VALLIYAMMAL AND ANOTHER
v.
SPECIAL TEHSILDAR (LAND ACQUISITION) AND ANOTHER ETC.
(Civil Appeal Nos. 6127-6128 of 2011)

AUGUST 01, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

Land Acquisition Act, 1894 – ss. 4(1), 18(1) and 54 – Compulsory acquisition of small parcels of land owned by appellants by the State Government for construction of houses by State Housing Board – Market value fixed as also compensation determined by the Reference Court – High Court substantially reduced the compensation – On appeal, held: High Court while deducting 40% towards development charges, ignored its own finding that the acquired land was situated in the vicinity of the residential colonies developed by the Housing Board – Thus, the High Court could have at best applied 1/3rd deduction towards development cost – The acquired land is a semi-urban land and has huge potential for being developed as housing site – High Court should have added 10% per annum escalation in the price specified in the sale deeds relied upon for fixing market value of the acquired land – Majority of the landowners have been deprived of their entire landholding and have waited for 14 to 20 years for getting the compensation – It would be wholly unjust to deprive them of their legitimate right by approving the 20% deduction made by the High Court – Accordingly the market value of the acquired land is fixed and the landowners would get solatium, interest and other statutory benefits in accordance with the provisions of the Act.

Various small parcels of land were acquired by certain Notifications by the State Government for construction of houses by State Housing Board. The

High Court reduced the market value fixed by the Reference Court and as such the amount of compensation determined by the Reference Court was substantially reduced. Thus, the appellants-landowners filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 In fixing market value of the acquired land, which is undeveloped or under-developed, the courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. [Para 17] [309--F-G]

Kasturi v. State of Haryana **(2003) 1 SCC 354: 2002 (4) Suppl. SCR 117** *Tejumal Bhojwani v. State of U.P.* **(2003) 10 SCC 525:2003(2) Suppl. SCR 1044;** *V. Hanumantha Reddy v. Land Acquisition Officer and Mandal Revenue Officer* **(2003) 12 SCC 642;** *H.P.Housing Board v. Bharat S. Negi* **(2004) 2 SCC 184;** *Kiran Tandon v. Allahabad Development Authority* **(2004) 10 SCC 745: 2004 (3) SCR 467 – relied on.**

Shaji Kuriakose v. Indian Oil Corporation Limited **(2001) 7 SCC 650: 2001 (1) Suppl. SCR 573;** *Viluben Jhalejar Contractor v. State of Gujarat* **(2005) 4 SCC 789: 2005 (3) SCR 542;** *Atma Singh v. State of Haryana* **(2008) 2 SCC 568: 2007 (12) SCR 1120;** *Lal Chand v. Union of India* **(2009) 15 SCC 769: 2009 (13) SCR 622;** *A.P. Housing Board v. K.Manohar Reddy* **(2010) 12 SCC 707: 2010 (11) SCR 1107;** *Subh Ram v. State of Haryana* **(2010) 1 SCC 444: 2009 (15) SCR 287 – referred to.**

1.2 The impugned judgment suffer from multiple errors and call for interference by this Court. The first error committed by the High Court relates to deduction of 40% towards development charges. While doing so,

the High Court ignored its own finding that the acquired land was situated in the vicinity of the residential colonies developed by the Board and other establishments as also the fact that the respondents had not produced any evidence to show that they will have to start the development work from scratch. Therefore, the High Court could have, at best, applied 1/3rd deduction towards development cost. [Paras 20 and 21] [312-H; 313-A-C]

1.3 The second error committed by the High Court is that while fixing market value, it did not take into account the escalation in land prices. [Para 22] [313-D]

Ranjit Singh v. U.T. of Chandigarh **(1992) 4 SCC 659;** *Land Acquisition Officer and Revenue Divisional Officer v. Ramanjulu* **(2005) 9 SCC 594;** *Krishi Utpadan Mandi Samiti v. Bipin Kumar* **(2004) 2 SCC 283;** *Sardar Jogendra Singh v. State of U.P.* **(2008) 17 SCC 133;** *Revenue Divisional Officer-cum-L.A.O. v. Shaik Azam Saheb etc.* **(2009) 4 SCC 395;** *The General Manager, Oil and Natural Gas Corporation Ltd. v. Rameshbhai Jivanbhai Patel* **(2008) 14 SCC 745 – referred to.**

1.4 The acquired land is situated in the close vicinity of various residential colonies, educational institutions, hospitals etc. and is on the junction of two important roads. Therefore, it can safely be concluded that the land is semi-urban and has huge potential for being developed as housing sites and the High Court should have added 10% per annum escalation in the price specified in the sale deeds relied upon for fixing market value of the acquired land. The third error committed by the High Court is that in fixing market value of the land acquired vide notifications issued in 1991, 1992 and 1995 with reference to sale deed dated 4.9.1990 vide which a piece of land was sold at the rate of Rs.20/- per square feet, the High Court did not add 10% escalation per

annum in the land prices. [Paras 23 and 24] [315-E-H; 316-A]

1.5 The deduction of 20% may have been sustained keeping in view the smallness of the plots which were sold vide sale deeds dated 4.9.1990 and 8.2.1991, but, in the peculiar facts of the case, it will be wholly unjust to allow such deduction. Majority of the appellants have been deprived of their entire landholding and they have waited for 14 to 20 years for getting the compensation. It appears that in compliance of the interim orders passed by the Court, some of the appellants did get 25% and one of them got 35% of the compensation, but majority of them have not received a single penny towards compensation and at this distant point of time, it will be wholly unjust to deprive them of their legitimate right by approving the 20% deduction made by the High Court. In such matters, the Court cannot be oblivious of the fact that the landowners have been deprived of the only source of livelihood, the cost of living has gone up manifold and the purchasing power of rupee has substantially declined. [Para 25] [316-A-D]

2. The market value of the acquired land is fixed as under:

(i) For the acquisition made vide notification dated 9.10.1990, the base document will be sale deed dated 4.9.1990 vide which land was sold at the rate of Rs.20/- per square feet. One-third of Rs.20/- comes to Rs.6.6 per square feet. After deducting Rs.6.6 from Rs.20/-, market value of the acquired land will be Rs.13.4 per square feet which is rounded off to Rs.14/- per square feet.

(ii) For the acquisitions made by the notifications issued on 15.4.1991, 16.4.1991 and 27.5.1991, the base document will be sale deed dated 8.2.1991 vide

which land was sold at the rate of Rs.30/- per square feet. One-third of Rs.30/- is equal to Rs.10/- per square feet. After deducting Rs.10/- from Rs.30/-, market value will be Rs.20/- per square feet.

(iii) For the acquisition made vide notification dated 08.4.1992, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. By adding 10% per annum in lieu of escalation in the land prices and deducting 1/3rd towards development cost, market value of the acquired land will be Rs.29.2 per square feet which is rounded off to Rs.30/- per square feet.

(iv) For the acquisition made vide notification dated 15.3.1995, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. By adding 10% per annum in lieu of escalation in the land prices and deducting 1/3rd towards development cost, market value of the acquired land will be Rs.29.2 per square feet which is rounded off to Rs.30/- per square feet.

(v) For the acquisitions made by the notifications issued on 17.1.1997 and 19.3.1997, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. If 10% per annum is added in lieu of escalation in the land prices and 1/3rd is deducted towards development charges, market value of the acquired land will be Rs.35.3 per square feet which is rounded off toRs.36/- per square feet. The appellants shall get solatium, interest and other statutory benefits in accordance with the provisions of the Act. [Para 26] [316-E-H; 317-A-F]

3. With a view to ensure that the landowners are not fleeced by the middleman, it is directed that within one

month from the date of receipt of copy of this judgment, the Land Acquisition Officer shall depute an officer subordinate to him not below the rank of Naib Tehsildar or an equivalent rank, who shall get in touch with the landowners and/or their legal representatives and inform them about their entitlement to receive enhanced compensation. The concerned officers shall instruct the landowners and/or their legal representatives to open savings bank account in a nationalized or scheduled bank, in case they already do not have such account. The account numbers of the landowners and/or their legal representatives should be furnished by the concerned officer to the Land Acquisition Officer within a period of two months. Within next one month, the Land Acquisition Officer shall deposit the amount of compensation along with other statutory benefits in the bank accounts of the landowners and/or their legal representatives by way of cheques. [Para 27] [317-G-H; 318-A-D]

State of Uttar Pradesh v. Ram Kumari Devi **(1996) 8 SCC 577: 1996 (2) SCR 749;** *Faridabad Gas Power Project, NTPC v. Om Prakash* **(2009) 4 SCC 719 – cited.**

Case Law Reference:

1996 (2) SCR 749	Cited	Para 9
(2009) 4 SCC 719	Cited	Para 9
2001 (1) Suppl. SCR 573	Referred to	Para 14
2005 (3) SCR 542	Referred to	Para 15
2007 (12) SCR 1120	Referred to	Para 16
2002 (4) Suppl. SCR 117	Relied on	Para 17
2003 (2) Suppl. SCR 1044	Referred to	Para 18
(2003) 12 SCC 642	Relied on	Para 18
(2004) 2 SCC 184	Relied on	Para 18

2004 (3) SCR 467	**Relied on**	**Para 18**
2009 (13) SCR 622	**Referred to**	**Para 18**
2010 (11) SCR 1107	**Referred to**	**Para 19**
2009 (15) SCR 287	**Referred to**	**Para 19**
(1992) 4 SCC 659	**Referred to**	**Para 22**
(2005) 9 SCC 594	**Referred to**	**Para 22**
(2004) 2 SCC 283	**Referred to**	**Para 22**
(2008) 17 SCC 133	**Referred to**	**Para 22**
(2009) 4 SCC 395	**Referred to**	**Para 22**
(2008) 14 SCC 745	**Referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6127-6128 of 2011.

From the Judgment & Order dated 02.03.2009 of the High Court of Judicature at Madras in A.S. No. 759 to 764 of 1999.

WITH

C.A. Nos. 6132-6133, 6134, 6135-6138, 6139-6140, 6141-6146, 6147, 6148-6154, 6155, 6156, 6157, 6158, 6159, 6160, 6161, 6162, 6163, 6164, 6165, 6166, 6167, 6168, 6169, 6170, 6171 of 2010.

V. Giri, S. Ravi Shankar, V.P. Sengottuvel, Mohammed Sadique T.A., M.A. Chinnasamy, K. Krishna Kumar, Preetam Shah, P. Soma Sundaram for the Appellants.

Gurukrishna Kumar, AAG, Anesh Paul, Prasannan, Subramonium Prasad, R. Nedumaran for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Delay in filing Special Leave Petition

(Civil) Nos.33777-33782/2009, 22831/2010, 23641/2010, 23643/2010 and 1961/2011 is condoned.

2. Leave granted.

3. These appeals filed against the judgments/orders passed by different Division Benches of the Madras High Court substantially reducing the amount of compensation determined by Additional District Judge, Erode and Principal Subordinate Judge, Erode (hereinafter referred to as, "the Reference Court") are illustrative of the plight of the owners of small parcels of land, who are deprived of the only source of livelihood and who have to spend substantial amount in litigation and wait for years together to get just and reasonable compensation in lieu of the compulsory acquisition of their land by the State.

4. For the sake of convenience, we shall first advert to the factual matrix of the appeals arising out of SLP (C) Nos.25581-82 of 2009 – Jaganatha Gounder v. Special Tahsildar (Land Acquisition), Erode and another because learned counsel for the parties made submissions keeping in view the factual matrix of those cases.

5. In exercise of the powers vested in it under Section 4(1) of the Land Acquisition Act, 1894 (for short, "the Act"), the Government of Tamil Nadu issued notification dated 17.1.1997 for the acquisition of 55.89 acres land comprised in different survey numbers of village Erode for construction of houses by the Tamil Nadu Housing Board (for short, "the Board").

6. By an award dated 3.3.2000, the Land Acquisition Officer fixed market value of the acquired land at the rate of Rs.50,000/- per acre. This did not satisfy the appellants who filed applications under Section 18(1) of the Act and claimed compensation at the rate of Rs.50/- per square yard by asserting that the acquired land is situated near Erode-Perundurai and Sennimalai Road junction and residential colonies like Anna Nagar, Sri Nagar, Bharthi Nagar, Rail Nagar,

Jeeva Nagar, Subramania Nagar, Kalaigner Karunanidhi Nagar, Arts College, Women's College, Kongu Higher Secondary School, St. Joseph Clinic, Hospitals etc. and was having potential for being used for housing and business purposes. Thereupon, the Collector made reference to the Court for the determination of the compensation payable to the appellants. The Reference Court considered the pleadings of the parties and evidence produced by them and concluded that the appellants are entitled to compensation at the rate of Rs.28/- per square feet.

