act. The counter claim by the elected candidate was only to raise a valid defence to save his own election and it was in the nature of raising or introducing pleadings permitting him to show that it is not only in respect of the particular polling stations named in the election petitions that some votes cast in the name of dead persons were required to be declared as void, but such votes, cast in other polling stations also were required to be declared void in order to know as to who had, in fact, polled the majority of votes. There was nothing wrong in raising this plea, more particularly, because rule of democracy, which

depends upon the valid elections, can be called to be the 'basic structure of the Constitution of India'. [Paras 10, 11,12] [554-G-H; 555-A-F]

Jabar Singh v. Genda Lal **AIR 1964 SC 1200;** *Inayatullah Khan v. Diwanchand Mahajan* **AIR 1959 M.P. 58;** *Bhim Sen v. Gopali* **22 Election Law Reports 288 SC;** *N. Gopal Reddy v. Bonala Krishnamurthy & Ors.* **1987 (2) SCC 58;** *P.Malaichami v. Andi Ambalam* **1973 (2) SCC 170;** *Arun Kumar Bose v. Mohd. Furkan Ansari* **1984 (1) SCC 91;** *Janardan Dattuappa Bondre v. Govind Shiv Prasad Chaudhary* **1979 (4) SCC 516;** *Bhag Mal v. Ch.Prabhu Ram* **1985 (1) SCC 61, referred to.**

2. The import of words "the reception of any vote which is void" in section 100(1)(d)(iii) would cover each and every void vote received by each and every candidate because void vote cannot be counted: whether it is cast in favour of an elected candidate or any other candidate contesting the elections. Once the real import of clause "the reception of any vote which is void" is realized, it becomes clear that, in recount of the votes which are void votes, those would have to be excluded and for that purpose, the returned candidate can raise a plea by way of defence that the void votes were cast either in favour of elected candidate or any other defeated candidate. He can at least raise a plea that such void votes were actually cast and he would certainly be justified in raising a plea that the void votes were cast not only in the polling Stations named in the election petition, but in some other polling Stations also. Therefore, if recount was to be ordered, the recount cannot be restricted only to the named polling Stations in the election petition, but it would have to be a general recount where the void votes would have to be avoided. Therefore, there would have to be an opportunity to the elected candidate to prove that there were void votes in

other polling Stations also and for that purpose, there should be recount of all the votes of all the Polling Stations. It is only thereafter that the true position as regards majority of votes could be obtained. The plea raised in the paragraphs 22-31 is not a recriminatory plea within the meaning of Section 97 of the Representation of the People Act, 1950. What is raised is a mere plain defence that, even if there was going to be a recount, then it should be a recount of all the votes and not of the votes cast only in his favour and for that purpose, he would be allowed to prove that it is not only in the particular polling stations that the votes were cast in the name of dead persons, but they were also cast in other polling stations. [Paras 24, 26] [570-A-F; 571-B-D]

3. At the time when *Jabar Singh's* **case was decided, the amended provisions of Order VIII, Rule 6A CPC providing for counter claim was not available on the Statute. That provision came only by way of amendment later on. Though, the concept of counter claim was not unknown, even in the absence of a specific provision therefor, introduction of a specific provision for raising the counter claim would be a relevant factor for considering as to whether a candidate, in the absence of any recrimination, could insist upon counting of the votes cast in favour of the other losing candidates. Raising of a counter claim by way of a valid defence would still be permissible considering the broad language of that provision. In ordering counting of the votes of the elected candidate alone, the whole election process would stand prejudiced, inasmuch as, then, even if some invalid votes are cast in favour of the other candidates or void votes are cast in the election, those votes would not be counted and in that case, there could be no correct reflection in respect of the votes secured by each candidate. This is apart from the fact that a very unfair advantage can be secured by an election petitioner in favour of the losing**

candidate by deliberately not claiming any declaration either in favour of the election petitioner or in favour of any other losing candidate so that the elected candidate would be rendered completely helpless in showing that he alone is a candidate having secured majority of votes. Securing a majority of votes is the very essence of the democratic elections and the democracy being a part of the basic structure of our Constitution, the question involved herein gains all the more importance. The theory of basic structure of the Constitution also was not available when Jabar Singh's case was decided. The interpretation put forth in Jabar Singh's case, in a majority decision would, therefore, require reconsideration, more particularly, in view of the minority decision therein which was more in accord with the principles of securing majority votes in a democratic elections. [Paras 27, 28] [571-D-G; 573-A; 572-D-H]

Case Law Reference:

Judgment of Dr. Mukundakam Sharma, J:

AIR (1964) SC 1200	**referred to**	**Paras 13, 18, 20, 22, 23, 24**
(2003) 5 SCC 650	**referred to**	**Para 13, 21, 22**
(1972) 1 SCC 826	**referred to**	**Para 13**
(1975) 2 SCC 447	**referred to**	**Para 13, 21**
AIR 1982 SC 983	**held applicable**	**Para 17, 18**
(1979) 1 SCC 560	**referred to**	**Para 19**
(2003) 5 SCC 650	**relied on**	**Para 21**
(1975) 2 SCC 447	**distinguished**	**Para 21**
(1987) 2 SCC 58	**distinguished**	**Para 21, 23**
(1982) 3 SCC 24	**referred to**	**Para 22**

(1979) 1 SCC 560	**referred to**	**Para 22**

Judgment of V.S. Sirpurkar, J.

AIR 1964 SC 1200	**referred to**	**Paras 15, 16, 22, 24, 27, 28**
AIR 1959 M.P. 58	**referred to**	**Para 16**
22 ELR 288 SC	**referred to**	**Para 16**
1987 (2) SCC 58	**referred to**	**Para 22**
1973 (2) SCC 170	**referred to**	**Para 22**
1984 (1) SCC 91	**referred to**	**Para 22**
1979 (4) SCC 516	**referred to**	**Para 22**
1985 (1) SCC 61	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5851 of 2010.

From the Judgment & Order dated 11.2.2008 of the Court of Gauhati, Imphal Bench in M.C. (Election Petition) No.1 of 2008 in Election Petition No.2 of 2007.

Hijam N.K. Singh, Lenin Singh Hijam, Ashok Kumar Sharma, Shivaji M. Jadhav, Rahul Joshi for the Appellant.

P.S. Narasimhan, L. Roshmani, K. Parameshwar, Ritesh Choudhary (for Aribam Guneshwar Sharma) for the Respondent.

The Judgment of the Court was delivered by.

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. The present appeal is directed against the order dated 11.02.2008 passed by the Designated Election Judge of the Gauhati High Court in M. C. (Election Petition) No. 1 of 2008

in Election Petition No. 2 of 2007, whereby the learned Election Judge allowed the miscellaneous application filed by the election petitioner, respondent herein, with an order that the statements, in the nature of recrimination and counter claim, made in the written statement of the returned candidate, appellant herein, more particularly, in paragraph nos. 22-31 would stand struck off from the defence of the appellant.

3. Being aggrieved by the aforesaid order, the appellant filed the present Special Leave Petition on which notice was initially issued and on service the respondent entered appearance. The learned senior counsel appearing for the parties have been heard at length.

4. The appellant and the respondent and few other candidates had contested the election of the 9th Manipur Legislative Assembly from 6-Keirao Assembly Constituency. The said election was held on 14.02.2007 and 16.02.2007 (re-poll in polling station No. 615) and the election result was declared on 27.02.2007, wherein the appellant emerged as the winner after defeating the respondent-election petitioner by a margin of only two votes. The aforesaid election of the appellant-returned candidate was challenged by the respondent by filing an election petition basically under Section 100(1)(d) (iii) and (iv) of the Representation of the People Act, 1951 [for short "the Act"], with a prayer that the election of the appellant be declared void.

5. In order to appreciate the contention of the counsel appearing for the parties, the relevant portion of the prayer made in the election petition viz., paras iii to v, is extracted hereinbelow: -

"……

(iii) to order a re-count of the votes after excluding the void votes if required;

(iv) to declare the election of the Respondent No. 1 as void;

(v) *to pass other and further orders as may be deemed fit by the Hon'ble Court in the facts and circumstances of the case."*

So far as the reliefs prayed in paragraphs i) & ii) are concerned, they relate to seeking for a direction and for calling certain records. As the same are not directly connected with the contentions raised herein, they have not been extracted.

6. Immediately after appearance in the election petition, the appellant filed a miscellaneous application before the Gauhati High Court which was registered as MC (EP) No. 6 of 2007 whereby the appellant challenged the maintainability of the election petition on technical grounds. The said miscellaneous application was however dismissed on 31.10.2007. After taking a few adjournments, the appellant filed the written statement on 04.01.2008, in which, apart from contesting the allegations made in the election petition, the appellant-returned candidate made several statements in the nature of counter claim/recrimination in paragraph nos. 22-31.

7. The respondent thereafter filed an application under Order VI Rule 16 of the Code of Civil Procedure [for short 'the Code'] praying for striking off the aforesaid paragraphs allegedly made by way of counter claim/recrimination. The said application came up for consideration before the learned Election Judge, who after an elaborate discussion on the merits of the said application allowed the same by holding that the statements in the nature of recrimination and counter claim made in the written statement by the appellant, more particularly, in paragraphs nos. 22-31 would stand struck off from the defence pleaded. Being aggrieved by the aforesaid order this appeal was filed.

8. The main contention of the counsel appearing for the

appellant is that under Order VIII Rule 6A of the Code the appellant has a right and a prerogative to raise certain defences by way of counter claim and the said right can be exercised even in a case where there is no additional claim in terms of Section 84 of the Act; and despite the fact that a recrimination petition as such may not be maintainable in terms of Section 97 of the Act. It was further submitted that since in the present case the election petitioner has intentionally avoided to make additional claim as provided under Section 84 of the Act, the appellant-returned candidate had no other option except to fall back upon Order VIII, Rule 6-A of the Code.

9. The short question that falls for consideration in the present appeal is: when there is no provision and right vested in the returned candidate to file a recrimination petition due to absence of a prayer by the election petitioner in the election petition seeking for his declaration (or any other candidate) as a returned candidate, can the returned candidate in his written statement take up pleas which are in fact counter claims with the aid of Order VIII, Rule 6A of the Code?

10. In order to answer the aforesaid issues, it would be necessary to peruse some of the relevant provisions of the Act and some of the decisions of this Court referred to and relied upon by the counsel appearing for the parties and also the contents of the paragraph nos. 22-31 of the written statement filed by the appellant. However, before proceeding with the same, it would be appropriate to refer to an order passed by the Election Judge on 29.08.2007, on the application filed by the appellant under Section 101 of the Act read with Section 151 of the Code, seeking a direction to the election petitioner to clarify the exact relief sought for in the prayer nos. (iv) to (v) (*already extracted hereinabove*). The said application came up for hearing and after conclusion of the hearing, an order was passed on 29.08.2007 to the following effect: -

"Under Section 82 of the Representation of People Act, 1951, all the candidates to the election are required to be

impleaded as a party in the Election Petition if the petitioner makes any prayer to declare himself or any other candidate as duly elected representative. In the present case, the election petitioner has not impleaded the remaining candidates. Hence, it is implied that the petitioner has not made any prayer to declare himself or any other candidate as elected representative, which declaration can be given u/s 101 of the Representation of People Act, 1951.