7. Both, the appellants and the respondents challenged the judgment of the Reference Court by filing appeals under Section 54 of the Act. They also filed applications under Order XLI Rule 27 of the Code of Civil Procedure for permission to adduce additional evidence. The High Court allowed the applications and directed the Reference Court to give opportunity to the parties to adduce additional evidence and make fresh determination of the compensation payable to the appellants and remit its findings along with the documents.

8. In compliance of the direction given by the High Court, the Reference Court considered the additional evidence produced by the parties and opined that the appellants are entitled to compensation at the rate of Rs.19.28 per square feet.

9. After receiving the report of the Reference Court, the High Court considered the evidence produced by the parties and held that valuation of the land, which was made basis by the Land Acquisition Officer for fixing market value cannot be relied upon because that land was situated far away from the acquired land. The High Court noted that there was a steady increase of property value in the area because of repeated acquisitions made on behalf of the Board, referred to the topo-sketch and sale deed Exhibit C.8 dated 8.2.1991 and observed:

"……The said property is in a housing colony by

name K.K.Nagar and the area is considered to be a developed area. Therefore we are of the opinion that the valuation as found mentioned in Ex.C.8 could be taken as Bench Mark for the purpose of fixing the market rate. In fact we have taken a document of the year 1989 showing the market rate at Rs.20/- per sq.ft. for arriving at the market rate in respect of the property acquired as per the notification issued in the year 1991.

Even though as per Ex.C.8 dated 8.2.1991 the property was sold at the rate of Rs.30/- per sq.ft., the said transaction relates to a smaller extent. However as per the subject notification larger extent of property was acquired and as such the value as shown in Ex.C.8 cannot be taken in its entirety for arriving at the market rate. The Housing Board has to develop the property for housing purposes. It is in evidence that the acquired property was only an agricultural property and it has no potential as a housing site. No evidence was placed on the side of the claimants to show that they have been getting substantial income from the property or it has got high potential as a house-site. Therefore we are of the view that necessary deduction has to be made towards development charges."

The High Court then adverted to the principles laid down by this Court in *State of Uttar Pradesh v. Ram Kumari Devi* (1996) 8 SCC 577, *Viluben Jhalejar Contractor v. State of Gujarat* (2005) 4 SCC 789, *Atma Singh v. State of Haryana* (2008) 2 SCC 568, *The General Manager, Oil and Natural Gas Corporation Ltd. v. Rameshbhai Jivanbhai Patel* (2008) 14 SCC 745, *Revenue Divisional Officer-cum-L.A.O. v. Shaik Azam Saheb etc.* (2009) 4 SCC 395, *Faridabad Gas Power Project, NTPC v. Om Prakash* (2009) 4 SCC 719 for determination of market value of the acquired land as also the rule of deduction towards development cost and held:

"The acquired property is a manwari land and even according to the claimants it was not a house-site

developed by them. The acquisition was only for construction of residential houses and therefore necessarily the Housing Board has to spend considerable amount for development and to make it fit for construction of residential units. On the other hand, the property in Ex.C.8 is a developed site and the same was sold only as a house-site. Therefore considering the advantages, development and potential of the property in Ex.C.8 vis-a-vis the disadvantages, undeveloped state and lack of potential of the acquired property, we are of the view that deduction at the rate of 40% has to be given towards development charges."

The High Court also took cognizance of the fact that the sale instance Exhibit C.8 relied upon for fixing market value was in respect of a small piece of land and held:

"While fixing the market rate, very often, documents of smaller extent would be taken as the basis. The normal rule in fixing compensation for large extent of land with reference to the value shown in the sale document of lesser extent is that there must be suitable deduction. It is common knowledge that larger extent of property invariably fetch less when compared to smaller extent. No prudent buyer would buy large extent of land by quoting the price prevailing in the market for a small piece of land.

The document in Ex.C.8 is in respect of a property having only 1200 sq.ft. However as per the present notification, large extent of property was acquired. Therefore we are of the considered opinion that necessary deduction on account of small size of the property retained for fixing the market value has to be given. On an overall consideration of the matter, we fix the deduction on account of small size of the plot taken as the basic document at 20%.

Taking an overall view of the matter we are of the opinion that 40% deduction should be made towards development

costs and 20% on account of small size of the plot taken as the basis to arrive at the market value. Accordingly, while retaining Ex.C.8 dated 8.2.1991 (Rate Rs.30/- per sq.ft.) as the basic document for arriving at the market rate, we deduct 40% by way of development charges and 20% by way of small size of the plot and arrive at the market rate at Rs.5,22,720/- per acre."

10. The facts of the other appeals have been incorporated in a statement, which is marked as Schedule 'A' and shall be treated as part of this judgment. A perusal of the statement shows that various parcels of land were acquired by the State Government vide notifications dated 9.10.1990, 15.4.1991, 16.4.1991, 22.5.1991, 27.5.1991, 8.4.1992, 15.3.1995, 17.1.1997, 12.2.1997 and 19.3.1997 and the High Court reduced the market value fixed by the Reference Court from Rs.19.28 to Rs.12/- and from Rs.20/- to Rs.8/- per square feet.

11. Shri V. Giri, learned senior counsel appearing for the appellants in some of the cases criticized the impugned judgments/orders primarily on the ground that while reducing market value fixed by the Reference Court, the High Court completely ignored the settled rule that the landowner is entitled to the benefit of escalation in land prices. Learned senior counsel then argued that the High Court was not at all justified in making 40% deduction towards the cost of development and 20% further deduction on account of smallness of the size of plot, which was taken as basis for arriving at the market value ignoring that the appellants had suffered huge monetary loss on account of non-payment of compensation for years together. The other learned counsel appearing for the appellants adopted the arguments of Shri Giri.

12. Shri Gurukrishna Kumar, Additional Advocate General, Tamil Nadu fairly stated that the appellants are entitled to the benefit of escalation in land prices but argued that the deduction of 40% towards development cost and 20% due to

smallness of the size of the plots sold vide Exhibit C.8 cannot be termed as excessive.

13. We have considered the respective arguments and carefully perused the record. At the threshold, it will be useful to notice some of the judgments in which the Court has laid down guiding principles for determination of market value of the acquired land.

14. In *Shaji Kuriakose v. Indian Oil Corporation Limited* (2001) 7 SCC 650, this Court held:

> "It is no doubt true that courts adopt comparable sales method of valuation of land while fixing the market value of the acquired land. *While fixing the market value of the acquired land, comparable sales method of valuation is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act. However, comparable sales method of valuation of land for fixing the market value of the acquired land is not always conclusive. There are certain factors which are required to be fulfilled and on fulfilment of those factors the compensation can be awarded, according to the value of the land reflected in the sales. The factors laid down inter alia are: (1) the sale must be a genuine transaction, (2) that the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, (3) that the land covered by the sale must be in the vicinity of the acquired land, (4) that the land covered by the sales must be similar to the acquired land, and (5) that the size of plot of the land covered by the sales be comparable to the land acquired. If all these*

> *factors are satisfied, then there is no reason why the sale value of the land covered by the sales be not given for the acquired land.* However, if there is a dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land."
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> (emphasis supplied)

15. In *Viluben Jhalejar Contractor v. State of Gujarat* (supra), this Court laid down the following principles for determination of market value of the acquired land:

> "Section 23 of the Act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub-section (1) of Section 4.
>
> One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.
>
> Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered.

The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-à-vis the land under acquisition by placing the two in juxtaposition. The positive and negative factors are as under:

Positive factors	Negative factors
(i) smallness of size	(i) largeness of area
(ii) proximity to a road	(ii) situation in the interior at a distance from the road
(iii) frontage on a road	(iii) narrow strip of land with very small frontage compared to depth
(iv) nearness to developed area	(iv) lower level requiring the depressed portion to be filled up
(v) regular shape	(v) remoteness from developed locality
(vi) level vis-à-vis land under acquisition	(vi) some special disadvantageous factors which would deter a purchaser
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage	

Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges

may range between 20% and 50% of the total price."

16. In *Atma Singh v. State of Haryana* (supra), the Court held:

"In order to determine the compensation which the tenure-holders are entitled to get for their land which has been acquired, the main question to be considered is what is the market value of the land. Section 23(1) of the Act lays down what the court has to take into consideration while Section 24 lays down what the court shall not take into consideration and have to be neglected. The main object of the enquiry before the court is to determine the market value of the land acquired. The expression "market value" has been the subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arm's length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. See *Kamta Prasad Singh v. State of Bihar, Prithvi Raj Taneja v. State of M.P., Administrator General*

of W.B. v. Collector, Varanasi and Periyar Pareekanni Rubbers Ltd. v. State of Kerala.

For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing or has prospect of development have to be taken into consideration. See *Collector v. Dr. Harisingh Thakur, Raghubans Narain Singh v. U.P. Govt. and Administrator General, W.B. v. Collector Varanasi. It has been held in Kausalya Devi Bogra v. Land Acquisition Officer and Suresh Kumar v. Town Improvement Trust* that failing to consider potential value of the acquired land is an error of principle."

17. In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. In *Kasturi v. State of Haryana* (2003) 1 SCC 354, the Court held:

"..... It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of

compensation has to be deducted out of the amount of compensation payable on the acquired land subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for roads and other civic amenities to develop the land so as to make the plots for residential or commercial purposes. A land may be plain or uneven, the soil of the land may be soft or hard bearing on the foundation for the purpose of making construction; may be the land is situated in the midst of a developed area all around but that land may have a hillock or may be low-lying or may be having deep ditches. So the amount of expenses that may be incurred in developing the area also varies. A claimant who claims that his land is fully developed and nothing more is required to be done for developmental purposes, must show on the basis of evidence that it is such a land and it is so located. In the absence of such evidence, merely saying that the area adjoining his land is a developed area, is not enough particularly when the extent of the acquired land is large and even if a small portion of the land is abutting the main road in the developed area, does not give the land the character of a developed area. In 84 acres of land acquired even if one portion on one side abuts the main road, the remaining large area where planned development is required, needs laying of internal roads, drainage, sewer, water, electricity lines, providing civic amenities, etc. *However, in cases of some land where there are certain advantages by virtue of the developed area around, it may help in reducing the percentage of cut to be applied, as the developmental charges required may be less on that account. There may be various factual factors which may have to be taken into consideration while applying the cut in payment of compensation towards developmental charges, may be in some cases it is more than 1/3rd and in some cases less than 1/3rd. It must be remembered that there is difference between a developed area and an*

area having potential value, which is yet to be developed. The fact that an area is developed or adjacent to a developed area will not ipso facto make every land situated in the area also developed to be valued as a building site or plot, particularly when vast tracts are acquired, as in this case, for development purpose."

(emphasis supplied)

18. The rule of 1/3rd deduction was reiterated in *Tejumal Bhojwani v. State of U.P.* (2003) 10 SCC 525, *V. Hanumantha Reddy v. Land Acquisition Officer & Mandal Revenue Officer* (2003) 12 SCC 642, *H.P. Housing Board v. Bharat S. Negi* (2004) 2 SCC 184 and *Kiran Tandon v. Allahabad Development Authority* (2004) 10 SCC 745. In *Lal Chand v. Union of India* (2009) 15 SCC 769, the Court indicated that percentage of deduction for development to be made for arriving at market value of large tracts of undeveloped agricultural land with potential for development can vary between 20 and 75 per cent of the price of developed plots and observed:

"The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works. …

Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed layout, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorised private layout or an industrial layout. It is also well known that the development cost incurred by statutory agencies is much higher than the cost incurred by private developers, having regard to higher overheads and expenditure."

19. In *A.P. Housing Board v. K. Manohar Reddy* (2010)

12 SCC 707, the rule of 1/3rd deduction towards development cost was invoked while determining market value of the acquired land. In *Subh Ram v. State of Haryana* (2010) 1 SCC 444, this Court held as under:

"Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost". Two factors have a bearing on the quantum (or percentage) of deduction in the "retail price" as development cost. Firstly, the percentage of deduction is decided with reference to the extent and nature of development of the area/layout in which the small developed plot is situated. Secondly, the condition of the acquired land as on the date of preliminary notification, whether it was undeveloped, or partly developed, is considered and appropriate adjustment is made in the percentage of deduction to take note of the developed status of the acquired land.

The percentage of deduction (development cost factor) will be applied fully where the acquired land has no development. But where the acquired land can be considered to be partly developed (say for example, having good road access or having the amenity of electricity, water, etc.) then the development cost (that is, percentage of deduction) will be modulated with reference to the extent of development of the acquired land as on the date of acquisition. But under no circumstances, will the future use or purpose of acquisition play a role in determining the percentage of deduction towards development cost."

(emphasis supplied)

20. If the impugned judgment is considered in the light of

the principles laid down in the aforesaid cases, there is no escape from the conclusion that the same suffer from multiple errors and call for interference by this Court.

21. The first error committed by the High Court relates to deduction of 40% towards development charges. While doing so, the High Court ignored its own finding that the acquired land was situated in the vicinity of the residential colonies developed by the Board and other establishments as also the fact that the respondents had not produced any evidence to show that they will have to start the development work from scratch. Therefore, the High Court could have, at best, applied 1/3rd deduction towards development cost.

22. The second error committed by the High Court is that while fixing market value, it did not take into account the escalation in land prices. In *Ranjit Singh v. U.T. of Chandigarh* (1992) 4 SCC 659, *Land Acquisition Officer and Revenue Divisional Officer v. Ramanjulu* (2005) 9 SCC 594, *Krishi Utpadan Mandi Samiti v. Bipin Kumar* (2004) 2 SCC 283, *Sardar Jogendra Singh v. State of U.P.* (2008) 17 SCC 133, *Revenue Divisional Officer-cum-L.A.O. v. Shaik Azam Saheb* (supra) and *Oil and Natural Gas Corporation Ltd. v. Rameshbhai Jivanbhai Patel* (supra), this Court has repeatedly held that the exercise undertaken for fixing market value and determination of the compensation payable to the landowner should necessarily involve consideration of escalation in land prices. In the last mentioned judgment, the Court noticed the earlier precedents and observed as under:

> "We have examined the facts of the three decisions relied on by the respondents. They all related to acquisition of lands in urban or semi-urban areas. Ranjit Singh related to acquisition for development of Sector 41 of Chandigarh. Ramanjulu related to acquisition of the third phase of an existing and established industrial estate in an urban area. Bipin Kumar related to an acquisition of lands adjoining Badaun-Delhi Highway in a semi-urban area where

> building construction activity was going on all around the acquired lands.
>
> Primarily, the increase in land prices depends on four factors: situation of the land, nature of development in surrounding area, availability of land for development in the area, and the demand for land in the area. In rural areas, unless there is any prospect of development in the vicinity, increase in prices would be slow, steady and gradual, without any sudden spurts or jumps. On the other hand, in urban or semi-urban areas, where the development is faster, where the demand for land is high and where there is construction activity all around, the escalation in market price is at a much higher rate, as compared to rural areas. In some pockets in big cities, due to rapid development and high demand for land, the escalations in prices have touched even 30% to 50% or more per year, during the nineties.
>
> On the other extreme, in remote rural areas where there was no chance of any development and hardly any buyers, the prices stagnated for years or rose marginally at a nominal rate of 1% or 2% per annum. There is thus a significant difference in increases in market value of lands in urban/semi-urban areas and increases in market value of lands in the rural areas. Therefore, if the increase in market value in urban/semi-urban areas is about 10% to 15% per annum, the corresponding increases in rural areas would at best be only around half of it, that is, about 5% to 7.5% per annum. This rule of thumb refers to the general trend in the nineties, to be adopted in the absence of clear and specific evidence relating to increase in prices. Where there are special reasons for applying a higher rate of increase, or any specific evidence relating to the actual increase in prices, then the increase to be applied would depend upon the same.

> Normally, recourse is taken to the mode of determining the market value by providing appropriate escalation over the proved market value of nearby lands in previous years (as evidenced by sale transactions or acquisitions), where there is no evidence of any contemporaneous sale transactions or acquisitions of comparable lands in the neighbourhood. The said method is reasonably safe where the relied-on sale transactions/acquisitions precede the subject acquisition by only a few years, that is, up to four to five years. Beyond that it may be unsafe, even if it relates to a neighbouring land. What may be a reliable standard if the gap is of only a few years, may become unsafe and unreliable standard where the gap is larger. For example, for determining the market value of a land acquired in 1992, adopting the annual increase method with reference to a sale or acquisition in 1970 or 1980 may have many pitfalls. This is because, over the course of years, the "rate" of annual increase may itself undergo drastic change apart from the likelihood of occurrence of varying periods of stagnation in prices or sudden spurts in prices affecting the very standard of increase."

23. Though it may appear repetitive, we deem it necessary to mention that the acquired land is situated in the close vicinity of various residential colonies, educational institutions, hospitals etc. and is on the junction of two important roads. Therefore, it can safely be concluded that the land is semi-urban and has huge potential for being developed as housing sites and the High Court should have added 10% per annum escalation in the price specified in the sale deeds relied upon for fixing market value of the acquired land.

24. The third error committed by the High Court is that in fixing market value of the land acquired vide notifications issued in 1991, 1992 and 1995 with reference to sale deed dated 4.9.1990 vide which a piece of land was sold at the rate of Rs.20/- per square feet, the High Court did not add 10%

escalation per annum in the land prices.

25. We may have sustained 20% deduction keeping in view the smallness of the plots which were sold vide sale deeds dated 4.9.1990 and 8.2.1991, but, in the peculiar facts of the case, we think that it will be wholly unjust to allow such deduction. Majority of the appellants have been deprived of their entire landholding and they have waited for 14 to 20 years for getting the compensation. It appears that in compliance of the interim orders passed by the Court, some of the appellants did get 25% and one of them get 35% of the compensation, but majority of them have not received a single penny towards compensation and at this distant point of time, it will be wholly unjust to deprive them of their legitimate right by approving the 20% deduction made by the High Court. In such matters, the Court cannot be oblivious of the fact that the landowners have been deprived of the only source of livelihood, the cost of living has gone up manifold and the purchasing power of rupee has substantially declined.

26. In the result, the appeals are allowed and market value of the acquired land is fixed as under:

(i) For the acquisition made vide notification dated 9.10.1990, the base document will be sale deed dated 4.9.1990 vide which land was sold at the rate of Rs.20/- per square feet. One-third of Rs.20/- comes to Rs.6.6 per square feet. After deducting Rs.6.6 from Rs.20/-, market value of the acquired land will be Rs.13.4 per square feet which is rounded off to Rs.14/- per square feet.

(ii) For the acquisitions made by the notifications issued on 15.4.1991, 16.4.1991 and 27.5.1991, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. One-third of Rs.30/- is equal to Rs.10/- per square feet. After deducting Rs.10/- from Rs.30/-, market value will be Rs.20/- per square feet.

(iii) For the acquisition made vide notification dated 08.4.1992, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. By adding 10% per annum in lieu of escalation in the land prices and deducting 1/3rd towards development cost, market value of the acquired land will be Rs.29.2 per square feet which is rounded off to Rs.30/- per square feet.

(iv) For the acquisition made vide notification dated 15.3.1995, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. By adding 10% per annum in lieu of escalation in the land prices and deducting 1/3rd towards development cost, market value of the acquired land will be Rs.29.2 per square feet which is rounded off to Rs.30/- per square feet.

(v) For the acquisitions made by the notifications issued on 17.1.1997 and 19.3.1997, the base document will be sale deed dated 8.2.1991 vide which land was sold at the rate of Rs.30/- per square feet. If 10% per annum is added in lieu of escalation in the land prices and 1/3rd is deducted towards development charges, market value of the acquired land will be Rs.35.3 per square feet which is rounded off toRs.36/- per square feet.

The appellants shall get solatium, interest and other statutory benefits in accordance with the provisions of the Act.

27. With a view to ensure that the landowners are not fleeced by the middleman, we deem it proper to issue the following further directions:

(i) Within one month from the date of receipt of copy of this judgment, the Land Acquisition Officer shall depute an officer subordinate to him not below the rank of Naib Tehsildar or an equivalent rank, who shall get in touch with

the landowners and/or their legal representatives and inform them about their entitlement to receive enhanced compensation.

(ii) The concerned officers shall instruct the landowners and/or their legal representatives to open savings bank account in a nationalized or scheduled bank, in case they already do not have such account.

(iii) The account numbers of the landowners and/or their legal representatives should be furnished by the concerned officer to the Land Acquisition Officer within a period of two months.

(iv) Within next one month, the Land Acquisition Officer shall deposit the amount of compensation along with other statutory benefits in the bank accounts of the landowners and/or their legal representatives by way of cheques.

N.J. Appeal allowed.

SCHEDULE 'A'

S. No.	SLP(C) Nos. & Name of Parties	Date of Section 4(1) Notification	Date of award by LAO and compensation	Date of Reference Court order and Amount fixed.	Date of High Court Judgment in Appeal Suit Nos. and rate fixed
1.	22086-22087/2009 – Valliyammal and another v. Special Tahsildar (Land Acquisition), Erode and another	19.3.1997	21.6.2000 & Rs.50,000/- per acre	4.7.2003 and Rs.28/- per square feet	28.4.2009 in A.S. Nos. 200 & 201/2009 and Rs.12/- per square feet.
2.	25591/2009–Thangamuthu Gounder v. Special Tahsildar (Land Acquisition), Erode and another	17.1.1997	3.3.2000 & Rs.50,000/- per acre	24.3.2005 and Rs.30/- per square feet	2.3.2009 in A.S. No. 706/2006 and Rs.12/- per square feet
3.	25587-90/2009 – Mohan and others etc v. Special Tahsildar (Land Acquisition), Erode and another	15.4.1991	10.06.1994 & Rs.37,500/- per acre	27.11.2002 and Rs.20/- per square feet	2.3.2009 in A.S. Nos. 813, 820, 821 and 822/ 2003 and Rs.8/- per square feet (Rs.3,48,480/- per acre)
4.	25596-97/2009 – K.R. Palaniappan v. Special	9.10.1990/ 16.4.1991	28.9.1994, 10.6.1994 &	30.03.2001 and Rs.16/- per	2.3.2009 in A.S. Nos. 170/2003 and 871/2006

	Tahsildar (Land Acquisition), Erode and another		Rs.37,500/- per acre	square feet	and Rs.8/- per square feet
5.	33777-82/2009 – Ramayammal and others v. Special Tahsildar (Land Acquisition), Erode and another	15.4.1991	10.6.1994 & Rs.37.500/- per acre	16.4.1999 and Rs.2,18,500/- per acre	2.3.2009 in A.S. Nos. 759 to 764/1999 and Rs.8/- per square feet (Rs.3,48,480/- per acre)
6.	33808/2009 – Vishwanatha Gounder v. Special Tahsildar (Land Acquisition) Erode	27.5.1991	03.7.1994 & Rs.37,500/- per acre	27.11.2006 and Rs.20/- per square feet	2.3.2009 in A.S. Nos. 721/2003 and Rs.8/- per square feet (Rs.3,48,480/- per acre)
7.	2194-2200/2010 – Veerasamy and others v. Special Tahsildar (Land Acquisition), Erode and another	19.2.1997	31.6.2000 & Rs.50,000/- per acre	29.11.2002 and Rs.28/- per square feet	2.3.2009 in A.S. Nos. 727, 729, 730, 731, 732, 733 and 734/2003 and Rs.12/- per square feet
8.	12581/2010 – N. Pazhanisamy Gounder v. Special Tahsildar (Land Acquisition), Erode and another	12.2.1997	3.3.2000 & Rs.50,000/- per acre (Rs.1.15 per	2.3.2006 and Rs.30/- per square feet	8.7.2009 in A.S. No. 854/2006 and Rs.12/- per square feet (Rs.5,22,720/- per acre) square feet)
9.	22831/2010 – Arumugha Gounder and another v. Special Tahsildar (Land	15.4.1991	10.6.1994 & Rs.37,500/- per acre	25.10.1999 and Rs.17/- per square feet	2.3.2009 in A.S. No. 325/2000 and Rs.8/- per square feet

	Acquisition), Erode and another				(Rs.3,48,480/- per acre)
10.	23654/2010 – Kulanthaiswamy and another v. Special Tahsildar (Land Acquisition) Erode and another	08.4.1992	22.5.1995 & Rs.37,500/- per acre	26.3.2007 and Rs.20/- per square feet	11.12.2009 in A.S. No. 428/2008 and Rs.8/- per square feet
11.	23655/2010 – K.B. Dakhinamoorthy and others v. Special Tahsildar (Land Acquisition) Erode and another	08.4.1992	22.5.1995 & Rs.37,500/- per acre	26.3.2007 and Rs.20/- per square feet	11.12.2009 in A.S. No. 543/2008 and Rs.8/- per square feet
12.	23656/2010 – P. Chandrasekar and others v. Special Tahsildar (Land Acquisition) Erode and another	08.4.1992	22.5.1995 & Rs.37,500/- per acre	26.3.2007 and Rs.20/- per square feet	11.12.2009 in A.S. No. 610/2008 and Rs.8/- per square feet
13.	23657/2010 – Pavayammal and others v. Special Tahsildar (Land Acquisition) Erode and another	15.4.1991	10.6.1994 & Rs.37,500/- per acre	4.1.2006 and Rs.20/- per square feet	11.12.2009 in A.S. No. 1002/2007 and Rs.8/- per square feet
14.	23658/2010 – Lakshmi & Anr. v. Special Tahsildar	15.3.1995	25.3.1998 & Rs.39,220/-	6.2.2006 and Rs.22/- per	11.12.2009 in A.S. No. 356/2007 and Rs.8/- per