In my considered opinion, under clause (v) of the prayer, this Court can only grant the relief to the petitioner or pass appropriate orders, which are ancillary to the Election Petition and no specific declaration can be granted that either the election petitioner or any other candidate shall be construed as elected candidate."

It is, therefore, established from the aforesaid order passed by the Election Judge by way of a clarification that in the election petition what survives for consideration is the prayer as to whether or not to declare the election of the appellant-returned candidate as void. Therefore, there is no dispute with regard to the fact that in the said election petition no additional prayer was made by the election petitioner seeking for a declaration that he or any other candidate be declared as the elected candidate.

11. The relevant statutory provisions, which may now be referred to, read as follows:

"Section 84: Relief that may be claimed by the petitioner:-

A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

Section 87: Procedure before the High Court –

(1) Subject to the provisions of this Act and of any rules made thereunder every election petition shall be tried by the High Court as nearly as may be, in accordance with the procedure applicable under the code of Civil Procedure, 1908 for the trial of suits.

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

Section 97: Recrimination when seat claimed –

(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has within fourteen days from the date of commencement of the trial given notice

to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118, respectively.

(2) Every notice referred by in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.

Section 100 – Grounds for declaring election to be void-

S.100 (1) (d) (iii): -

By the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or

……."

12. The provisions of Order VIII Rule 6A of the Code, which was repeatedly referred to during the course of the arguments, may also be extracted here: -

"Order VIII – Written Statement, Set-off and Counter-Claim

Rules 6A – Counter-claim by defendant –

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action according to the defendant against the plaintiff either before or after the filing of the suit but before the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such

counter-claim is in the nature of a claim for damages or not;

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

13. Reference was also made to the decisions of this Court in *Jabar Singh v. Genda Lal* [AIR 1964 SC 1200]; *T.A. Ahammed Kabeer v. A.A. Azees and Others* [(2003) 5 SCC 650]; *Virendra Kumar Saklecha v. Jagjiwan & Others* [(1972) 1 SCC 826]; *Dr. Rajendra Kumari Bajpai v. Ram Adhar Yadav and Others* [(1975) 2 SCC 447]. Reference was also made to Order VI Rule 16 of the Code and relying on the same counsel appearing for the appellant submitted that interference by the High Court at the behest and request of the respondent was unjustified and uncalled for as none of the conditions laid down in Rule 16 was attracted in the present case. This argument may be dealt with at the outset.

14. Order VI Rule 16 of the Code has been incorporated therein with the idea of empowering the Courts to strike out or amend any matter in any pleading, including the statement in the written statement, at any stage of the proceedings when the same is found to be unnecessary, scandalous, frivolous and vexatious; or which may tend to prejudice, embarrass or delay

the fair trial of the suit; or which is otherwise an abuse of the process of the Court.

15. Order VIII Rule 6A empowers the defendant in a suit to raise by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff and that such a counter-claim would have the same effect as a cross-suit so as to enable the Court to pronounce the final judgment in the same suit, both on the original claim and on the counter-claim. It is also provided therein in sub-rule (4) of Rule 6A that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. So far as in the present case the statements made by the appellant-returned candidate in the written statement, particularly in paragraph nos. 22-31 are concerned, it would indicate that those statements are by way of counter-claim against the claim of the election petitioner and relate to the right or claim in respect of the same cause of action.

16. Section 97 of the Act which deals with an election petition provides that when an election petition is filed claiming a declaration that any candidate other than the returned candidate has been duly elected, in that event, the returned candidate or any other party would be entitled to give evidence to prove that the election of such candidate would have been void had he been the returned candidate. Therefore, paragraphs nos. 22-31 of the written statement relate to matters in respect of which evidence should have to be laid to prove that if those allegations are established then the election of such candidate would be void.

17. An election petition is required to be considered and decided in accordance with the procedure laid down in the Representation of People Act, 1951 which constitutes a complete and self-contained code. This view was endorsed by this Court in the case of *Jyoti Basu v. Debi Ghosal* [AIR 1982 SC 983 : (1982) 1 SCC 691] in the following words:-

"8. ……..An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act……So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute……."

18. Now since there is a specific provision in the Act as to how a recrimination petition is to be dealt with, the same is required to be decided in the manner as provided therein. In the present case since there was no prayer in the election petition to declare the election petitioner or any other candidate as elected candidate, necessarily therefore, the provisions of Section 97 of the Act could not be said to be applicable or attracted. In fact, statements which are intended and could be made in light of Section 97 of the Act are counter-claims, which are so stated in the Five-Judge Bench decision of this Court in *Jabar Singh* (supra). When the specific provision which provides for raising a counter-claim is excluded and not

attracted in terms of the provisions of Section 97 of the Act, it cannot be said that such counter-claim could be raised in terms of the provisions of Order VIII Rule 6A. The decision in the case of *Jyoti Basu* (supra) is clearly applicable as the provision of common law is held to be not applicable when specific special law would apply. The legality and validity of the provisions contained either in Section 97 or in Section 87 of the Act has not been challenged. Therefore, in line with the provisions in Section 97 of the Act, the counter-claims could not be allowed to be raised by following the procedure under Order VIII Rule 6A. The learned Senior counsel for the appellant also did not contend that the provision of filing recrimination petition under Section 97 is in the nature of filing a counter-claim under the provision in the Code. The same could not have also been done in view of the ratio of the decision in *Jabar Singh* (supra).

19. The Representation of People Act, 1951 is a self contained code and the enacted provisions therein have substituted the general provisions under the common law. Under the Act, a specific provision has been incorporated in the form of Section 97 providing for considering recrimination petition/counter-claim under certain circumstances, and therefore, the same being a provision under a special Act, would prevail over the provisions of Order VIII Rule 6A of the Code which is a general law. The said legal principle is based on the latin maxim *generalia specialibus non derogant* which means general words do not derogate from special. It is also to be kept in mind that when the legislation inserted the provision of Order VIII Rule 6A into the Code, it never intended to bring a corresponding change in Section 97 of the Act, despite being fully conscious of the change. In view of this mandate, permitting the returned candidate to file a counter claim in terms of Order VIII Rule 6A, when the same cannot be done under Section 97 of the Act would tantamount to completely obliterating the effect of Section 97 of the Act. If Section 97 of the Act expressly allows a recrimination petition

when an election petition is filed seeking a declaration that the election petitioner or any other candidate is the returned candidate, then there is an implied bar on filing a recrimination petition in the absence of such a declaration. As the principle of statutory construction, *Expressio Unius Est Exclusio Alterius* states, the express inclusion of one thing is the exclusion of all others. In this case, the specific inclusion of a condition for filing a recriminatory petition under Section 97 of the Act, namely that a declaration that the election petitioner or any other candidate is the returned candidate should be filed, excludes its filing in all other cases. Simply put, Section 97 of the Act bars filing of a counter-claim by way of a recrimination petition when an election petition is filed without seeking for a declaration that the election petitioner or any other candidate is the returned candidate. In such a case, the application of Order VIII Rule 6A would not be permissible, as permitting the same would amount to allowing indirectly, what is prohibited by law to be done directly. It is settled law that whatever is prohibited by law to be done directly cannot be allowed to be done indirectly. The decision of the Court in *Jagir Singh v. Ranbir Singh & Anr.* [(1979) 1 SCC 560], maybe referred to, where it was held thus:

> "5……..……We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute. It is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance" (per Abbot, C.J. in *Fox* v. *Bishop of Chester*). "To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined."(*Maxwell*, 11th Edn., p.109)
>
> ……"

20. Section 87 of the Representation of People Act, 1951 opens with the expression *"subject to the provisions of this Act and any other rules made thereunder".* This definitely means

that Section 87 is subject to the provisions of Section 97 of the Act. Section 87 also specifically provides that the procedure under the Code would be applicable *"as nearly as may be"* meaning thereby that only those provisions for which there is no corresponding provision in the Act could be made applicable. The distinction between sub-section (1) and sub-section (2) of Section 87 of the Act brings out the contradistinction between the two provisions inasmuch as sub-section (2) makes the entire Evidence Act applicable subject to the provisions of the Act but *in extenso* whereas sub-section (1) makes the Code of Civil Procedure applicable subject to the provisions of the Act and *as nearly as possible*. Therefore, the provisions of the Code are not wholly applicable to the trial of the election petitions. Accordingly, if there is no scope for filing a recrimination petition under Section 97 of the Act, this limitation cannot be sought to be removed or overcome by taking resort to another provision of the Code which will be explicitly and impliedly inconsistent with the provisions of Section 97 of the Act. A similar view was taken by the Constitution Bench of this Court in the case of *Jabar Singh v. Genda Lal* [AIR 1964 SC 1200 : (1964) 6 SCR 54]. In para 11 this Court has held as follows:-

> 11. There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that Section 100 as well as Section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that Section 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas,

because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate……If the returned candidate does not recriminate as required by Section 97, then he cannot make any attack against the alternative claim made by the petition. In such a case an enquiry would be held under Section 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate."

21. Reliance was, however, placed by the counsel appearing for the appellant on the decision of this Court in the case of *Dr. Rajendra Kumari Bajpai v. Ram Adhar Yadav and Others* [(1975) 2 SCC 447]. The said decision does not in any manner advance the case of the appellant because of the fact that it has already been held hereinbefore that the provision of Order VIII Rule 6A cannot be substituted in place of provision of Section 97 and that Section 97 excludes the applicability of the provisions of Order VIII Rule 6A of the Code. Attention was also drawn to the decision of this Court in the case of *N. Gopal Reddy v. Bonala Krishnamurthy and Others* [(1987) 2 SCC 58], which is distinguishable inasmuch as in the said case the issue was whether the returned candidate can refer to and rely upon the evidence already on record, in the light of the fact that he is not entitled to lead evidence as he had failed to file the recrimination petition in a case where there was an additional prayer for declaring the election petitioner as the elected candidate. The said decision was taken notice by this Court in the case of *T.A. Ahammed Kabeer v. A.A. Azees and Others* [(2003) 5 SCC 650] and after referring to all the existing

decisions of this Court on the issue in question, the Division Bench summed up the legal position as follows:-

"**33.** We have already stated that the rigorous rule propounded by the Constitution Bench in Jabar Singh case has met with criticism in some of the subsequent decisions of this Court though by Benches of lesser coram and an attempt at seeking reconsideration of the majority opinion in Jabar Singh case has so far proved to be abortive. The view of the law taken by the Constitution Bench in Jabar Singh case is binding on us. Analysing the majority opinion in Jabar Singh case and the view taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:

……

(2) A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.