	(Land Acquisition) Erode and another		per acre	square feet	square feet
15.	23659/2010 –Kannammal and others v. Special Tahsildar (Land Acquisition) Erode and another	15.4.1991	10.6.1994 & Rs.37,500/- per acre	29.11.2005 and Rs.20/- per square feet	11.12.2009 in A.S. No. 748/2008 and Rs.8/- per square feet
16.	23666/2010–Kannammal @ Rajeshwari & another v. Special Tahsildar (Land Acquisition) Erode & another	15.3.1995	25.3.1998 & Rs.50,000/- per acre	29.11.2002 and Rs.28/- per square feet	11.12.2009 in A.S. No. 770/2004 and Rs.8/- per square feet
17.	23669/2010 – Kannammal and others v. Special Tahsildar (Land Acquisition) Erode and another	27.5.1991	10.6.1994 & Rs.37,500/- per acre	29.11.2005 and Rs.20/- per square feet	11.12.2009 in A.S. No. 760/2008 and Rs.8/- per square feet
18.	23641/2010 –Chinnasamy and others v. Special Tahsildar (Land Acquisition) Erode and another	27.5.1991	3.7.1994 & Rs.37,500/- per acre	23.3.2001 and Rs.17/- per square feet	2.3.2009 in A.S. No. 618/2003 and Rs.8/- per square feet
19.	23643/2010 –K.N. Arumugham v. Special Tahsildar (Land Acquisition) Erode and another	09.10.1990	28.9.1994 & Rs.37,500/- per acre	17.01.2005 and Rs.75,000/- per acre	2.3.2009 in A.S. No. 756/2008 and Rs.8/- per square feet (Rs.3,48,480/- per acre)

20.	26825/2010 –Thambusamy (Dead by LRs.) v. Special Tahsildar (Land Acquisition) Erode and another	27.5.1991	03.08.1994 & Rs.37,500/- per acre	27.3.2008 and Rs.9/- per square feet	19.12.2009 in A.S. No. 835/2008 and Rs.8/- per square feet
21.	1961/2011 –Nachimuthu v. Special Tahsildar (Land Acquisition) Erode and another	19.2.1997	31.6.2000 & Rs.50,000/- per acre	31.3.2004 and Rs.28/- per square feet	2.3.2009 in A.S. No. 544/2005 and Rs.12/- per square feet (Rs.5,22,720/- per acre)
22.	2187/2011– Kannaki & another v. Special Tahsildar (Land Acquisition) Erode and another	19.3.1997	21.06.2000 & Rs.50,000/- per acre	29.2.2005 and Rs.30/- per square feet	8.7.2009 in A.S. No.141/ 2006 and Rs.12/- per square feet (Rs.5,22,720/- per acre)
23.	1147/2011 –Jayalakshmi and others v. Special Tahsildar (Land Acquisition) Erode and another	19.3.1997	21.6.2000 & Rs.50,000/- per acre	4.4.2006 and Rs.25/- per square feet	8.7.2009 in A.S. No. 181/2007 and Rs.12/- per square feet (Rs.5,22,720/- per acre)
24.	3520/2011–P.Subbarayan and others v. Special Tahsildar (Land Acquisition) Erode and another	22.5.1991	10.8.1994 & Rs. 37,500/- per acre Rs. 0.86 per sq. ft.)	21.11.2005 and Rs.17/- per square feet	8.7.2009 in A.S. No. 392/2007 and Rs. 8/- per square feet (Rs.3,48,480/- per acre)

A THE REGISTRAR GENERAL, HIGH COURT OF MADRAS
v.
M. MANICKAM AND ORS.
(Civil Appeal Nos.7030-31 of 2011)

B AUGUST 17, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

TAMIL NADU STATE JUDICIAL SERVICE RULES:

C

Rules 30 (b) and (c) – Date of birth – Change in – Limitation – Held: The application filed by the District Munsif for change of his date of birth was filed beyond the period of limitation – Besides, the application was not addressed to the D *State Government but it was addressed to the Registrar of the High Court – Therefore, the Officer did not follow the mandate and requisites of r. 30 and, as such, in terms of sub-r. (c), the application was to be summarily rejected – The evidence adduced by the Officer in support of his claim is most* E *unreliable – Further, the Officer has failed to discharge his onus of proving the authenticity of the horoscope on which reliance is placed—The Officer has failed to prove that any change of his date of birth is called for – Constitution of India, 1950 – Article 136 – Service Law – Date of birth.*

F *CONSTITUTION OF INDIA:*

Article 136 – Appeal by special leave – Appreciation of evidence – Suit filed for declaration and mandatory injunction to correct plaintiff's date of birth recorded in the S.S.L.C. Certificate and the service record – Ultimately, decreed by G *High Court – Held: Change of date of birth is a very important responsibility to be discharged – There must be strong, cogent and reliable evidence in support of the claim that the date of birth entered in the service records or S.S.L.C.*

H

certificate was wrongly entered by mistake – The evidence adduced by the officer in support of his case is most unreliable – Since the horoscope is the primary document on which reliance is placed, there cannot be any bar to examine the authenticity and evidentiary value of the same while exercising the power under Article 136 as it permits such a scrutiny particularly when it relates to the change of date of birth of a person who seeks to get an advantage to his benefit to which he otherwise may not be entitled – On a close examination of the horoscope and the related documents, it is evident that the plaintiff has failed to discharge his onus in proving the authenticity of the horoscope – The judgment and the decree passed by the High Court cannot be sustained and are set aside – The suit stands dismissed – Service Law – Evidence.

EVIDENCE:

Date of birth – Proving of –Medical certificate – Held: The medical certificate produced in the instant case is described as "Age Proof Certificate" — It is very vague and unreliable – Whether or not any radiological examination or any ossification test was conducted is not reflected in the certificate – It only states that on the basis of physical examination and from appearance of the Officer and on the basis of his own statement the age was determined — The doctor who was examined to prove the certificate also did not produce any test report or copy thereof – Thus, reliance cannot be placed on the authenticity and validity of the said age proof certificate – Service Law.

Respondent No.1 joined as District Munsif-cum-Judicial Magistrate on 4.11.1988 in the State of Tamil Nadu. On 11.11.1993 he submitted an application to the Registrar, High Court of Madras seeking to change his date of birth from 19.3.1947 to 24.11.1950. Subsequently, he filed a suit bearing O.S. No.549 of 1995 in the Court of

the District Munsif for a declaration that his date of birth was 24.11.1950, and for a mandatory injunction to enter his date of birth in the S.S.L.C. book and in the service records as 24.11.1950 instead of 19.3.1947. The suit was decreed with a mandatory injunction to make the change of date of birth in S.S.L.C. book. The appeal filed by respondent nos.2 to 4 was allowed by the Sub-Judge. However, the second appeal filed by respondent no.1 was allowed by the High Court. The review petition filed by the Registrar General, High Court of Madras having been dismissed, he filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 Sub rule (b) of r.30 of the Tamil Nadu State Judicial Service Rules provides that after the person has entered the service by direct recruitment, an application to correct his date of birth as entered in the official records should normally be entertained only if such application is made within five years of such entry into the service and that such application shall be made to the government through the High Court and should be disposed of in accordance with the procedure laid down in sub-rule (a). Sub-rule (c) of Rule 30 on the other hand, provides that any application received after five years of entry into service should be summarily rejected. It is true that the word "normally" is used in sub-rule (b). However, sub-rule (c) which immediately follows makes it mandatory that an application which is received after five years of entry into the service should be summarily rejected. Therefore, the pre-requisite of filing such an application is that it must be submitted within five years period and when it is so submitted the same should be entertained. [Paras 13 and 14] [335-D-H; 336-A]

1.2 In the instant case, the formal application was admittedly filed after expiry of the period of five years.

Sub-r.(a) of r. 30 clearly emphasizes that the application seeking for change of date of birth is to be made to the government through the High Court. The letter on which reliance is placed by respondent No. 1 which is dated 11.11.1993 is not addressed to the government but it is addressed to the Registrar of the High Court and in that application respondent No. 1 has formally sought for change of his date of birth stating the reason as to why such change in the date of birth is called for. Thus, strictly speaking the respondent while filing the said application did not follow the mandate and requisites of Rule 30 of the Rules. Therefore, in terms of sub-r.(c) it was to be summarily rejected. [Paras 15 and 17] [336-B-C; 339-E-G]

Punjab & Haryana High Court at Chandigarh Vs. Megh Raj Garg and Another **2010 (7) SCR 172 = (2010) 6 SCC 482; *U*nion of India Vs. Harnam Singh 1993 (1) SCR 862 = (1993) 2 SCC 162 – relied on.**

2.1 PW-2, the doctor who has proved the medical certificate, stated that he was the Chairman of the Medical Board and that the medical certificate (Ext.A-12) was given to respondent No. 1 by the Medical Board. He has specifically stated in his deposition that he has not produced the test report or its copy before the Court showing supporting documents and the tests based on which they had determined the age of respondent No. 1/ plaintiff. It must be indicated at this stage that respondent No. 1/plaintiff himself went to the Medical Board and got himself examined and obtained the report which was brought in evidence. At the top of the medical certificate, it is written as "Age Proof Certificate." The said medical certificate is very vague and unreliable. Whether or not any radiological examination was done and if so, of what nature, and also whether any ossification test was done or not is not reflected from the said report. It is only stated in the certificate that on the basis of physical examination and from his appearance and on the basis of his own

statement the age of respondent no. 1 was determined as 48 years. [Paras 20-22] [341-B-C-E-F; 342-B-D]

Ramdeo Chauhan alias Raj Nath v. State of Assam **2001 (3) SCR 669 = (2001) 5 SCC 714 – referred to.**

2.2 The age proof certificate appears to have been got prepared for the purpose of adducing evidence at the time of hearing of the suit and not before. The document is also found to be unrealistic and unreliable. Considering the facts and circumstances of the case, it is very difficult to place any reliance on the authenticity and validity of the said age proof certificate. [Para 24] [342-G-H; 343-A]

2.3 Respondent No. 1 also relied upon the evidence of two persons in support of his contention that he was born in the year 1950. PW-3, who is the elder brother of respondent No. 1 stated that respondent No. 1 was born in the year 1950. He stated that generally when a child is born, the same is registered with the Village Munsif and that he did not know whether his father had informed the village Munsif about the birth of respondent No. 1. He stated that while his brother was at the age of about three or four years, to get him admitted in the school, his father had given innocently his age as about 7 or 8 years and got respondent No. 1 admitted in the school. The only other witness who was examined to prove the age of respondent No. 1 was PW-4 who stated that respondent No. 1 was born in the year 1950 and that he also got married in the year 1950. However, in the cross-examination, he could not say as to what is the date and month in which respondent No. 1 was born. He also could not give the date and month of his marriage as well. [Paras 24-27] [343-A-B-D-F]

2.4 The evidence adduced by respondent No. 1 in support of his case is most unreliable. Change of date of

birth is a very important responsibility to be discharged. There must be strong, cogent and reliable evidence in support of the contention that the date of birth entered in the service records or in the S.S.L.C. certificate was wrongly entered by a mistake. The difference of age in the instant case is also considerable, as it is 3 years, 8 months and 5 days. [Paras 28-29 and 34] [343-G; 344-G; 347-A-H]

State of U.P. v. Shiv Narayan Upadhyaya **2005 (1) Suppl. SCR 847 = (2005) 6 SCC 49 – relied on.**

2.5 The horoscope relied upon by respondent No. 1 is the basis and foundation of his claim. As has been held by this Court, a horoscope is a very weak piece of material to prove age of a person and that heavy onus lies on a person who wants to press it into service to prove its authenticity. The creator of the horoscope or the writer is not examined in the case as he was stated to be dead. None of his family members or any of his acquaintances was examined to prove the handwriting. This court itself closely and very minutely considered the horoscope. There cannot be any bar to examine the authenticity and evidentiary value of the same while exercising the power under Article 136 of the Constitution of India. Article 136 permits such a scrutiny particularly when it relates to the change of date of birth of a person who seeks to get an advantage to his benefit to which he otherwise may not be entitled to. There is a notebook containing the horoscopes of all the sons and daughters of the father of respondent No. 1 stated to have been made at different points of time. The book allegedly containing horoscopes of all persons was shown to have been maintained from 1939 to 1953. But a bare perusal of the document would indicate that for all the horoscopes written between a period of 14 years the same ink was used by the same writer. It could be deduced from the materials on record that somewhere

around 1993 this document was got prepared. If such a notebook was available, nothing is stated as to why the same could not have been looked at and produced at the time of admission of respondent no.1 in the school or at the time of admission in the college or even at the time when he was entering into the service. [paras 31- 33 and 34] [345-C-H; 347-C-E; 346-D-E]

State of Punjab Vs. Mohinder Singh **2005 (2) SCR 758 = (2005) 3 SCC 702 and** *Ramakant Rai v. Madan Rai and Others* **2003 (4) Suppl. SCR 17 = (2003) 12 SCC 395 – relied on.**

2.6 From the signature appearing on the school leaving certificate, it is evident that the father of respondent No. 1 was a man of letters and there was no reason as to why he would subscribe to a wrong age as alleged and that too in his S.S.L.C. Certificate. The S.S.L.C. Certificate showing the date of birth of respondent no. 1 as 19.3.1947 was produced by him at the time of his entry into the college as also his entry into the service knowing fully well that, that particular age is factually recorded. [Para 32-33] [346-E-G]

3. This court is of a firm opinion that respondent No. 1 has failed to discharge his onus in proving the authenticity of the horoscope on which reliance is placed. The judgment and the decree passed by the Munsif Court which is affirmed by the High Court cannot be sustained. The judgment and decree of the High Court are set aside and it is held that respondent No. 1 has failed to prove that any change of date of birth is called for in the case. The suit stands dismissed. [Para 34-35] [347-B-C; 348-B]

Case Law Reference:

2010 (7) SCR 172	**relied on**	**Para 15**
1993 (1) SCR 862	**relied on**	**Para 16**

2001 (3) SCR 669	**referred to**	**Para 23**	A
2005 (1) Suppl. SCR 847	**referred to**	**Para 28**	
2005 (2) SCR 758	**relied on**	**Para 30**	
2003 (4) Suppl. SCR 17	**relied on**	**Para 34**	B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7030-7031 of 2011.

From the Judgment & Order dated 15.03.2007 and dated 21.07.2007 of the High Court of Madras, Madurai Bench in Review Petition No. 19 of 2007 in Second Appeal No. 1064 of 2005. C

Dr. Rajeev B. Majodkar, Anil K. Jha for the Appellant.

K.V. Vishwanathan, V. Mohana, Abhishek K., Subramonium Prasad for the Respondents. D

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Delay condoned. E

2. Leave granted.

3. The present appeals are filed against the judgments and orders dated 15.03.2007 and 21.07.2007 in Second Appeal No. 1064 of 2005, and Review Petition No. 19 of 2007, respectively, passed by the Madras High Court whereby it dismissed the second appeal and the review petition filed by the appellant herein accepting the contentions raised by the Respondent No. 1. By its judgments and orders aforementioned, the High Court set aside the judgment and decree of Subordinate Court and restored the judgment and decree of District Munsif Court dated 09.10.2002. F G

4. The facts leading to the filing of the present appeals are that the Respondent No. 1- M. Manickam joined the State Subordinate Judicial Service as District Munsif-cum-Judicial H

A Magistrate on 04.11.1988, after getting duly selected for the said post by the Tamil Nadu Public Service Commission. It is alleged by the Respondent No. 1 that in his service records, his date of birth has been entered as 19.03.1947, as found in the S.S.L.C. Book, whereas his actual date of birth is B 24.11.1950 and that due to the wrong entry of his date of birth in the service records, he would retire from his service 3 years, 8 months and 5 days before his actual date of superannuation.

5. He submitted a letter dated 07.10.1993 to the Chief C Judicial Magistrate, Kanyakumari requesting him for permission to peruse his service register in which he submitted that his date of birth has wrongly been submitted. He also requested him for supplying of requisite proforma for changing his date of birth. Thereafter Respondent No. 1 submitted an D application dated 11.11.1993 to Registrar, High Court of Madras seeking change of his date of birth. In response to his application, the Administrative Officer of the High Court asked for certain particulars and documents in response to which Respondent No. 1 submitted his reply vide letter dated 27.01.1994. E

6. Subsequent thereto Respondent No. 1 filed a Suit before the District Munsif Court, Karur, which was registered as O.S. No. 549/1995, for a declaration that his date of birth is 24.11.1950 and for a mandatory injunction to enter his date of F birth in his S.S.L.C. book and in the Service Records as 24.11.1950, instead of 19.03.1947. The Munsif Court vide order dated 09.10.2002 decreed the suit in favour of Respondent No. 1 and against Respondent Nos. 2-4. The Munsif Court granted mandatory injunction against Respondent G Nos. 2-4 to make the change of date of birth in their S.S.L.C. book. However, mandatory injunction against the present appellant to alter the date of birth in the service register was not granted.

7. Aggrieved by the decision of the Munsif Court, H Respondent Nos. 2-4 filed an appeal before the Sub-Judge,

Karur which was allowed by the Sub-Judge by its judgment and order dated 12.10.2004. Against the said order of the Sub-Judge, Respondent No. 1 preferred Second Appeal before the High Court of Madras which was registered as S.A. No. 1064 of 2005. The High Court vide its judgment and order dated 15.03.2007 allowed the second appeal of the Respondent No. 1 and restored the judgment and decree of the Trial Court. Review Petition filed by the appellant herein before the High Court also got dismissed vide order dated 21.07.2007. Against these orders of the High Court, viz., 15.03.2007 and 21.07.2007 the appellant has filed the present appeals, on which we heard learned counsel appearing for the parties.

8. Learned counsel appearing for the appellant submitted that the application filed by the respondent seeking for change of his date of birth was filed after the period of limitation contemplated under the Tamil Nadu State Judicial Service Rules (hereinafter referred to as "*Rules*") which is five years and therefore the decree and the judgment passed by the High Court affirming the decree of the Munsif is illegal and erroneous. In support of the said contention, the counsel relied upon the contents of the letter dated 7.10.1993 which was submitted by respondent No. 1 in which for the first time, he requested for perusal of his service register contending inter alia that his date of birth appears to be wrongly recorded for which he contemplated making of an application at a later point of time. It was submitted that in the said letter, the respondent No. 1 never made a request for said change of date of birth. According to him, the formal application was filed by respondent No. 1 only on 11.11.1993 to the Madras High Court requesting for passing suitable orders directing concerned authorities to change his date of birth as 24.11.1950 instead of 19.3.1947.

9. He further submitted that since representation for change of his date of birth was submitted after five years, therefore, the same was required to be rejected summarily in terms of the Rules. So far as the medical report to which reference was made

by the courts below, it was submitted that the aforesaid medical report was not supported by any test report and proof of having made any ossification test or any supporting document like test reports or X-Ray reports and therefore the said medical report relied upon by respondent No. 1 and done at his instance is of no evidentiary value and is of no assistance.

10. He also submitted that reliance on the horoscope itself for change of birth is unfounded as the said horoscope is not only a very weak piece of evidence but the horoscope on which reliance is placed by respondent No. 1 is doubtful and appears to have been created for the purpose of fortifying the claim for change of date of birth.

11. He had also drawn our attention to the copy of the S.S.L.C. certificate. By way of reference to the said S.S.L.C. certificate, it was submitted that originally the date of birth of respondent No. 1 was recorded as 19.3.1947 which appears to have been subsequently changed in a different handwriting, changing it to 24.11.1950 without indicating as to who had changed the same. There is neither the identification of the person who corrected the same nor any seal of the concerned authority permitting and making such necessary changes.

12. The aforesaid contentions of the counsel appearing for the appellant were refuted by the counsel appearing for the respondent No. 1 who submitted that in the present case, the respondent No. 1 has submitted not only documentary evidence in support of his claim but such a claim for change of his date of birth was also supported by medical evidence as also oral evidence. He also submitted that inadmissibility of the horoscope was not a question raised in the special leave petition and therefore, the same cannot be gone into and cannot be made a case to exercise jurisdiction under Article 136 of the Constitution of India. He submitted that the aforesaid change of date of birth in the S.S.L.C. certificate was made pursuant to an order made by the competent authority and

therefore, there is nothing wrong in relying on the same by the High Court as also by the Munsif Court who held in favour of respondent No. 1.

13. We have perused the records very carefully in the light of the aforesaid submissions. Rule 30 of the then Rules which is the relevant service Rule for deciding the case provides for the procedure for alteration of date of birth. Sub-Rule (a) of Rule 30 provides that if at the time of his appointment in service by direct recruitment, a candidate claims that his date of birth is different from that entered in the S.S.L.C. books or Matriculation Register or School Records, he should make an application through the High Court stating the evidence on which he relies and stating that how the mistake had occurred. The said application when received should be forwarded to the Board of Revenue for report after investigation by an officer not below the rank of Deputy Collector and on receipt of the report, the Government should decide as to whether such alteration of date of birth should be permitted or the application should be rejected. Sub Rule (b) of Rule 30 provides that after the person has entered the service by direct recruitment, an application to correct his date of birth as entered in the official records should normally be entertained only if such application is made within five years of such entry into the service and that such application shall be made to the government through the High Court and should be disposed of in accordance with the procedure laid down in sub-Rule (a). Sub-Rule (c) of Rule 30 on the other hand, provides that any application received after five years of entry into service should be summarily rejected.

14. Counsel appearing for the respondent No. 1 put his emphasis on the word "normally" in sub-rule (b). This sub-rule (b) is indisputably applicable to the respondent. However, sub-rule (c) which immediately follows makes it mandatory that an application which is received after five years of entry into the service should be summarily rejected. Therefore, the pre-requisite of filing such an application is that it must be submitted

within five years period and when it is so submitted the same should be entertained.

15. In this case, the formal application was admittedly filed after expiry of the period of five years. Sub-Rule (a) of Rule 30 clearly emphasizes that the application seeking for change of date of birth is to be made to the government through the High Court. The letter on which reliance is placed by respondent No. 1 which is dated 11.11.1993 is not addressed to the government but it is addressed to the Registrar of the High Court and in that application the respondent No. 1 has formally sought for change of his date of birth stating the reason as to why such date of birth is called for.

16. In *Punjab & Haryana High Court at Chandigarh Vs. Megh Raj Garg and Another* reported in (2010) 6 SCC 482, this Court while dealing with the issue of limitation in the case of application for change of date of birth, held as follows:-

> "13. If the correct date of birth of Respondent 1 was 27-3-1938 and this was supported by the certificates issued by the schools in which he had studied before appearing in the matriculation examination, then he would have immediately after joining the service made an application to the University for change of the date of birth recorded in the matriculation certificate and persuaded the authority concerned to decide the same so as to enable him to move the State Government and the High Court for making corresponding change in the date of birth recorded in his service book in terms of Para 1 of Annexure A to Chapter II of the Punjab Civil Service Rules, Volume I…..
>
> 15. The High Court or for that reason the State Government did not have the power, jurisdiction or authority to entertain the representation made by Respondent 1 after more than twelve years of his entering into service. Therefore, neither of them committed any illegality by

refusing to accept the prayer made by Respondent 1 on the basis of change effected by the University in the date of birth recorded in his matriculation certificate. Unfortunately, the trial court, the lower appellate court and the learned Single Judge of the High Court totally misdirected themselves in appreciating the true scope of the embargo contained in the relevant rule against the entertaining of an application for correction of the date of birth after two years of the government servant's entry into service and all of them committed grave error by nullifying the decision taken by the State Government in consultation with the High Court not to accept the representation made by Respondent 1 for change of the date of birth recorded in his service book.

17. This Court has time and again cautioned the civil courts and the High Courts against entertaining and accepting the claim made by the employees long after entering into service for correction of the recorded date of birth. In Union of India v. Harnam Singh this Court considered the question whether the employer was justified in declining the respondent's request for correction of the date of birth made after thirty-five years of his induction into the service and whether the Central Administrative Tribunal was justified in allowing the original application filed by him. While reversing the order of the Tribunal, this Court observed: (SCC pp. 167-68, para 7)

> 7. *A government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the*

reason that the right to continue in service stands decided by its entry in the service record. A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the courts and tribunals. It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a government servant can be entertained. *A government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous.* The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age."