(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.

(4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition

is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.

……."

22. In view of the fact that there is a pronouncement of the Constitution Bench of this Court in *Jabar Singh* (supra) and also the decision of this Court in *T.A. Ahammed Kabeer* (supra) which on an interpretation of Section 97 of the Act, has carved out a settled position of law, a different view cannot be taken. So long the Legislature does not change the law to obliterate the discrepancy, if any, the Court cannot do so on its own. It would not be appropriate for the Court to go beyond the legislative intent as derived from the existing provisions and lay down its views on a particular matter although such a view could be a possible view. The judiciary does not have any power to legislate and that is to be strictly adhered to. The Constitution-bench decision of this Court in the celebrated case of *Bachan Singh v. State of Punjab* (1982) 3 SCC 24 may be cited here to bring out the position clearly:

"77. Now it is true that there are cases where the court lays down principles and standards for guidance in the exercise of the discretion conferred upon it by a statute, but that is done by the court only in those cases where the principles or standards are gatherable from the provisions of the statute. Where a statute confers discretion upon a court, the statute may lay down the broad standards or principles which should guide the court in the exercise of such discretion or such standards or principles may be discovered from the object and purpose of the statute, its underlying policy and the scheme of its provisions and sometimes, even from the surrounding circumstances. When the court lays down standards or principles which should guide it in the exercise of its discretion, the court does not evolve any new standards or principles of its own but merely discovers them from the statute. The standards

or principles laid down by the court in such a case are not standards or principles created or evolved by the court but they are standards or principles enunciated by the legislature in the statute and are merely discovered by the court as a matter of statutory interpretation. *It is not legitimate for the court to create or evolve any standards or principles which are not found in the statute, because enunciation of such standards or principles is a legislative function which belongs to the legislative and not to the judicial department.*

(emphasis supplied)

23. It is no doubt true that a two-Judges Bench of this Court in the case of *N. Gopal Reddy* (supra) opined that the law laid down in *Jabar Singh* (supra) requires reconsideration but the reference made could not be finally decided as the petition became infructuous on expiry of the term of five years and the parties having lost interest in view of that eventuality. Therefore, the field continues to be governed by the position of law as laid down in the *Jabar Singh* (supra). Since then there has been no change in the law regarding the issue at hand.

24. It was at one stage argued by the counsel appearing for the appellant that the concept of counter-claim was for the first time inserted in the Code of Civil Procedure in the year 1976 and therefore when *Jabar Singh* (supra) was decided, the concept of counter-claim was not there and what was available was only a concept of written statement and set-off. It is to be pointed out that though it is true that there was no specific provision for raising a counter-claim by the defendant in the written statement prior to the amendment of the Code in 1976 but claims by way of counter claims were in fact raised and considered by all the Courts including the Supreme Court of India which would be apparent from a bare reference of the decision in the case of *Jabar Singh* (supra). It is needless to point out that Section 97 of the Act bestows a right upon the returned candidate to raise a defence when an additional claim

under Section 84 of the Act is made by the election petitioner. Recrimination, as envisaged under Section 97 of the Act, is nothing else but a counter-claim and this concept was incorporated in the Act, which as noted earlier is a special Act, even prior to 1976 when the provision of counter claim now contained in Order VIII Rule 6A was inserted in the Code. Therefore, the aforesaid change brought in the Code, which is a general common law, would not have any consequential effect so far as the present case is concerned. It is thus apt to note that the concept of counter-claim was not foreign or totally absent during the period prior to 1976.

25. In view of the aforesaid position and also in view of the fact that there is a specific provision in the Act to raise counter-claim with certain pre-conditions and on certain specific conditions the provisions of Order VIII Rule 6A of the Code cannot be invoked in view of the bar and prohibition enforced by Section 97 of the Act.

26. The present petition is an election petition. In view of the mandate of Section 86(7), an Election Petition is required to be considered and finally decided within a period of six months. Two and a half years have already passed and the matter is still pending in the Gauhati High Court and that too at a preliminary stage. The instant situation is one which warrants urgent consideration by the High Court.

27. In view of the foregoing discussion, there is no merit in this appeal, and the same is hereby dismissed, leaving the parties to bear their own costs.

V. S. SIRPURKAR, J. 1. I have had the benefit of the opinion expressed by my brother. Since the facts in this appeal have been meticulously put in that judgment, I need not restate them. It is held in that judgment that the order passed by the Learned Single Judge deleting paragraphs 22 to 31 from the written statement of the elected candidate in pursuance of the application filed by the election petitioner under Order VI Rule

16, Code of Civil Procedure is correct. With deepest respect to my brother, I find myself unable to agree with the view taken, as also the ultimate order passed in pursuance of that view. In my opinion, the Learned Designated Election Judge was not right in striking out those paragraphs and the application made by the election petitioner under Order VI Rule 16, CPC was liable to be dismissed.

2. The election petitioner was a losing candidate and he had lost his election by merely two votes. In the election petition, the following prayers were made:

> "....
>
> (iii) to order a re-count of the votes after excluding the void votes if required;
>
> (iv) to declare the election of the Respondent No.1 as void;
>
> (v) to pass other and further orders as may be deemed fit by the Hon'ble Court in the facts and circumstances of the case."

3. During pendency of the case, an application came to be made by the winning candidate herein seeking a direction to the election petitioner to clarify the exact relief sought for in prayer Nos.(iv) and (v) as probably, because the prayer in clause (v) was too general and the appellant herein probably wanted to know as to what were the ramifications of that direction and, more particularly, whether it included a prayer for a direction in favour of the election petitioner in case, if, as a result of the recount, it was found that he had secured more votes than the elected candidate.

4. A clear cut order came to be passed to the effect that the election petitioner had not made any prayer to declare himself or any other candidate as an elected candidate, which declaration can be given under Section 101 of the

Representation of the People Act, 1950. The Learned Judge, therefore, held that, under clause (v), the Court could grant only such reliefs or pass such reliefs which were ancillary to the election petition and no specific declaration could be made in favour of the election petitioner or any other candidate and resultantly, the elected candidate could not raise a defence that the election petitioner had secured votes which were void and hence, the appellant had secured more votes and was rightly elected.

5. By way of defence, the appellant herein, who was an elected candidate, has enumerated from paragraphs 22 to 31 that even the defeated candidate had not secured the votes which have been shown to have been cast in his favour as, even in his case, number of dead voters had cast votes; besides, numbers of votes were illegally counted in his favour. He, therefore, raised a question that, if at all recount had to be ordered, the votes of all the candidates who contested the election should be counted.

6. In paragraph 21, it was suggested in the following words that:

> "as provided and regulated by the procedure of CPC, the present answering respondent has hereby sought for raising counter claim as to the maintainability of the total number of votes obtained by the election petitioner".

7. In paragraph 22, details have been given regarding four polling stations, namely 6/1, 6/2, 6/3 and 6/4 suggesting the number of persons voted, who were, in fact, dead or who could not have otherwise cast their vote and also gave names of the persons who had impersonated the dead persons and had cast their votes. In these paragraphs, more particularly, paragraph 28 says that, in the alternative, if the High Court has to direct the recounting, the High Court should also direct recounting of the void votes of polling station Nos. 6/1, 6/2, 6/3 and 6/4 and cancel them. In short, the contention was that if there is going

to be a recount, the said recount should be of all the candidates including the election petitioner.

8. Here was the case where the recount was prayed for, not of the votes of a returned candidate, but of all the candidates. The prayer was extremely general in nature suggesting the order of the recount of the votes after excluding the void votes, if required. Therefore, at least, insofar as the prayer clause is concerned, there is nothing to suggest that the recount was restricted to the votes of the returned candidate.

9. In order to buttress his case and, more particularly, to raise a valid defence to the election petition, the elected candidates alleged that number of dead persons had cast the votes in other polling stations. All that he had claimed was scrutiny of the votes polled so that there could be a proper decision on the issue as to who had polled the maximum votes. It could not have been said and indeed it was not said by the elected candidate as to in whose favour these votes had gone and it was impossible for him to contend that the votes polled by some impersonators would have gone only in favour of the election petitioner or some other candidate. Some of those could have been cast in his own favour. Therefore, it was clear by these paragraphs that the plea was to make a recount of all the votes cast of all the contesting candidates and for that purpose, permit him to prove that, even in some other polling stations, some impersonators of the dead persons were allowed to vote. It was not as if the elected candidate had made any claim in terms of recrimination either against the election petitioner or any of the other candidates contesting that election and in fact, there were three more candidates contesting elections.

10. In my opinion, therefore, the plea raised in these ten paragraphs (from 22 to 31) was not in the nature of recrimination, but, thereby the election candidate was setting up a valid defence and was suggesting that it was a case of

the election petitioner that in particular number of polling stations, some impersonators had voted in the name of dead persons. Such things had happened in other constituencies also and, therefore, the votes cast in the name of dead persons in all the polling stations, more particularly, the named polling stations should also be deleted or held to be void votes. [This, according to me, could not be viewed as a recriminatory plea which was barred under Section 97 of the Act.]

11. True it is that the words 'counter claim' have been used in paragraph 21, but then the question would be as to whether by way of that so-called counter claim, the elected candidate wanted any other candidate's proposed election to be upset. It was not a question of this sort as no declaration was ever prayed by the election petitioner. Therefore, this counter claim, in my opinion, was only to raise a valid defence to save his own election and it was in the nature of raising or introducing pleadings permitting him to show that it is not only in respect of the particular polling stations named in the election petitions that some votes cast in the name of dead persons were required to be declared as void, but such votes, cast in other polling stations also were required to be declared void in order to know as to who had, in fact, polled the majority of votes.

12. In my opinion, there was nothing wrong in raising this plea, more particularly, because rule of democracy, which depends upon the valid elections, can be called to be the 'basic structure of the Constitution of India'. Democratic Government is what we have assured to ourselves by the Constitution. There is creation of an Election Commission to control the election process in the country and it goes without saying that obtaining of majority valid votes is the soul of valid election.

13. In this behalf, when a question was put to the Learned Counsel appearing for the respondent herein Shri P. S. Narasimhan, he very candidly agreed that, in fact, only those votes will be declared void which have been cast in the name

of dead persons, only in the named polling stations in the election petition, in the process of recount and the elected candidate will not be allowed to suggest that such votes have been cast in other polling stations also which, if proved, would have the effect of affecting the votes of the election petitioner or other candidates who had lost. Shri Narasimhan further suggested as a sequel to his argument that, in the process of recount, if ordered in pursuance of the pleadings in the election petition, only the votes cast in favour of the elected candidate alone shall be counted, whereas, even if it is proved that, in some other polling stations also votes were cast in the name of dead persons, those votes cannot be invalidated, even if it is found that those votes had been cast in favour of the election petitioner or other defeated candidates. In short, according to the Learned Senior Counsel, it is only the votes of the elected candidates which will be counted and counting of votes in respect of all the other candidates will be of no consequence. According to me, if this procedure is adopted in the recount, it will be direct annihilation of the principle of majority of votes for declaring the elected candidate.

14. I have already shown above that such a recount is not prayed for. The recount prayed for is a general recount but if the recount is to be made in such a peculiar fashion, then, it may be that even when the elected candidate has actually secured majority of votes, his election would have to be set aside. In fact, there will be no way to know as to who has actually secured majority of votes, if in a recount, the votes cast only in favour of the returned candidate are counted while ignoring his plea that there are some void votes cast in favour of the other candidates. In my opinion, this cannot be the import of Sections 100(1) (d) (iii), 84 and 97 of the Act.

Section 100(1)(d)(iii) runs as under :-

100. *Grounds for declaring election to be void:*

(1) Subject to the provisions of sub-Section (2) if the

High Court is of opinion-

(a) Not relevant

(b) Not relevant

(c) Not relevant

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) Not relevant

(ii) Not relevant

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) Not relevant

(2) Not relevant

then the High Court may decide that the election of the returned candidate is not void.

Section 84 is as under:

"84. Relief that may be claimed by the petitioner.–A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

Section 97 is in the following terms:

"97. Recrimination when seat claimed.–

(1) When in an election petition a declaration that any candidate other than the returned candidate has

been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of [commencement of the trial], given notice to 2[the High Court] of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section *(1)* shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

15. In the present case, Sections 84 and 97 are not relevant because there is no such declaration prayed for by the election petitioner for declaring himself or any other candidate as duly elected candidate. We shall, therefore, keep those two Sections a little aside and concentrate on Section 100(1)(d)(iii) of the Act. It is only on the basis of this Section and, more particularly, the law laid down by this Court earlier that the concerned paragraphs in the Written Statement have been ordered to be deleted holding that the returned candidate cannot urge even by way of a valid defence that the other candidates have also been benefited by some void votes having been cast in their favour. It was held by the High Court that such plea cannot be raised by an elected candidate where there is no prayer made under Section 84 and resultantly, if there is a recount of votes, it will be only of the votes secured by the elected candidate. For this purpose, heavy reliance was

placed on the decision in the case of *Jabar Singh Vs. Genda Lal* [AIR 1964 SC 1200]. This was a case where, in addition to the prayer of election of the returned candidate to be declared void, another prayer was also made under Section 84 of the Act. However, the returned candidate had failed to file any recrimination under Section 97 of the Act. It was on this backdrop that the case proceeded. It was found that the course taken by the Tribunal and confirmed by the High Court in regard to examining validity of the votes cast in favour of the election petitioner was not correct and that, on bare reading of Section 100(1)(d)(iii) of the Act, it was possible only to examine validity of the votes cast in favour of the returned candidate alone.

16. The factual scenario in the case of *Jabar Singh Vs. Genda Lal* (cited supra) was that appellant Jabar Singh was declared elected having defeated the respondent Genda Lal by 2 votes. The election petition filed by respondent Genda Lal before the Election Tribunal ordered a recount and found that Genda Lal had secured 5664 votes as compared to Jabar Singh, who had secured 5652 votes. This was the position after recount which was ordered by the Tribunal. However, at that stage, Jabar Singh raised an objection that there should be recounting and re-scrutiny on the ground that improper votes had been accepted in favour of Genda Lal and valid votes had been improperly rejected when they were cast in favour of appellant Jabar Singh. Respondent Genda Lal, of course, objected to this course on the ground that Jabar Singh had neither recriminated nor had complied with the provisions under Section 97(1). The Tribunal, however, rejected the contention raised by respondent Genda Lal and held that, in order to consider the relief which respondent Genda Lal had claimed in his election petition, it was necessary to decide whether Genda Lal had, in fact, received majority of votes under Section 101 of the Act and so the Tribunal went on to re-examine the ballot papers of the respondent, as also appellant Jabar Singh and came to the conclusion that 22 ballot papers having votes

cast in favour of the respondent had been wrongly accepted. Thus, it came to the conclusion that respondent had not secured majority of the votes. The Tribunal, however, held the election of Jabar Singh to be void and also refused to grant declaration to the respondent Genda Lal that he was duly elected. Two appeals came to be filed before the High Court against the decision of the Election Tribunal; one by Jabar Singh and second by Genda Lal. Relying on the reported decision in the case of *Inayatullah Khan Vs. Diwanchand Mahajan* [AIR 1959 M.P. 58] as well as the decision of this Court in the case of *Bhim Sen Vs. Gopali* [22 Election Law Reports 288 SC], both the appeals were dismissed by the High Court. Jabar Singh filed an appeal before this Court, while Genda Lal's appeal was dismissed on the ground of delay. The matter was referred to the Five Judges' Bench on account of the earlier judgment by this Court in the case of *Bhim Sen Vs. Gopali* [cited supra]. Before this Court, appellant Jabar Singh contended that, in fact, 22 votes received in favour of Genda Lal could not have been so received by him and they could not have been accepted as valid votes in his favour. This Court, therefore, went into the true import of Section 100(1) read with Section 101 of the Act. The Court noted the following contentions raised by appellant Jabar Singh:-

> "Mr. Kapoor contends that in dealing with the cases falling under Section 100(1)(d)(iii), Section 97 can have no application and so, the enquiry contemplated in regard to cases falling under that class is not restricted by the prohibition prescribed by Section 97(1). He suggests that when the Tribunal decides whether or not the election of the returned candidate has been materially affected by the improper reception, refusal, rejection of any vote, or the reception of any vote which is void, it has to examine the validity of all votes which have been counted in declaring the returned candidate to be elected, and so, no limitation can be imposed upon the right of the appellant to require the Tribunal to consider his contention that some votes

which were rejected though cast in his favour had been improperly rejected and some votes which were accepted in favour of the respondent had been improperly accepted. Basing himself on this position, Mr.Kapoor further contends that when Section 101 requires that the Tribunal has to come to the conclusion that in fact that petitioner or such other candidate received a majority of the valid votes, that can be done only when a recount is made after eliminating invalid votes, and so, no limitations can be placed upon the scope of the enquiry contemplated by Section 101(a). Since Section 100(1)(d)(iii) is outside the purview of Section 97, it would make no difference to the scope of the enquiry even if the appellant has not recriminated as required by Section 97(1)."

17. This argument was resisted and the Court had dealt with the argument in para 9 of the judgment as under :-

"On the other hand, Mr.Garg who has addressed to us a very able argument on behalf of the respondent, urged that the approach adopted by the appellant in dealing with the problem posed for our decision in the present appeal is inappropriate. He contends that in construing Sections 97, 100 and 101, we must bear in mind one important fact that the returned candidate whose election is challenged can face the challenge under Section 100 only by making pleas which can be described as pleas affording him a shield of defence, whereas if the election petition besides challenging the validity of the returned candidate claims that some other person has been duly elected, the returned candidate is given opportunity to recriminate and by way of recrimination he can adopt pleas which can be described as weapons of attack against the validity of the election of the other person. His argument is that though Section 100(1)(d)(iii) is outside Section 97, it does not mean that in dealing with a claim made by an election petition challenging the validity of his election, a returned

candidate can both defend the validity of his election and assail the validity of the votes cast in favour of the petitioner or some other person. It is in the light of these two rival contentions that we must now proceed to decide what the true legal position in the matter is."

18. Following were the observations made in the majority judgment in para 10:-

"It would be convenient if we take a simple case of an election petition where the petitioner makes only one claim and that is that the election of the returned candidate is void. This claim can be made under Section 100. Section 100(1)(a), (b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under Section 100(1)(d), it would be noticed that what the election petition has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of Section 100(1)(d), but it has also to establish that as a result of the existence of the said ground, the result of the election in so far as it concerns a returned candidate has been materially affected. It is thus obvious that what the Tribunal has to find is whether or not the election in so far as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is: has the election of the returned candidate been materially affected? *And no other enquiry is legitimate or permissible in such a case. This requirement of Section 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of Section 100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote*

in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under Section 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in Section 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry. Therefore, it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of Section 100(1)(d) itself. The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, Section 97(1) has no application to the case falling under Section 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else..... the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition." (**emphasis supplied**)

This judgment was given by Hon'ble Gajendragadkar, J. However, Hon'ble Ayyangar, J., in his minority judgment, did not agree with the interpretation put forward by Hon'ble Gajendragadkar, J. on the correct import of Section 100(1)(d)(iii). Hon'ble Ayyangar, J. had very painstakingly pointed out that the interpretation put forward in the majority

judgment was not correct. In Para 30 of the judgment, after quoting the Section, the learned Judge formulated the question of law in the following words:-

> "what is the import of the words by the improper reception, refusal or rejection of any vote or the reception of any vote which is void?

The learned Judge left out of the consideration the last clause i.e. "the reception of any vote which is void" and considered only the earlier clause. The learned Judge further held that the jurisdiction of the Election Tribunal to declare the election void arises only if it is of the opinion that result of the election has been materially affected by the defects or improprieties set out in clause (i) to (iv), so that even if there are such improprieties or illegalities and yet if the result of the election is not materially affected, the returned candidate would retain his seat. The learned Judge then pointed out that, the Tribunal, in considering whether the result of an election had been materially affected, was confined to the consideration of any impropriety alleged as regards reception of the votes of the returned candidate as well as the improprieties alleged by the petitioner in refusal or rejection of votes stated to have been cast in favour of that petitioner and denials of these charges by the returned candidate. It was further observed that the contention raised was that, in dealing with an objection under Section 100(i)(d), the Tribunal had jurisdiction to proceed only on the allegations made in the petition and that, even where a case had been established for a scrutiny and recount was ordered, it would be so confined and that its jurisdiction would not extend to the cases of complaints by the returned candidate. The learned Judge specifically refused to accept this argument. In para 32, the learned Judge then gave a specific example in the following words:-

> "32 ……. *Let us suppose that A has been declared elected as having secured, say 200 votes as against B who has secured 190. If B in his*

election petition says that A's votes have been wrongly counted as 200, whereas, in fact, if they were recounted they would only be 180 and the Tribunal on a recount finds the allegation in the petition made out and that the returned candidate had obtained only 180 votes the acceptance of Mr. Garg's argument would mean that the election of A would have to be set aside notwithstanding that there has been a similar mistake in the counting of B's votes and if these were properly counted they might not amount to more than 170. Mr. Garg submitted that though if B claimed the seat there would have to be a recount of the votes of both the candidates and this also, only in the event of a recrimination being filed under Section 97, still if no seat was claimed the election of the returned candidate would be set aside and that the latter had no means whereby he could maintain his election notwithstanding that as a fact he had obtained a majority of lawful votes."