(emphasis supplied)

Again in *Union of India Vs. Harnam Singh* reported in (1993) 2 SCC 162, this Court said about limitation in paragraph 7 in the following manner:-

> "7. …… It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. ……."

17. Therefore, strictly speaking the Respondent while filing the said application did not follow the mandate and requisites of Rule 30 of the Rules. The application was not addressed to the State Government nor the procedure prescribed in sub-Rule (a), which is applicable even for a case where sub-Rule (b) applies was not adhered to nor the said application was filed within five years. Therefore, in terms of sub-rule (c) it was to be summarily rejected. But, instead of deciding the present appeal only on the aforesaid ground, we proceed to decide on the other issues also which were urged before us and which in our considered opinion call for our decision.

18. So far as the contention with regard to change made in the S.S.L.C. Certificate is concerned, we have perused the said certificate. In the said certificate, it was clearly mentioned

that his date of birth was 19.3.1947 which was entered into by the headmaster of the concerned school. It also contained the declaration of the father of respondent No. 1. The signature of the father of the respondent No. 1 is clearly visible on the declaration and the signature is distinct, bold and beautifully written and therefore appears to be that of a man of letters. The date recorded therein came to be changed to 24.11.1950 by someone by putting his initials, but the same is also without any date and no seal also appears to have been appended thereto in support of such change.

19. Sub-Section(1) of Section 13 of the Registration of Births and Deaths Act, 1969 provides that any birth or death of which information is given to the Registrar after expiry of the period specified therein, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed. Sub-section (2) thereof provides that any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorized in this behalf by the State Government. Sub-section (3) of Section 30 which is relevant for our purpose also provides that any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee. There is nothing in the evidence to indicate that the pre-conditions and the requisites of sub-section (3) of Section 30 were followed in the instant case by respondent No. 1. No order of the Magistrate of the first class or Presidency Magistrate is placed on record to prove and establish that such an order was passed after verifying the correctness of the birth nor any other connected document thereof is placed on record and therefore, the change

apparently was not made in terms of the aforesaid mandate of Section 13 of Registration of Births and Deaths Act, 1969.

20. Reliance is placed by respondent No. 1 on the evidence of the doctor and the medical certificate. PW-2 is Shri Newmen who has proved the medical certificate stating that he was the Chairman of the Medical Board and that the medical certificate was given to the plaintiff/respondent No. 1 by the Medical Board which is Ext. A-12. He stated in his examination-in-chief that he was the Chief of the Board formed for issuance of Ex. A-12, which is relied upon by plaintiff/respondent No. 1 and one doctor in Pathology, one General Medical Expert and one Radiologist were in that team. He has also stated that the said medical team generally examined plaintiff/respondent No. 1 and examined him radiologically and came to the conclusion as per Ex. A-12. He also stated that what kind of examination was conducted on plaintiff/respondent No. 1 is noted in the report of the Medical Board.

21. He has specifically stated in his deposition that he has not produced the test report or its copy before the Court showing supporting documents and the tests based on which they had determined the age of respondent No. 1/plaintiff. It must be indicated at this stage that respondent No. 1/plaintiff himself went to the Medical Board and got himself examined and obtained the aforesaid report which was brought in evidence. At the top of the aforesaid medical certificate, it is written as "Age Proof Certificate". The said age proof certificate is signed by the Chairman and also signed by two other members. What is recorded in the said age proof certificate is extracted below:-

> "This is to certify that MEDICAL BOARD No. Office at TIRUPUR have carefully examined THIRU MANICKAM, S/o Thiru V. Muthusamy, Subordinate Judge, Udumalpet an applicant for Age Certificate. His identification marks are;
>
> 1. A Black mole on the right collar bone.
>
> 2. A Black mole on the right hand.
>
> According to my physical examination and personal of his appearance of the individual, he appears to be about 48 years (Forty Eight years) according to his own statement"

22. In our considered opinion, the said medical certificate is very vague and unreliable. Whether or not any radiological examination was done and if so, of what nature, and also whether any ossification test was done or not is not reflected from the said report. It is only stated in the certificate that on the basis of physical examination and from his appearance and on the basis of his own statement the age of the respondent was determined as 48 years.

23. This Court in the case of *Ramdeo Chauhan alias Raj Nath v. State of Assam* reported in (2001) 5 SCC 714 while dealing with the reliability of the ossification test held as follows: -

> "21. ..... An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

24. That age proof certificate appears to have been got prepared for the purpose of adducing evidence at the time of hearing of the suit and not before. The document is also found to unrealistic and unreliable. Considering the facts and circumstances of the case, it is very difficult to place any

reliance on the authenticity and validity of the said age proof certificate. Respondent No. 1 also relied upon the evidence of two persons in support of his contention that he was born in the year 1950. Let us now proceed to consider the strength of such oral evidence.

25. PW-3, Murugan who is the elder brother of respondent No. 1 was examined. He had stated that respondent No. 1/ plaintiff was born in the year 1950. He also stated that in their family except respondent No. 1, nobody studied in school or college which is found to be incorrect because at a later stage he himself had stated that he had studied upto 2nd or 3rd standard.

26. He also stated that generally when the child is born, the same is registered with the Village Munsif and that he did not know whether his father had informed the village Munsif about the birth of respondent No. 1. He had stated that while his brother was at the age of about three or four years, to get him admitted in the school, his father had given innocently his age as about 7 or 8 years and got respondent No. 1 admitted in the school.

27. The only other witness who was examined to prove the age of respondent No. 1 was Chettiappa Velar, PW-4 who had stated that respondent No. 1 was born in the year 1950 and that he also got married in the year 1950. However, in the cross-examination, he could not say as to what is the date and month in which the respondent No. 1 was born. He also could not give the date and month of his marriage as well.

28. The aforesaid evidence adduced by respondent No. 1 in support of his case is most unreliable. Change of date of birth is a very important responsibility to be discharged for there is a general tendency amongst the employees to lower their age and change their date of birth to suit their career and to lengthen their service career. In paragraph 6 of the judgment

of this Court in *State of U.P. v. Shiv Narayan Upadhyaya* reported in (2005) 6 SCC 49, this Court held thus: -

> **"6.** .....But, of late a trend can be noticed, that many public servants, on the eve of their retirement waking up from their supine slumber raise a dispute about their service records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution or by filing applications before the Administrative Tribunals concerned, or even filing suits for adjudication as to whether the date of birth recorded is correct or not."

Again in Para 9 of the said judgment it was stated thus: -

> "9. .....As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order....."

29. There must be strong, cogent and reliable evidence in support of the contention that the date of birth entered in the service records or in the S.S.L.C. certificate was wrongly entered by a mistake.

30. In *State of Punjab Vs. Mohinder Singh* reported in (2005) 3 SCC 702, this Court had occasion to deal with the evidentiary value of horoscope as proof of date of birth. It was

held in that decision that a horoscope is very weak piece of material to prove age of a person and in most of the cases the maker may not be available to prove that it was prepared immediately after the birth and therefore a heavy onus lies on the person who wants to press it to prove its authenticity. It was further held that in fact a horoscope to be treated as evidence in terms of Section 32(5) of Evidence Act, 1872, it must be proved to have been made by a person having special means of knowledge as regards authenticity of the date, time etc. mentioned therein. In that context horoscopes have been held to be inadmissible in proof of age.

31. Keeping the aforesaid principles laid down by this Court in our mind, we proceed to examine the evidentiary value of the horoscope which is relied upon by the respondent No. 1 in support of his claim. The aforesaid horoscope is the basis and foundation on which the respondent No. 1 primarily relies upon. The said horoscope, therefore, must be shown to have been made by a person who has special knowledge of making such a horoscope. The creator of the horoscope or the writer is not examined in the present case as he was stated to be dead. None of his family members or any of his acquaintances was examined to prove handwriting. In order to come to a definite decision about the authenticity and evidentiary value or the reliability of the document, we have ourselves closely and very minutely considered the horoscope.

32. Having gone through the same, we find that although it is stated to be a notebook containing the horoscopes of all the sons and daughters of the father of Respondent No. 1 made at different points of time, but a bare perusal of the document would indicate that all the horoscopes are made at one point of time by the same person at one go and not on different dates as sought to be claimed. The book allegedly containing horoscopes of all persons was shown to be maintained from 1939 to 1953. For all the horoscopes written between a period of 14 years the same ink was used by the same writer. First

horoscope was of 1939 and written in that year in a note book distributed and published from Trichy-2. At that time, i.e., before independence there was no postal zone. As per materials available the Indian Postal Service which was constituted after Independence has introduced a PIN code system "the Postal Index Number Code System" in India on 15.08.1972. The objective of introduction of the said Code was to simplify the sorting of mails and thus speed up their transmission and delivery. Since this system came in 1972 the note book has to be of a period after 1972 and, therefore, the contention that immediately on birth of a member in the family, the date of birth was entered in the note book has been falsified. Therefore, it reinforces the findings of this Court that the Respondent No. 1 has incorrectly stated the year of preparation of horoscope. It could be deduced from the materials on record that somewhere around 1993 this document was got prepared. If such a notebook was available, nothing is stated as to why the same could not have been looked at and produced at the time of his admission in the school or at the time of his admission in the college or even at the time when he was entering into the service. From the signature appearing on the school leaving certificate, we find that the father of respondent No. 1 was a man of letters and there was no reason as to why he would subscribe to a wrong age as alleged and that too in his S.S.L.C. Certificate.

33. The aforesaid S.S.L.C. certificate with the date 19.3.1947 was produced by him at the time of his entry into the college as also in entry into the service knowing fully well that, that particular age is factually recorded. The said notebook allegedly contained the horoscopes of all the persons prepared at different points of time and therefore the said date of birth was known to the family and therefore, if it existed at that point of time, it would have definitely been placed at the time of his entry to the school or admission in the college or the same would have been relied upon at least at the time of his entry to

the service. We reiterate the proposition of law laid down by this Court in the aforesaid decision that horoscope is a very weak piece of material to prove age of a person and that heavy onus lies on a person who wants to press it into service to prove its authenticity.

34. We are of a firm opinion that respondent No. 1 has failed to discharge his onus in proving the authenticity of the aforesaid horoscope on which reliance is placed. Since the aforesaid horoscope is a primary document on which reliance is placed for change of his date of birth, therefore, the same is required to be looked into very carefully and minutely so as to ascertain the genuineness of the claim of respondent No. 1. There cannot be any bar to examine the authenticity and evidentiary value of the same while exercising the power under Article 136 of the Constitution of India. Power under Article 136 of the Constitution of India permit such a scrutiny particularly when it relates to the change of date of birth of a person who seeks to get an advantage to his benefit to which he otherwise may not be entitled to. In the decision of this Court in *Ramakant Rai v. Madan Rai and Others* reported in (2003) 12 SCC 395, the ambit and scope of power of Article 136 is stated thus: -

> "14. ……In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on this Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the Court. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limits, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. ……"

The difference of age in the present case is also considerable, as it is 3 years, 8 months and 5 days.

35. When we look into the dispute and the matter from any angle, we find that the judgment and the decree passed by the Munsif Court which is affirmed by the High Court cannot be sustained and is liable to be set aside. We hereby set aside the judgment and decree of the High Court and hold that respondent No. 1 has failed to prove that any change of date of birth is called for in the present case. The appeals are allowed and the suit stands dismissed, leaving the parties to bear their own costs.

R.P. Appeals allowed.

MALOTH SOMARAJU
v.
STATE OF A.P.
(Criminal Appeal No. 1849 of 2008)

AUGUST 17, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

Penal Code, 1860 – s. 302 – Accused alleged to have committed murder of his elder brother by inflicting fatal injuries by axe at night – Acquittal by trial court – However, conviction and sentence u/s. 302 by High Court – On appeal, held: Trial court got swayed away by the so-called irrelevant suspicious circumstances which resulted into the acquittal of the accused – High Court dealt with all the other aspects in detail and also considered the evidence without being influenced by all the irrelevant and imaginary suspicious circumstances – PW 1 (wife of deceased) was a truthful and reliable eye-witness – She had a close relation with the accused who was her real brother-in-law and was not expected to commit any mistake in identifying him and she would certainly be interested in naming the culprit since she had lost her husband – She was a natural witness and her presence in her own household was also absolutely natural – PW-1 lodged the FIR barely within 4-41/2 hours of the accident which is complete in all the details – FIR completely corroborates her evidence – She stood her cross examination extremely well –Other prosecution witnesses who had rushed to the scene of incident hearing the shrieks of PW-1 and had allegedly seen the accused, turned hostile, cannot be viewed as a suspicious circumstance – Quality of the evidence of PW-1 is very high and her evidence alone is sufficient for the conviction of the accused – Thus, order passed by the High Court is upheld.