19. In para 33, the learned Judge observed:-

"33. …….. I do not see any force in the contention that the returned candidate is confined merely to disproving what is alleged to dislodge him from his seat and is forbidden from proving that votes which under the law had to be counted in his favour, have been wrongly omitted to be so counted. The words in clause (iii) do not impose any such restriction, for they speak of the "improper reception or refusal of any vote", and as the inquiry under Section 100(1)(d) is for ascertaining whether the result of the election has been materially affected which in the context of clause (iii) obviously means "the returned candidate has been proved not to have obtained, in fact, a majority of valid votes", there

appears to me no scope for the argument pressed before us by Mr.Garg."

The learned Judge gave another example, while considering Rule 59 under the Act, in the following words:-

"Let us for instance assume that the voting procedure adopted in an election was that prescribed in rule 59 i.e. by placing the ballot papers in the ballot boxes set apart for the different contesting candidates. The returning officer counts the valid votes cast in the several boxes and declares A elected as having secured 200 votes as against B whose votes are counted as 198. If B files a petition and alleges that the counting was irregular, that the totals of the ballot papers in the result sheet are not properly computed, and that as a matter of fact A's papers if counted, would be 196, Mr. Garg's submission is that though the discrepancy disclosed in the totals is considerable, A cannot prove that there has been a miscounting of B's votes also, and that though if properly counted his total is only 190, still A's election should be set aside. It is said that the position would be different and the anomaly would be overcome in cases where the election petitioner, besides claiming a declaration that the election of the returned candidate is void, also seeks a further declaration that he should be declared duly elected and the returned candidate files a recrimination against such a prayer."

20. The learned Judge proceeded to hold:-

"Therefore we would have the anomalous situation wherein the election of the returned candidate is declared void by reason of his not obtaining the majority of valid votes so far as the decision under Section 100(1)(d) is concerned and then after the matter set out in the claim to the seat and the recrimination is inquired into and decided the election tribunal holds that the returned candidate had a

majority of lawful votes but that this affected only the right of the defeated candidate to claim the seat. In my judgment the provisions of Section 100 read with Section 101 do not contemplate this position of a candidate's election being set aside because he did not get a majority of lawful votes but in the same proceedings and as part of the same inquiry, he being held to have obtained a majority of lawful votes. A construction of Section 100(1)(d) which would lead to this result must, in my opinion, be rejected as unsound."

In para 35 also, the learned Judge had shown, again taking an example of multi-cornered contest, that the interpretation put forward by the majority judgment was incorrect. The learned Judge observed:-

"35. ……. I cannot accept the position that either Section 100(1)(d)(iii) or Section 101(a) contemplate this result which is at once so unjust and anomalous and appears to me to contradict the basic principles underlying election law viz., (1) that apart from disqualification, corrupt practices etc., the election of a candidate who obtains the majority of valid votes shall not be set aside, and (2) no candidates shall be declared duly elected who has not obtained the majority of valid votes."

21. In para 36, the learned Judge had shown the findings where majority proceeded on the misconception of the procedure involved in a scrutiny. In that para, the learned Judge had considered Rule 57(3) also. The learned Judge ultimately observed in para 37:-

"37. …… I do not consider that it is possible to contend that it is beyond the power of the returned candidate to establish this fact which he might do in any manner he likes. He might do this by establishing that though a few votes were wrongly

counted as in his favour, still a larger number of his own votes were counted in favour of the petitioner or that votes which ought to have been counted as cast for him, have been improperly counted as cast in favour of defeated candidates other than the petitioner. Without such a scrutiny it would manifestly not be possible to determine whether the election of the returned candidate has been materially affected or not. Nor do I see anything in the language of clause (iii) which precludes the returned candidate from establishing this……."

In para 38, the language of Section 101 was also considered on the backdrop of Section 100(i)(d)(iii) alongwith Rule 57(1) and 57(3) and ultimately, the learned Judge held that the construction put forward by the majority judgment was not correct.

22. Therefore, the view that has been taken by me is in consonance with the view taken by the minority judgment, which according to the law of *precedents* is not possible. However, the judgment in the case of *Jabar Singh Vs. Genda Lal* (cited supra) was doubted by a Two Judge Bench in the decision in the case of *N.Gopal Reddy Vs. Bonala Krishnamurthy & Ors.* [1987 (2) SCC 58], where the identical controversy was involved. In that case, the learned Judges considered the law laid down in *P.Malaichami Vs. Andi Ambalam* [1973 (2) SCC 170], *Arun Kumar Bose Vs. Mohd. Furkan Ansari* [1984 (1) SCC 91], *Janardan Dattuappa Bondre Vs. Govind Shiv Prasad Chaudhary* [1979 (4) SCC 516] and *Bhag Mal Vs. Ch.Prabhu Ram* [1985 (1) SCC 61] and recommended that this question should be referred to a larger Bench for reconsidering the views expressed in the decision in the case of *Jabar Singh Vs. Genda Lal (cited supra)*. It was specifically noted that in the decision in *Janardan Dattuappa Bondre Vs. Govind Shiv Prasad Chaudhary (cited supra)*, the Division Bench had taken a view which was not strictly in accordance

with the principles laid down in the decision in *Jabar Singh Vs. Genda Lal (cited supra)* and the High Court had refused to grant benefit of 250 votes to the returned candidate while recounting in view of the absence of recriminating notice under Section 97 of the Act. In that case, this Court had held that the claim of the returned candidate that he should be granted benefit of 250 votes cast in his favour although placed in another candidate's package, was justified and his claim could not be rejected in the absence of recriminatory notice under Section 97 as the claim of the returned candidate did not involve reconsideration of validity of the votes. However, unfortunately, it is reported at the Bar that the matter never came to be considered by the larger Bench, though a specific reference was made, probably on the ground that the period of election was over by the time the matter came up before this Court again.

23. Now, the law is settled that a Two Judge Bench cannot make a direct reference to Seven Judge Bench and can only make a reference to Three Judge Bench. Therefore, I am not in a position to recommend a reference to a larger Bench to reconsider the decision in the case of Jabar Singh Vs. Genda Lal (cited supra). However, in view of the peculiar history of this controversy and further, in view of importance of the question and its direct impact on the principle of majority of valid votes for winning an election, it would be worthwhile if the position is reconsidered.

24. It must be noted that, the present matter, with which we are dealing, more or less depends upon incorrect acceptance of votes but not the void votes. According to the election petitioner, the elected candidate has received some votes which were cast by some impersonators of the dead voters. In reality, therefore, the question before the present Election Tribunal is whether the election petitioner proves that some dead voters were impersonated and in their name, votes were cast. Again, it will have to be proved by the election petitioner that those impersonated had voted in favour of the

elected candidate because that will be the only way to prove that the void votes have affected the result in favour of elected candidate materially. The question of void votes was not considered in *Jabar Singh's* case. Even, in the minority judgment, Hon'ble Ayyanger, J. restricted himself to the earlier part of clause 100 (1) (d) (iii) and left the clause of "the reception of any vote which is void". The import of words "the reception of any vote which is void" would, in my opinion, cover each and every void vote received by each and every candidate because void vote cannot be counted: whether it is cast in favour of an elected candidate or any other candidate contesting the elections. Once the real import of clause "the reception of any vote which is void" is realized, it becomes clear that, in recount of the votes which are void votes, those would have to be excluded and for that purpose, the returned candidate can raise a plea by way of defence that the void votes were cast either in favour of elected candidate or any other defeated candidate. He can at least raise a plea that such void votes were actually cast and he would certainly be justified in raising a plea that the void votes were cast not only in the polling Stations named in the election petition, but in some other polling Stations also. Therefore, if recount was to be ordered, the recount cannot be restricted only to the named polling Stations in the election petition, but it would have to be a general recount where the void votes would have to be avoided. Therefore, there would have to be an opportunity to the elected candidate to prove that there were void votes in other polling Stations also and for that purpose, there should be recount of all the votes of all the Polling Stations. It is only thereafter that the true position as regards majority of votes could be obtained. In this view also, I cannot agree with my learned brother Sharma J, as also the Judgment of the High Court holding that it is only the votes cast in the named polling Stations which are liable to be counted and not those which have been named in the questioned paragraphs which have been ordered to be deleted from the Written Statement of the elected candidate.

25. There is one more reason why I felt compelled to differ with my learned brother and recommend reconsideration of this question.

26. The plain language, according to me, does not suggest that where the declaration is not prayed for by the election petitioner, the elected candidate cannot raise any plea in his written statement that, in fact, he has secured the majority of votes. In my opinion, the plea raised herein is not a recriminatory plea within the meaning of Section 97 of the Representation of the People Act, 1950. What is raised is a mere plain defence that, even if there was going to be a recount, then it should be a recount of all the votes and not of the votes cast only in his favour and for that purpose, he would be allowed to prove that it is not only in the particular polling stations that the votes were cast in the name of dead persons, but they were also cast in other polling stations. All that the elected candidate is doing here is trying to show that it is he who is actually the elected candidate having secured the majority of valid votes.

27. At the time when *Jabar Singh's* case (cited supra) was decided, the amended provisions of Order VIII, Rule 6A of the Code of Civil Procedure providing for counter claim was not available on the Statute. That provision came only by way of amendment later on. Though, the concept of counter claim was not unknown, even in the absence of a specific provision therefor, introduction of a specific provision for raising the counter claim would, in my opinion, be a relevant factor for considering as to whether a candidate, in the absence of any recrimination, could insist upon counting of the votes cast in favour of the other losing candidates. The provisions of Order VIII, Rule 6A have not been considered in the later decisions. In my opinion, raising of a counter claim by way of a valid defence would still be permissible considering the broad language of that provision. Shri Singh, very earnestly argued that an election petition has to be tried in accordance with Civil Procedure Code and, therefore, the amended provisions

providing for laying of a counter claim has to be read in favour of the elected candidate for raising a plea that it is he, who has secured the maximum votes. The recount order should, therefore, be not limited to counting of his votes alone, but it should be a general recount in respect of the votes secured by all the contesting candidates. Shri Singh, therefore, urged that, by introducing the paragraphs, which have been ordered to be struck off from the written statement of the appellant, the appellant, who was an elected candidate, had raised a valid defence by way of a counter claim. The argument is undoubtedly a novel one and has not been so far considered by this Court. At this juncture, I must point out again, at the cost of repetition that, in ordering counting of the votes of the elected candidate alone, the whole election process would stand prejudiced, inasmuch as, then, even if some invalid votes are cast in favour of the other candidates or void votes are cast in the election, those votes would not be counted and in that case, there could be no correct reflection in respect of the votes secured by each candidate.

28. This is apart from the fact that a very unfair advantage can be secured by an election petitioner in favour of the losing candidate by deliberately not claiming any declaration either in favour of the election petitioner or in favour of any other losing candidate so that the elected candidate would be rendered completely helpless in showing that he alone is a candidate having secured majority of votes. As I have already expressed, securing a majority of votes is the very essence of the democratic elections and the democracy being a part of the basic structure of our Constitution, the question involved herein gains all the more importance. I may point out here that the theory of basic structure of the Constitution also was not available when *Jabar Singh's* case (cited supra) was decided. In my opinion, the interpretation put forth in *Jabar Singh's* case, in a majority decision would, therefore, require reconsideration, more particularly, in view of the minority decisions therein which

is more in accord with the principles of securing majority votes in a democratic elections. The very roots of the democracy would be shaken if the majority view expressed in *Jabar Singh's* case, which was already recommended to be reconsidered, is valid. For these reasons, I am not in a position to agree with my learned brother, nor can I agree with the judgment of the High Court (Election Tribunal).

In short, my conclusions are as follows:-

(1) *Jabar Singh's* case (cited supra), which was referred to the Seven Judge Bench needs reconsideration, since the question involved therein goes to the very root of the democratic election process.

(2) The interpretation put forward to the provision of Section 100(1)(d)(iii) read with section 97 of the Representation of the People Act would be very unfair for an elected candidate, particularly where the election petition seeks for recount of votes. In such a petition where the question involved is of recount, it will be extremely unfair to count only the votes of returned candidate and ignore all his objections regarding the votes improperly accepted in case of the other candidates or the other candidates having secured void votes. Such unfairness cannot be permitted at least to maintain the purity of election process.

(3) The observations in *Jabar Singh's* case particularly in para 10 thereof, could amount to *obiter dicta,* particularly, in view of the factual position in Jabar Singh's case. It is to be remembered that the observations in para 10 were taken only by way of an example. This position is all the more obtained because in that case though the declaration was claimed, there was no recrimination filed and, therefore, the observations in *Jabar Singh's* Case would become a binding law only in case where though a declaration is claimed in favour of other candidate than the elected one, yet the elected candidate has not claimed any recrimination. In short, the observations made in para 10 thereof may not become a binding law in case where no declaration is sought for at all and, therefore, no recrimination is claimed by the elected candidate.

(4) When a recount is ordered at the instance of a election petitioner, it cannot be a partial recount. It has to be a general recount where the void votes can be located and ignored to arrive at a conclusion that this will also apply to the votes improperly accepted of the other candidates than the elected candidates. It is only then that a correct position could be arrived at as to which candidate has, in fact, secured majority of votes. It has to be remembered that securing of majority of votes is the basis of democratic election.

(5) In the wake of amended provision of Order VIII, Rule 6 of the Code of Civil Procedure introducing counter claim, the defendant in this case – the elected candidate, could still raise his defence by way of a counter claim. The language of Section 97 of the Representation of the People Act, 1950, which is in the nature of positive language, does not bar raising of any such defence.

29. In view of the difference of opinion, the papers be kept before the Hon'ble, the Chief Justice of India for referring the matter to an appropriate bench.

D.G. Referred to the matter larger bench.

DAHYABHAI RANCHHODDAS DHOBI AND ANR.
v.
STATE OF GUJARAT AND ORS.
(Civil Appeal No. 5882 of 2010)

JULY 23, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Land Acquisition Act, 1894:

s.5A – Hearing/enquiry under – Plea of landowners that hearing u/s.5A not held – Held: The affidavit of land acquisition officer specifically stated that hearing of objections was fixed from time to time and landowners were heard through their lawyers – In view of specific information, it is incorrect to say that enquiry/hearing in terms of s.5A was not held.

s.6(2) – Locality publication – s.6 notification published in gazette and public notice displayed at the office of Mamlatdar of the concerned ward – Therefore it is incorrect to say that no publication of notice in the locality u/s.6(2) was effected.

s.11A – Award – Limitation – s.6 notification published on 19.4.1990 – Award u/s.11A published on 18.4.1992 – Held: Award published within 2 years from publication of s.6 notification.

Acquired land – Plea that land was designated as residential and hence authorities cannot establish a school thereon – Held: Not tenable as land in question was reserved for school in the sanctioned development plan u/s.17 of Gujarat Town Planning and Urban Development Act, 1976 – It is for the authorities to take a decision understanding the need and necessity of establishing primary school in the area.

The respondent-State initiated acquisition proceedings under the Land Acquisition Act, 1894 for the purpose of construction of school on the suit land owned by the appellants. The appellants challenged the acquisition proceedings on the ground that there was no hearing/enquiry in terms of Section 5A of the Act; that the locality publication was not effected under Section 6(2); that the award under Section 11A was not passed within two years from the date of last publication of notification under Section 6 which vitiated the acquisition proceeding; that after change of classification of the suit land namely, residential use, the respondents could not establish a primary school; and that in view of the fact that the area was designated as residential congested by houses on either side, it was not a fit place for establishing a school.

Dismissing the appeal, the Court

HELD: 1. With regard to the first objection as to the enquiry under Section 5A of the Land Acquisition Act, 1894, though the appellants stated that they were not given an opportunity of being heard, however, in the counter affidavit filed by the Special Land Acquisition Officer, Surat before the High Court it was specifically asserted that notification under Section 4 in the Official Gazette was published on 09.03.1989, public notice was displayed at the office of Mamlatdar of the concerned Ward on 20.04.1989 and hearing of objections under Section 5A was fixed on 20.05.1989. In para 4 of the counter affidavit, the Land Acquisition Officer specifically stated that appellants were given several opportunities for hearing their objections from time to time. The hearing was fixed on 29.05.1989, 05.06.1989, 12.06.1989, 20.09.1989, 28.09.1989 and 16.10.1989 and the appellants were heard through their lawyer. In view of the above

specific information, the contention contrary to the same is liable to be rejected. [Para 8] [582-F-H; 583-A-B]

2. With regard to the second objection that locality publication was not effected under Section 6(2) of the Act, in the same counter affidavit filed by the Land Acquisition Officer, it was asserted that publication of notification under Section 6 was published in the Gazette dated 21.03.1990. Public Notice displayed at the office of Mamlatdar of the concerned Ward on 19.04.1990. In the light of the said information, the claim that no publication of notice in the locality under Section 6(2) cannot be accepted. [Para 9] [583-B-C]

Avinash Mehrotra v. Union of India and Ors. **(2009) 6 SCC 398;** *Krishi Utpadan Mandi Samiti and Anr. v. Makrand Singh and Ors.* **(1995) 2 SCC 497;** *Eugenio Misquita and Ors. v. State of Goa and Ors.***(1997) 8 SCC 47;** *S.H. Rangappa v. State of Karnataka and Anr.* **(2002) 1 SCC 538;** *General Manager, Department of Telecommunications, Thiruvananthapuram v. Jacob S/o Kochuvarkey Kalliath (Dead) By Lrs. and Ors.* **(2003) 9 SCC 662;** *Bihar State Housing Board v. State of Bihar and Ors.* **(2003) 10 SCC 1;** *Kunwar Pal Singh (dead) by Lrs. v. State of U.P. and Ors.* **(2007) 5 SCC 85 – relied on.**

3. With regard to the third objection that the award under Section 11A was not made within two years from the date of last publication of Notification under Section 6, it is clearly indicated in the reply affidavit filed by the Special Land Acquisition Officer that the notification under Section 6 was last published on 19.04.1990, by affixing a copy of the Notification on the notice board of the office of City Mamlatdar, Surat and also by affixing the same in ward No.4 of Surat city. Hence the period of two years stipulated in Section 11A would begin to run from 19.04.1990 and, therefore, the publication of the award

under Section 11 of the Act on 18.04.1992 was within the stipulated time limit of two years. In such circumstances, this contention also is liable to be rejected. [Paras 10, 17] [583-D; 594-E-G]

4. The counter affidavit filed by the Director of Planning, Surat Municipal Corporation stated that the suit land was reserved for school purpose in the development plan sanctioned by the State Government under the provisions of Gujarat Town Planning and Urban Development Act, 1976. As per Section 20 of the said Act, the acquiring body, namely, Surat Municipal Corporation is required to acquire the land under the Land Acquisition Act as the impugned land was reserved for school purpose. Further, inasmuch as the suit land was kept under reservation for school in the sanctioned development plan for the State Government under Section 17 of the Gujarat Town Planning & Urban Development Act, it is the duty of the Corporation to acquire the land for implementing the provisions of the same. In view of the same, this contention is also liable to be rejected. [Para 18] [595-A-D]

5. In respect of the claim of the appellants that in view of existence of many schools in and around the vicinity, there was no need to establish a school in the land of the appellants, the Director of Planning, Surat Municipal Corporation, in the counter affidavit stated that there was no municipal school near the site in question and that the schools of the Corporation which were located in Begampura, Moti Talkies, Mumbaivad, Shetranjivad, Viramgami Maholla were very far from the land under acquisition and due to increase in population in the city of Surat, they were justified in establishing a school for providing primary education to the children in the said area. In respect of 'need' and 'necessity', it is for the Government and their authorities to take a decision

considering various aspects. If such a decision was taken based on materials it was not for the Court to doubt their claim. It was also stated that the Surat Municipal Corporation was required to pay the amount of compensation to the tune of Rs.10,54,901.95 and the said amount was already deposited with the Government Treasury on 27.05.1992. In view of the said information, the contention of the appellants is to be rejected. [Para 19] [595-D-H; 596-A]

Avinash Mehrotra v. Union of India and Ors. **(2009) 6 SCC 398 – referred to.**

Case Law Reference:

(2009) 6 SCC 398	**relied on**	**Para 5**
(1995) 2 SCC 497	**relied on**	**Para 11**
(1997) 8 SCC 47	**relied on**	**Para 12**
(2002) 1 SCC 538	**relied on**	**Para 13**
(2003) 9 SCC 662	**relied on**	**Para 14**
(2003) 10 SCC 1	**relied on**	**Para 15**
(2007) 5 SCC 85	**relied on**	**Para 16**
2009) 6 SCC 398	**referred to**	**Paras 5, 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5882 of 2010.

From the Judgment and Order dated 12.01.2009 of High Court of Gujarat at Ahmedabad in Special Civil Application No. 5663 of 1990.

Ranjit Kumar, Prashant G. Desai, B.K. Biju, Dinesh Kumar Garg, Kaushal D. Pandya, S.C. Patel, Hemantika Wahi and Renuka Sahu for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 12.01.2009 passed by the High Court of Gujarat at Ahmedabad in Special Civil Application No. 5663 of 1990 with Civil Application No. 3458 of 2006 whereby the High Court dismissed the petition preferred by the appellants herein.