Criminal law – Judgment of acquittal – Sustainability of

– Held: Merely because the acquittal is found to be wrong and another view can be taken, the judgment of acquittal cannot be upset.

According to the prosecution, appellant-accused committed murder of his elder brother 'K' by inflicting fatal injuries by an axe, to his temporal region, nose and face. At the time of the incident around 2.00 a.m., 'K' was sleeping on his cot along with one son and his wife PW 1 was sleeping on the other cot along with the another son. PW-9 (cousin of PW 1) also slept there on another cot. At that time suddenly, the appellant came and assaulted 'K'. PW 1 raised cry and on hearing her, relatives of her husband, her father-in-law (PW-4), her mother-in-law (PW-3), elder brother-in-law (PW-6) and his wife (PW-5), her second brother-in-law (PW-6) and his wife (PW-7) came there. On seeing them the accused fled away. 'K' was immediately taken to the hospital where he was declared as brought dead. PW-1 lodged a report. Being illiterate, she got scribed the report by PW-14 and submitted it to the police station at 6.30 a.m. in the morning. PW 1 stated in the complaint that the appellant-accused bore a grudge against her husband. On that day her husband did not go for the duty and on that night she and her husband and her cousin were sleeping and she woke up her husband to attend the call of nature. Thereafter, she and her husband slept and while they were talking to each other. The accused came from behind and assaulted him. The Sessions Judge acquitted the appellant-accused. However, the High Court convicted the accused of the offence u/s. 302 IPC and awarded sentence of life imprisonment. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 There can be no two opinions that merely because the acquittal is found to be wrong and another

view can be taken, the judgment of acquittal cannot be upset. The appellate court has more and serious responsibility while dealing with the judgment of acquittal and unless the acquittal is found to be perverse or not at all supportable and where the appellate court comes to the conclusion that conviction is a must, the judgment of acquittal cannot be upset. It is quite clear from the High Court's judgment that the High Court has certainly taken that care while upsetting the acquittal. [Para 5] [361-E-G]

1.2 The High Court wholly relied on the direct testimony of PW-1 and carefully examined her evidence threadbare. The High Court correctly found that she had a close relation with the accused who was her real brother-in-law and she was not expected to commit any mistake in identifying him; that she would certainly be interested in naming the culprit since she had lost her husband; and that that she was a natural witness and her presence in her own household was also absolutely natural. Her version that she woke up her husband to attend the call of nature is the most natural version and that has been specifically stated in the first information report which was filed barely within 4 - 4½ hours after the incident. Very significantly, PW 1 did not speak about her having lighted the bulb, in her examination-in-chief; however, in her cross-examination, when it was suggested to her that there was no power during that night, she specifically refuted the suggestion and then asserted that she had switched off the bulb before going to the bed and had switched on the same after she had awakened to attend the call of nature. This theory of her switching on the bulb, having been introduced in the cross-examination, becomes all the more significant. The High Court, therefore, accepted her version that she had put on the bulb and had not switched it off after she and her deceased husband returned to the bed after answering the call of nature. Therefore, whatever doubts

could have been raised because of the night being a new moon night and the prevalence of darkness on the spot, were also got dispelled by the defence by its cross-examination. The High Court also considered the submission for the defence that the accused could not have inflicted the injuries on the face of the deceased and, more particularly, front part thereof, if after answering the call of nature, both were talking to each other, meaning thereby that the deceased was in a sitting position. The High Court pointed out through the evidence of PW-1 that the deceased was in the lying position and it is on that basis that the High Court has rejected the defence theory and upheld the evidence of PW-1. The High Court also found that there could not have been any motive on the part of PW-1 to falsely implicate her husband's brother. The defence theory was that the sister of the deceased was married to her brother and her brother had committed suicide and in fact PW-1 was holding the accused to be responsible for the suicide. There being no support to this theory in evidence, the High Court rightly ignored the same. PW-1 was not cross-examined in respect of the controversy regarding the number of cots. She, in her evidence, had claimed that there were three cots and she, her husband and two sons were sleeping on the two cots, whereas the third cot was occupied by her cousin. Relying on the sketch drawn by the investigating officer as also on the photographs, it was suggested that only one cot was found. The High Court rejected this theory that the sketch which is the sketch drawn by the investigating officer was admissible in evidence. The High Court found that even if it was held to be admissible, admittedly, the sketch was drawn by 11.30 am and, therefore, the possibility of the two other cots, which had no signs of any blood or any other material evidence having been found, could not be ruled out. On the aspect of the cot as well as the position of the deceased and the location of the injuries on the

face of the deceased, the reasoning given by the High Court is quite satisfactory. With regard to the clothes of PW-1, being stained with blood, it is an admitted position that her clothes which were stained with blood were neither seized by the investigating agency nor were they sent for the chemical examination. The High Court accepted the explanation of Sub Inspector PW-20 that her clothes even otherwise could have stained with blood because she had carried the deceased in the auto rickshaw to the hospital and, therefore, the clothes were not material. There is no reason to reject this reasoning of the High Court. The submission that it was a doubtful circumstance and in the absence of the blood-stained clothes, the version of PW-1 could not be believed by the High Court and by this Court, cannot be accepted. [Para 6] [361-H; 362-A-H; 363-A-H; 364-A-B]

1.3 PW-1 was thoroughly cross-examined and nothing could be brought out in her cross-examination which would bring her testimony into dark. She lodged the FIR barely within 4-41/2 hours of the accident. There is clear endorsement by the Magistrate that the FIR reached the Magistrate at 7.30 in the morning. Once this aspect of the timing is proved, the same must clinch the issue and then it cannot be imagined that PW-1 who was in the company of her relatives on her husband's side, would falsely implicate her own brother-in-law. The theory of false implication is just not possible as the lady hardly had any time to think about the false implication of her brother-in-law. The lady is illiterate. She could not have just created the theory that it was her brother-in-law who was the culprit, unless that was the truth. On this backdrop, when the FIR is read it completely corroborates her evidence. [Para 7] [364-B-C; 365-G-H; 366-A-B]

1.4 The first information report given by PW-1 is complete in all the details. There were no contradictions

in her evidence. She has supported the first information report fully. The assertion of PW 14 that the FIR was scribed at 10 O' clock cannot be correct, particularly, in view of the registration of the offence at 6.30 a.m. in the morning and the copy of the FIR having reached the Magistrate at 7.30 a.m. It is obvious that PW-14 was falsely claiming the time of the FIR to be 10 O' Clock. PW-13 is a resident of another village. He is related to the accused as well as PW-1. His evidence would be of no consequence excepting to the evidence of judging the behaviour of PW-1 in revealing the name of the accused in his cross examination by the defence. The evidence of PW-19 completely supports the theory that the FIR was received at 6.30 a.m. and at the same time was registered. There is absolutely no cross examination of PW-19 except a bald suggestion that the time of the report was manipulated. All the evidence clearly shows that PW-1 was a truthful witness. She stood her cross examination extremely well. [Para 8-9] [366-B-C-F-G; 367-A-F]

1.5 It is not the quantity but the quality of the evidence which clinches the issue in the criminal trial of this type. The quality of the evidence of PW-1 is very high and her evidence alone is sufficient for the conviction of the accused. However, PW-2 the father of the deceased claimed that he was called at 12 midnight or at 1 a.m. by his deceased son that somebody had hit him and had broken his head. He claimed to have tied the towel to the head of the deceased and gave him water. At that time PW-1 and her children were sleeping in the house and the door was bolted from outside. He claimed to have opened the door and it is then that PW-1 came out. He was declared hostile and the whole statement made by him being totally contradictory was got proved by the Public Prosecutor. [Para 10] [367-G-H; 368-A-B]

1.6 In the cross examination of PW-2 by the defence, it has come that PW-1 had told him in the hospital that

the accused was the person responsible for the injuries. Thus, PW-1 had told the name of the accused even to PW-2 which is a relevant piece of evidence. The evidence of PW-5 and PW-6 is of no consequence except to the extent that he was present along with PW-4 and his father PW-2 in the hospital. He tried to improve upon his story to the effect that PW-1 had expressed to him as to who was the assailant. He was also declared hostile. Therefore, his evidence would be of no consequence. PW7, PW-8, PW-9, PW-10, PW-11 and PW-12 were also declared hostile and their evidence is of no consequence excepting to the extent stated earlier. The panch witnesses, namely, PW-15 and PW-16 have also turned hostile. When the evidence of all these persons who were the relatives of the deceased is compared, it is significant that it has nowhere come that PW-1's paternal relatives were there. In fact she was surrounded by all the relatives of her husband and yet she named her husband's younger brother as the accused in her FIR. It cannot be imagined that she would be falsely implicating the accused in presence of all the relatives of her husband's side. Therefore, PW-1 is a completely reliable witness. [Para 11] [368-G-H; 369-A-E]

1.7 The evidence of discovery of the murder weapon is not proposed to be believed for the reasons given by the courts below; however, that would not give any benefit to the accused whose presence on the spot and whose act of hacking the deceased was fully proved by the evidence of PW-1. The non-examination of the two child witnesses could not be viewed against the prosecution. After all, they were of the tender age and to put them in the witness box would have been hazardous. Besides the prosecution had put all the witnesses in the witness box who had rushed on hearing the shrieks by PW-1 and initially all those witnesses had allegedly seen the appellant/accused. It is a different affair that all of them

turned hostile, obviously in order to save the appellant/accused who was their own kith and kin. Therefore, it is not viewed to be a suspicious circumstance. [Para 12] [369-F-H; 370-A-B]

1.8 Much importance is not attached to this insignificant discrepancy of the murder weapon (hunting sickle or an axe) as it may be that PW-1 could not differentiate between the hunting sickle and the axe, both of which are fitted with a wooden handle. There are some suspicious circumstances mentioned in the judgment of the trial court. The trial court got swayed away by the so-called irrelevant suspicious circumstances which resulted into the acquittal of the appellant. The High Court in its judgment, dealt with all the other aspects in detail and also considered the evidence without being influenced by all these irrelevant and imaginary suspicious circumstances. The judgment of the High Court is wholly approved and confirmed. [Para 13] [370-C-D; 371-F-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1849 of 2008.

From the Judgment & Order dated 31.01.2008 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 47 of 2006.

Anand Dey, D. Bharat Kumar, Rajshree N. Reddy, Abhijit Sengupta for the Appellant.

I. Venkatanarayana, D. Mahesh Babu, Ramesh Allanki, Savita Dhanda, V. Pattabhi Ram for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Appellant Maloth Somaraju challenges the judgment of the High Court whereby the High Court allowed the State appeal challenging the acquittal by the

Trial Court. He was tried for the offence punishable under Section 302, IPC on the allegation that on 15.05.1999 at about 2 a.m. at night he committed the murder of his elder brother Maloth Krishna (hereafter referred to as "deceased" for short) by causing his death with an axe injuring his temporal region, nose and face which ultimately resulted in his death.

The prosecution story in short conspectus

Deceased was a worker in Singereni Collaries. He used to go for his duty at about 12.30 p.m. at night every day. On the fateful day, he did not go for his duty. At the time when the incident happened, he was sleeping on his cot along with one son. It is the prosecution case that besides him was another cot on which his wife Heeramani (PW-1) was sleeping along with another son. Besides these two cots, there was another cot on which was one Haridas (PW-9) who was the cousin of Heeramani (PW-1) was sleeping.