3. Brief facts:

a) According to the appellants, they are owners of the land in question measuring 848.66 sq.m., Nandh No. 2190/P, Ward No.4 of Surat City. The State of Gujarat initiated acquisition proceedings under the Land Acquisition Act, 1894 (hereinafter referred to as the "Act") for construction of a school in the land in question under the Surat Municipal Corporation. The appellants objected to the said acquisition on the ground that:

(i) this is the only land for them for carrying on the business of washermen and they are using this land for the purpose of their livelihood.

(ii) There are vacant/open lands adjoining to the land in question.

(iii) Within a radius of 1 km., number of schools are available particularly being run by the Surat Municipal Corporation.

(iv) While acquiring the land, the respondents have not followed the provisions of Sections 4, 5, 6 and 11A of the Act.

b) On the other hand, it is the stand of the State Government that:

(i) the land is required for establishing a primary school by the Surat Municipal Corporation.

(ii) They fully complied with the statutory notices and other requirements.

(iii) The appellants did not avail the opportunity of participating in the 5A enquiry by filing objections.

(iv) The declaration made under Section 6 of the Act is within time.

(v) Award under Section 11A has been passed within the statutory period. Since the establishment of school is for a public purpose and in view of compliance of all the statutory formalities, there is no merit in the appeal and prayed for dismissal of the same.

4. Heard Mr. Ranjit Kumar, learned senior counsel for the appellants and Mr. Prashant G. Desai, learned senior counsel for the Surat Municipal Corporation and Ms. Hemantika Wahi, learned counsel for the State of Gujarat.

5. Mr. Ranjit Kumar, learned senior counsel for the appellants has raised the following contentions:

a) there was no hearing/enquiry in terms of Section 5A of the Act which is mandatory;

b) the locality publication was not effected under Section 6(2);

c) the Award passed under Section 11A was not made within two years from the date of last publication of notification under Section 6, therefore the acquisition is vitiated;

d) after change of classification of the land in question, namely, residential use, the respondents are not permitted to establish a primary school which is not permissible;

e) In view of the fact that the area being designated as residential congested by houses on either side, it is not a fit place for establishing a school as observed by this Court in *Avinash Mehrotra* vs. *Union of India and Others*, (2009) 6 SCC 398.

6. On the other hand, Mr. Prashant G. Desai, learned senior counsel for the Surat Municipal Corporation has submitted that in view of Section 12 (2) (b) and Section 20 (1) of the Gujarat Town Planning & Urban Development Act, 1976, the State Government is well within their powers in establishing a primary school in Surat. He further submitted that all the statutory provisions have been strictly complied with and the declaration under Section 6 and Award under Section 11A were duly made within the prescribed time. Ms. Hemantika Wahi, learned counsel appearing for the State, by drawing our attention to specific averments in the counter affidavit submitted that the appellants having not filed objections in the enquiry under Section 5A, all the three modes of publication as contemplated under Section 6 were duly published and made and Award passed within the prescribed period, there is no infirmity in the acquisition proceedings and prayed for dismissal of the appeal.

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

8. With regard to the first objection as to enquiry under Section 5A of the Act though the appellants have stated that they were not given an opportunity of being heard, in the counter affidavit filed by the Special Land Acquisition Officer, Surat before the High Court it has been specifically asserted that notification under Section 4 in the Official Gazette was published on 09.03.1989, public notice displayed at the office of Mamlatdar of the concerned Ward on 20.04.1989 and hearing of objections under Section 5A was fixed on 20.05.1989. In para 4 of the counter affidavit, the Land Acquisition Officer has specifically stated that appellants were

given several opportunities for hearing their objections from time to time. The hearing was fixed on 29.05.1989, 05.06.1989, 12.06.1989, 20.09.1989, 28.09.1989 and 16.10.1989 and the appellants were heard through their lawyer Mr. Kashyap H. Shukla. In view of the above specific information the contention contrary to the same is liable to be rejected.

9. The second objection is that locality publication was not effected under Section 6(2) of the Act. In the same counter affidavit, the Land Acquisition Officer has asserted that publication of notification under Section 6 was published in the Gazette dated 21.03.1990. Public Notice displayed at the office of Mamlatdar of the concerned Ward on 19.04.1990. In the light of the said information, the claim that no publication of notice in the locality under Section 6(2) cannot be accepted.

10. The third and the important objection relates to passing of Award under Section 11A. It is the stand of the appellants that Award was not made within two years from the date of last publication of Notification under Section 6 hence the acquisition is vitiated. Since heavy reliance was placed on the said objection, it is useful to refer Section 6 and Section 11A of the Act which reads thus:

> *"6. Declaration that land is required for a public purpose.-* (1) Subject to the provision of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (1) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2);

> *Provided that* no declaration in respect of any particular land covered by a notification under section 4, sub-section (1)-
>
> (i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984 shall be made after the expiry of three years from the date of the publication of the notification; or
>
> (ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984 shall be made after the expiry of one year from the date of the publication of the notification:
>
> *Provided further that* no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.
>
> *Explanation 1.* - In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.
>
> *Explanation 2.* - Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.
>
> (2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situated of which at least one shall be in the regional language, and the Collector shall

cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing.

11A. Period within which an award shall be made.- (1) The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceeding for the acquisition of the land shall lapse:

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencement.

Explanation **-** In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded."

11. These provisions were considered by this Court in various decisions. In *Krishi Utpadan Mandi Samiti and Another* vs. *Makrand Singh and Others*, (1995) 2 SCC 497,

the question that was posed for consideration was whether the High Court was right in its conclusion that the declaration under Section 6 was published after three years and the last of the publications shall be the last date for the purpose of computing three years' period envisaged in clause (i) of the proviso to sub-section (1) of Section 6 of the Act as amended by Land Acquisition (Amendment) Act, 1984. The discussion and conclusion in paras 4 and 5 are relevant:

"4. The question, therefore, is that which date of the publications in three steps i.e. publication in the Gazette, two newspapers and local publication to be the last date for the purpose of computing three years' limitation prescribed in clause (*i*) of the proviso to Section 6(1) of the Act. Prima facie, it gives an impression that the last of any of the three steps puts in motion, the running of limitation of three years. But on deeper probe, it does not appear to be so and such a construction would easily defeat the public purpose and deflects the course of justice. So it is necessary to understand the scheme and policy of the Act to get the crux of the question. It is seen that sub-section (1) of Section 4 gives power of eminent domain to the State to acquire the land, whenever it appears to it that the land is needed or likely to be needed for any public purpose or for any company, by a notification published in the Official Gazette and two daily newspapers circulating in that area and at least one of them should be in the regional language and also the Collector is enjoined to cause public notice of the substance of notification to be given at convenient places in the said locality in which the land is situated. It is also mentioned thereunder that the last date of such publication and the giving of such public notice "*being hereinafter referred to*" as the date of publication of the notification. It would be seen that the purpose of notification under Section 4(1) is an intimation to the owner or person having an interest in the land that Government exercised the power of eminent domain in

relation to his land and for public purpose his land is needed or likely to be needed; puts an embargo on his freedom to deal with the land as an unencumbered land and also pegs the price of the land prevailing as on that date. It also is a caveat to the Collector to make the award under Section 11 as well as to determine the market value prevailing as on the last of the dates to be the date and the award should be made within a period prescribed by Section 11-A, lest the entire acquisition shall stand lapsed. The word 'hereinafter' is for such purposes as well as for the purpose of determination of the compensation under Chapter III of the Act as well. Therefore, the word 'hereinafter' referred to as the last date of the publication of the notification is the date from which the prevailing prices of the land is to be computed etc.

5. Clause (*i*) of the proviso to Section 6(1) mandates the publication of the declaration in the Official Gazette and it should be within three years from the date of the publication of the notification under Section 4(1) i.e. the last of the dates referred to in Section 4(1). The word 'publish' emphasises the act accomplished i.e. declaration under Section 6(1) being published in the Official Gazette. The last date under Section 6(2) shall be the date for the purposes "hereinafter referred to" would be not for computing the period of three years prescribed in clause (*i*) of proviso to Section 6(1) of the Act as it was already done, but purposes to be followed hereinafter. Otherwise language would have been "hereinbefore done". Sub-section (2) as such did not prescribe any limitation within which the declaration under Section 6(1) or other steps hereinafter to be taken, in other words, the steps to be taken thereafter in making the award under Section 11 or in computation of the period prescribed in Section 11-A. The publication of the declaration in two daily newspapers having circulation in the locality one of which is in the regional language and the publication of the substance of

the declaration in the locality are ministerial acts and is a procedural part. It appears that these publications are required to be done to make the declaration published in the manner, to be conclusive evidence of the public purpose under Section 6(1) and also to provide limitation to make the award under Section 11 by the Collector. In other words, the limitation prescribed under Section 11-A is for the purpose of making the award and if the Collector fails to do so, the entire proceeds under Sections 4(1) and 6(1) shall stand lapsed. If this consistent policy of the Act is understood giving teeth to the operational efficacy to the scheme of the Act and public purpose the Act seeks to serve, we are of the considered view that publication in the Official Gazette already made under clause (*i*) of proviso to sub-section (1) of Section 6 is complete, as soon as the declaration under Section 6(1) was published in the Official Gazette. That will be the date for the purpose of computation of three years' period from the last of the dates of the publication of the notification under Section 4(1). The procedural ministerial acts prescribed under sub-section (2) are only for the purpose of the procedure to be followed '*hereinafter*', in other words, the steps to be taken subsequent to the publication of the declaration under Section 6(1) of the Act. We cannot agree with Shri Rana, the learned Senior Counsel, that the date of making the declaration by the Secretary to the Government or the authorised officer is the date for computing period of three years. Equally, we cannot agree with the learned counsel for the respondents, Shri Upadhyay, that publication of the substance being the last date from which the period of three years needs to be computed. Acceptance of either contention would easily defeat the public policy under the Act by skilful manner of management with the lower level officials.

12. In *Eugenio Misquita and Others* vs. *State of Goa and Others*, (1997) 8 SCC 47, similar issue was considered by this

Court. K. Venkataswami, J. speaking for the Bench has concluded as follows:

> **"9.** Let us examine whether the learned counsel is right in his submission. As seen from the above extracts of relevant provisions, while Section 4(1) commands publication of notification under that section, Section 6 speaks of the declaration being made to the effect that any particular land is needed for public purpose or for a company. There are judicial decisions that have interpreted the word "made" to mean "published" for the reasons stated in those decisions. Therefore, strictly speaking, but for those judicial decisions the date of making of the declaration under Section 6(1) will be the relevant date for reckoning the period of limitation. However, in the interest of the general public, the courts have taken the view that the declaration made will stand accomplished only when it is published. This publication has, therefore, nothing to do with the publication referred to in Section 6(2) of the Act which is for a different purpose, inter alia, for reckoning the limitation prescribed under Section 11-A of the Act. This construction is supported by the language employed in Section 6(2) of the Act. In particular, the word "hereinafter" used in Section 6(2) will amply prove that the last of the series of the publication referred to under Section 6(2) is relevant for the purposes coming thereafter, namely, for making award under Section 11-A. The language employed in second proviso to Section 6(1) also supports this construction. Therefore, the contention of learned counsel cannot be accepted.
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> **10.** This is also the view taken by this Court in *Krishi Utpadan Mandi Samiti case*. The learned Judges framed the question thus: (SCC p. 499, para 4)
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> "*4*. The question, therefore, is that which date of the publications in three steps i.e. publication in the Gazette, two newspapers and local publication to be the last date for the purpose of computing three years' limitation prescribed in clause (*i*) of the proviso to Section 6(1) of the Act."
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> **11.** It may be noted that this Court in that case was considering a case which arose before the coming into force of Amending Act 68 of 1984. The case on hand has arisen after Amending Act 68 of 1984. The only difference is the period of limitation; for the cases arising before the Amending Act it was three years and one year for the cases arising after the Amending Act. Otherwise, the principle is the same.
>
> **16.** The above view of this Court lends support to the view that for the purpose of calculating the limitation prescribed under clause (*ii*) of the first proviso to Section 6(1), it is not the last of the publication in the series that should be taken into account, but the publication that was made in the first instance under Section 6.
>
> **17.** In the light of the law laid down by this Court, we have no hesitation to hold that the declaration published under Section 6 of the Act was well within one year and the challenge to the same has been rightly rejected by the High Court. However, the view taken in the judgment of the High Court under appeal that the relevant date for reckoning the period of limitation will be the date of making of the declaration under Section 6, may not be correct. As held in *Krishi Utpadan Mandi Samiti case* mere making of declaration is not enough. The making of declaration under Section 6 is complete for the purpose of clauses (*i*) and (*ii*) of the first proviso to Section 6(1) when it is published in the Official Gazette."

After holding so, since the Notification under Section 4 was lastly published on 06.08.1992 in the Official Gazette and declaration under Section 6 was published in the Gazette on

05.08.1993, this Court found that the same is well within one year and accordingly dismissed the appeal of the landowners.

13. In *S.H. Rangappa* vs. *State of Karnataka and Another*, (2002) 1 SCC 538, a three-Judge Bench of this Court speaking through Kirpal, J. has observed thus:

> **7.** Declaration under Section 6 is preceded by issuance of a notification under Section 4 which indicates the intention of the Government to inter alia acquire land for a public purpose. Pursuant to the issuance of the same, objections can be filed and after hearing the same, Section 6(1) enables the appropriate authority if it is satisfied, after considering the report made under Section 5-A of the Act, that if any particular land is needed for a public purpose, then a declaration is to be made under the signature of an appropriate officer. Where notification under Section 4 is published after the commencement of the Land Acquisition Amendment Act, 1984, as in the present case, proviso (*ii*) requires that such a declaration shall not be made after the expiry of one year from the date of the publication of Section 4 notification.
>
> **8.** We wish to clarify that the words "publish" and "from the date of publication of the notification" occurring in proviso (*ii*) to Section 6(1) refer to the publication of Section 4 notification and have no reference to the publication of any notification under Section 6. Under Section 6(1), it is only a declaration which is required to be made, the time-limit being within one year of the publication of Section 4 notification. The main purpose for the issuance of a declaration under Section 6 is provided by sub-section (3), namely, that the declaration is conclusive evidence that the land is needed inter alia for a public purpose and after the making of the declaration the appropriate Government may acquire the land in the manner provided by the Act. Sub-section (2) requires the declaration to be published in the

> Official Gazette and in two daily newspapers circulating in the locality in which the land is situate and in addition thereto the Collector is also required to cause public notice of the substance of the declaration to be given in the convenient places in the said locality.
>
> **9.** It is pertinent to note that sub-section (2) of Section 6 does not prescribe any time-limit within which the declaration made under Section 6(1) is to be published. It is well known that after an order or declaration is made there can be a time gap between the making of the order or a declaration and its publication in the Official Gazette. Whereas the time-limit for the making of an order is provided under Section 6(1), the legislature advisedly did not provide for any time-limit in respect of the steps required to be taken under sub-section (2) of Section 6. If the contention of Mr G.L. Sanghi, the learned Senior Counsel for the appellant is correct, the effect would be that not only the declaration would have to be published within the time prescribed under the proviso to Section 6(1) but all other steps, like publication in the daily newspaper and the Collector causing public notice of the declaration to be given at convenient places in the locality, must also be completed within a period of one year of Section 4 notification. This could certainly not be a consequence contemplated by the legislature. As already observed, the purpose of Section 6 notification being to give a final declaration with regard to the need of the land for public purpose, the interest of the landowners was sufficiently safeguarded with the requirement of the making of the declaration under Section 6(1) within a prescribed period. It is difficult for us to read into sub-section (2) the provisions of the proviso to Section 6(1) which relate to the time-limit for issuance of the notification under Section 6(1).
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> **10.** This view which we have expressed hereinabove finds

support from a decision of a Bench of four Judges of this Court in the case of *Khadim Hussain* v. *State of U.P."*

14. In *General Manager, Department of Telecommunications, Thiruvananthapuram* vs. *Jacob S/o Kochuvarkey Kalliath (Dead) By LRs. and others*, (2003) 9 SCC 662, this Court again reiterated that period of two years from the date of publication of the declaration prescribed under Section 11A for passing the Award, must be calculated from the last of the series of the publications referred to under Section 6(2). After holding so, Doraiswamy Raju, J. speaking for the Bench has held that last of the series of publications being publication in daily newspapers, the period of two years must be calculated from the date of such publication.

15. In *Bihar State Housing Board* vs. *State of Bihar and Others*, (2003) 10 SCC 1, Arijit Pasayat, J. while considering the rival contentions with reference to Sections 4 (1), 6(1), 6(2) and 11A of the Act has held thus:

"9. If one takes note of the parenthesis appearing in sub-section (2) of Section 6, it is clear that reference to the subsequent provisions of the Act to the date of publication of declaration has to be determined as the last of the dates of the publication and the giving of public notice. As the date of publication by local publication was the last at that point of time i.e. 15-3-1991, the award on 25-3-1992 was not beyond the prescribed period of limitation."

16. In *Kunwar Pal Singh (dead) by LRs* vs. *State of U.P. and Others*, (2007) 5 SCC 85, Panta, J. speaking for the Bench held:

"17. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the declaration under Section 6. In ordinary course, therefore, when the Government fails to make an award within two years of the

declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, the proceedings will lapse. The period of two years referred to in Section 11-A shall be computed by counting from the last of the publication dates, as per the prescribed modes of publication.

25. Again, in *Bihar State Housing Board* v. *State of Bihar* this Court reiterating the proposition of law has held that modes of publication of declaration prescribed under Section 6(2) are conjoint and cumulative and all of them must be resorted to and completed. Sub-section (2) of Section 6 of the Act necessarily makes it abundantly clear that the last of the dates of the publication and giving of such public notice shall "hereinafter" be referred to as the date of publication of the declaration and limitation period of two years for making award under Section 11-A has to be counted as the last of the dates out of the three modes of publication specified in Section 6 of the Act."

17. In the case on hand, it is clearly indicated in the reply affidavit filed by the Special Land Acquisition Officer that the notification under Section 6 was last published on 19.04.1990, by affixing a copy of the Notification on the notice board of the office of City Mamlatdar, Surat and also by affixing the same in ward No.4 of Surat city. Hence the period of two years stipulated in Section 11A would begin to run from 19.04.1990 and, therefore, the publication of the Award under Section 11 of the Act on 18.04.1992 was within the stipulated time limit of two years. In such circumstances, this contention also is liable to be rejected as devoid of any merit.

18. Learned senior counsel for the appellants submitted that inasmuch as the respondents, by a notification, has changed the classification of the land in question and designated as "residential use" at this moment, they are not

permitted to set up a school in the land in question. In the counter affidavit filed by the Director of Planning, Surat Municipal Corporation has highlighted that the land in question has been reserved for school purpose in the development plan sanctioned by the State Government under the provisions of Gujarat Town Planning and Urban Development Act, 1976. As per Section 20 of the said Act, the acquiring body, namely, Surat Municipal Corporation is required to acquire the land under the Land Acquisition Act as the impugned land is reserved for school purpose. Further, inasmuch as the land in question is kept under reservation for school in the sanctioned development plan for the State Government under Section 17 of the Gujarat Town Planning & Urban Development Act, it is the duty of the Corporation to acquire the land for implementing the provisions of the same. In view of the same, this contention is also liable to be rejected.

19. Mr. Ranjit Kumar, learned senior counsel for the appellants has also submitted that in view of existence of many schools in and around the vicinity, there is no need to establish a school in the land of the appellants. In respect of the said claim, the Director of Planning, Surat Municipal Corporation, in the counter affidavit has stated that there is no municipal school near the site in question and that the schools of the Corporation which are located in Begampura, Moti Talkies, Mumbaivad, Shetranjivad, Viramgami Maholla are very far from the land under acquisition and due to increase in population in the city of Surat, they are justified in establishing a school for providing primary education to the children in the said area. In respect of 'need' and 'necessity', it is for the Government and their authorities to take a decision considering various aspects. If such a decision is taken based on materials it is not for the Court to doubt their claim. It is also stated that the Surat Municipal Corporation is required to pay the amount of compensation to the tune of Rs.10,54,901.95 and the said amount has already been deposited with the Government Treasury on 27.05.1992. In view of the above information, the

contention of learned senior counsel for the appellants is to be rejected.

20. Finally, learned senior counsel for the appellants, by drawing our attention to the recent decision of this Court in *Avinash Mehrotra* vs. *Union of India and Others*, (2009) 6 SCC 398 submitted that in view of the strict conditions issued by this Court for establishing a school particularly in a crowded city, the respondents cannot fulfill those conditions and on this ground also the acquisition proceeding is liable to be dropped. It is true that in view of what had happened in Lord Krishna Middle School in Kumbakonam in the State of Tamil Nadu, this Court issued several directions and conditions, safety measures and standards for establishing a school. In our view, it is the duty of the State and their educational authorities to adhere to all those conditions before commencing a school in the land in question.

21. In the light of the above discussion, we are unable to sustain any of the objections raised by the appellants. On the other hand, we are in entire agreement with the stand taken by the State as well as the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed, however, with no order as to costs.

D.G. Appeal dismissed.