2. It is the case of the prosecution that at that time suddenly the appellant came and assaulted Krishna which incident was seen by Heeramani (PW-1) who raised cry which attracted the neighbours who were mostly the relatives of her husband including his parents, his brother, his sister-in-law and cousins of the deceased. All his relatives are Banjara by caste. The deceased was immediately carried in an auto rickshaw to Singereni hospital where he was declared as brought dead. On that Maloth Heeramani (PW-1) had lodged a report before Kothagudem Police Station. Since she was illiterate, Heeramani (PW-1) got scribed the report by Rayala Sathyanarayana (PW-14) and submitted it to Kothagudem police station at 6.30 in the morning. It has come on record that the report was immediately forwarded to the concerned Magistrate who received it at 7.30 in the morning. In this report Heeramani (PW-1) complained that in the midnight she woke up her husband for answering the call of nature. After that, she and her husband slept. As they were talking to each other, her brother-in-law Maloth Somaraju, the accused-appellant came

from behind the house with a sickle (Kota Kathi) and attacked her husband on his left temporal, nose and under the nose due to which there was heavy bleeding. She further suggested that she raised cry and on hearing her cries, her father-in-law Balunayak (PW-2), her mother-in-law, Maloth Bhikri (PW-3), elder brother in law Amar Singh (PW-4), his wife Kausalya (PW-5), her second brother in law Phool Singh (PW-6), his wife Maloth Dwali (PW-7) came there. On seeing them, accused Somaraju fled away. After that her husband was shifted in the auto of Mohan Rao to Company Singereni main hospital. However, the doctors there told that her husband was dead. She then narrated that accused/appellant was addicted to drinking and used to come to house and beat her in-laws and was harassing them for which her husband had to pacify them and about fifteen days back when the accused bit her in-laws, her husband had beaten the accused and it was because of this that he bore grudge against her husband and axed her husband. The offence was registered and the investigating officer rushed to the spot, got executed inquest Panchnama as also got drawn the map of the spot and sent the body for autopsy. Autopsy was conducted by M. Gopal Swamy (PW-16). Autopsy report is Exhibit P-19. The autopsy was conducted at 11 a.m. in the morning. According to the doctors, the approximate time of death was 8 to 10 hours before the autopsy. After the completion of the investigation, the charge-sheet was filed. At the trial, the prosecution examined as many as 20 witnesses and marked 31 documents. In his defence, the plea of accused is of total deny. There was no defence evidence tendered by him. The Sessions Judge acquitted the accused which acquittal was challenged by the State by filing an appeal which appeal was allowed convicting the accused of the offence under Section 302, IPC and awarding sentence of life imprisonment.

3. Shri Anand Dey, learned counsel appearing on behalf of the appellant contended before us that the High Court had committed an error in upsetting the verdict of acquittal given

by the trial Court. The learned counsel urged that the Sessions Judge had taken a possible view and merely because another view could be taken of the matter, the High Court could not have converted the verdict of acquittal into that of conviction. The learned counsel strenuously and painstakingly took us through all the evidence and contended that Heeramani (PW-1) was the sole eye witness and it was impossible for her to identify the accused as admittedly she as well as the deceased were sleeping in the courtyard and that was a new moon night and thereby there was complete darkness. Learned counsel further argued that there were number of suspicious circumstances in the matter inasmuch as though her own cousin was sleeping on the third cot, he did not support the prosecution when he was examined as PW-8. In fact the learned counsel was at pains to suggest that Heeramani (PW-1) had a definite motive to falsely implicate the accused inasmuch as the sister of her husband had married her brother and both her brother as well as his wife had died unnatural death because of which the relations between her family and the family of her husband were strained. It was further argued that the whole investigation was slipshod and casual inasmuch as the investigating officer had not even sent the blood stained clothes of the only eye witness for examination. He did not even send the clothes which were blood stained. Learned counsel pointed out from the record that though it was the version of the witness that there were three cots in the courtyard, when the investigating officer went there, only one cot was found. The investigating officer did not even bother to seize the cot which was blood stained. That apart, the learned counsel pointed out that there were serious discrepancies in the matter as the scribe of the FIR, Rayala Sathyanarayana (PW-14) had suggested that he had written the report at about 9-9.30 a.m. According to the learned counsel, by then, her relations and, more particularly, Bhukya Dhalsingh (PW-13) had come and, therefore, there was every possibility that the relatives had persuaded her to falsely implicate the accused on account of the strained relations. The learned counsel also pointed out that it had come in the evidence that

the Heeramani (PW-10) was in fact sleeping inside the house and outer door was chained from outside and in fact it was only after the said door was opened by her father in law, who come immediately after the assault, that she came out and, therefore, it was impossible for her to see the accused. In the FIR, she had never referred to any bulb and that she had made the improvement regarding existence of a bulb/ source of light only in her cross-examination. Learned counsel, therefore, urged that if all these suspicious circumstances were viewed in favour of the verdict of acquittal, the High court should not have upset the verdict merely because some other view favouring the conviction was possible.

4. As against this, Shri I. Venkatanarayana, learned senior counsel appearing on behalf of the State very strongly supported judgment of the High court and contended that though the house of the deceased was in the village, it was right on the road, and therefore, there was a possibility of the street lights being there. The learned counsel argued that the evidence of Heeramani (PW-1) is natural evidence as she could not have been elsewhere when the incident occurred. Her presence, therefore, was absolutely natural. He also pointed that her version is confirmed as she had taken the name of the accused barely in 3-4 hours after the incident, in her FIR. Considering that she was an illiterate lady there was no question of her falsely implicating the accused. The learned counsel pointed out that her own relations from her father's side could not have been present at 6.30 a.m. as they are the residents of the other village. He further pointed that the investigating officer had given the full explanation as to why he did not seize her blood stained clothes. As regards the cots, the explanation given by him was that it was possible that the cots were removed for being cleaned as admittedly there was huge amount of blood which was clear from the fact that even the earth became blood stained. The learned counsel further pointed out that the version given by her father-in-law about the door being closed and chained from outside was obviously

false as it was not supported by any other witness and it was clear that all the hostile witnesses who were the direct relations of the accused had the sole intention to save the accused. The learned counsel supported the judgment of the High Court saying that no other view was possible on the basis of the evidence led. He pointed out that even assuming there was darkness, Heeramani (PW-1) could not have committed mistake in identifying her own brother-in-law who was barely 2-3 feet from her when the incident occurred. He pointed out that the prosecution had proved all the contradictions brought out in the cross-examination by the Additional Public Prosecutor of the hostile witnesses. As regards the discrepancy in the FIR regarding its timing, the learned counsel pointed out that if the copy of the FIR reached the Magistrate as early as 7.30 in the morning and it was not expected that an illiterate lady like Heeramani (PW-1) to have necessary intention to falsely implicate the accused. It is on the basis of these conflicting claims that we have to see whether the High Court was justified in upsetting and convicting the accused for the offence of murder.

5. The law dealing with the judgments of acquittal is now settled. There can be no two opinions that merely because the acquittal is found to be wrong and another view can be taken, the judgment of acquittal cannot be upset. The appellate Court has more and serious responsibility while dealing with the judgment of acquittal and unless the acquittal is found to be perverse or not at all supportable and where the appellate Court comes to the conclusion that conviction is a must, the judgment of acquittal cannot be upset. We have to examine as to whether the High Court, while upsetting the acquittal, has taken such care and it is quite clear from the High Court's judgment that the High Court has certainly taken that care.

6. The High Court has wholly relied on the direct testimony of Heeramani (PW-1) and has carefully examined her evidence threadbare. Firstly, the High Court has correctly found that she had a close relation with the accused who was her real brother-

in-law and she was not expected to commit any mistake in identifying him. The High Court has correctly observed that she would certainly be interested in naming the culprit since she had lost her husband. The High Court has rightly found that she was a natural witness and her presence in her own household was also absolutely natural. Her version that she woke up her husband to attend the call of nature is the most natural version and that has been specifically stated in the first information report which was filed barely within 4 – 4½ hours after the incident. The High Court refuted the defence version that she could not have identified the accused because of the darkness on the basis of the theory of the bulb, introduced in the cross-examination. Very significantly, she had not spoken about her having lighted the bulb, in her examination-in-chief; however, in her cross-examination, when it was suggested to her that there was no power during that night, she specifically refuted the suggestion and then asserted that she had switched off the bulb before going to the bed and had switched on the same after she had awakened to attend the call of nature. This theory of her switching on the bulb, having been introduced in the cross-examination, becomes all the more significant. The High Court, therefore, accepted her version that she had put on the bulb and had not switched it off after she and her deceased husband returned to the bed after answering the call of nature. Therefore, whatever doubts could have been raised because of the night being a new moon night and the prevalence of darkness on the spot, were also got dispelled by the defence by its cross-examination. The High Court has also considered the contention raised on behalf of the defence that the accused could not have inflicted the injuries on the face of the deceased and, more particularly, front part thereof, if after answering the call of nature, both were talking to each other, meaning thereby that the deceased was in a sitting position. The High Court has pointed out through the evidence of Heeramani (PW-1) that the deceased was in the lying position and it is on that basis that the High Court has rejected the defence theory and upheld the evidence of Heeramani (PW-1). The High Court has also found

that there could not have been any motive on the part of Heeramani (PW-1) to falsely implicate her husband's brother. The defence theory was that the sister of the deceased was married to her brother and her brother had committed suicide and in fact Heeramani (PW-1) was holding the accused to be responsible for the suicide. There being no support to this theory in evidence, the High Court has chosen to ignore the same and in our opinion, rightly. The witness was not cross-examined in respect of the controversy regarding the number of cots. She, in her evidence, had claimed that there were three cots and she, her husband and two sons were sleeping on the two cots, whereas the third cot was occupied by her cousin. Relying on the sketch (Exhibit P-30) drawn by the investigating officer as also on the photographs, it was suggested that only one cot was found. The High Court has rejected this theory that the sketch (Exhibit P-30) which is the sketch drawn by the investigating officer was admissible in evidence. The High Court has found that even if it was held to be admissible, admittedly, the sketch was drawn by 11.30 am and, therefore, the possibility of the two other cots, which had no signs of any blood or any other material evidence having been found, could not be ruled out. Even before us, Shri Anand Dey, learned counsel appearing on behalf of the appellant very strenuously argued on the aspect of the cot as well as the position of the deceased and the location of the injuries on the face of the deceased. We are quite satisfied by the reasoning given by the High Court to reject the claim of the defence in this behalf. Similar is the situation regarding her clothes being stained with blood. It is an admitted position that her clothes which were stained with blood were neither seized by the investigating agency nor were they sent for the chemical examination. The High Court accepted the explanation of Sub Inspector M. Konda Reddy (PW-20) that her clothes even otherwise could have stained with blood because she had carried the deceased in the auto rickshaw to the hospital and, therefore, the clothes were not material. We do not see any reason to reject this reasoning of the High Court. Shri Dey, learned counsel, very strenuously

urged that it was a doubtful circumstance and that in the absence of the blood-stained clothes, the version of Heeramani (PW-1) could not be believed by the High Court and by this Court. We do not see any reason to accept the argument by the learned counsel.

7. Heeramani (PW-1) was thoroughly cross-examined and nothing could be brought out in her cross-examination which would bring her testimony into dark. On the other hand, the theory of switching on the bulb was introduced by the defence in her cross-examination. What impresses us most about the evidence of this witness is the fact that she lodged the FIR barely within 4-4½ hours of the incident. She is an illiterate lady, which is clear from the thumb mark on the FIR. It must be noted that after the incident which took place at 2 O' clock at night, the deceased was taken by her to the hospital. It has come in the evidence of this witness that immediately after the incident, her father-in-law Balunayak (PW-2), her mother-in-law Maloth Bhikri (PW-3), Phool Singh (PW-6), her other brother-in-law and Dwali (PW-7), wife of Phool Singh (PW-6) had rushed to the spot and then the deceased was carried to the hospital. It is obvious that she alone could not have carried her husband to the hospital and she must have been accompanied by the relatives on her husband's side. After her husband was declared dead by the hospital authorities, she straightaway went to the police station and lodged the FIR at 6.30 in the morning which is clear from the evidence of Sub Inspector M. Konda Reddy (PW-20) as also from the FIR which we have seen ourselves. What impresses this Court most is the fact that a copy of the FIR was sent to the Magistrate almost immediately and it was received by the Magistrate at 7.30 in the morning. It was urged by Shri Dey, learned counsel, that this FIR was scribed by Rayala Sathyanarayana (PW-14) as per the dictation of Heeramani (PW-1) and that the same was scribed near the police station. The learned counsel invited our attention to the evidence of this witness where he has claimed that he scribed the FIR (Exhibit P-1) at about 10 a.m. It has also come

in the evidence of this witness that the distance between the police station and the hospital is about 2 Kms. and the distance between the police station and the spot of occurrence is about 3 Kms. The learned counsel, therefore, very vehemently argued that the theory that the FIR was lodged at 6.30 am has to fall on the ground of evidence of this witness. The argument is absolutely incorrect. True it is that the witness had stated that he scribed the FIR at 10' o clock in the morning; however, Sub Inspector M. Konda Reddy (PW-20) has claimed that he received the FIR at 6.30 a.m. on 15.5.1999, on the basis of which he took up the investigation. Men may lie, but the circumstances and the documents don't. The copy of the FIR is seen by us which specifically mentions the time of recording of FIR 6.30 a.m. Further, the receipt of this FIR by the Magistrate at 7.30 a.m. would obviously put an end to the theory that the FIR was written by Rayala Sathyanarayana (PW-14) at 10 O' clock in the morning. It has also come in the evidence that the inquest on the dead body was itself held between 7 a.m. and 9.30 a.m. in presence of Banothu Srinivas (PW-15) and M. Gopal Swamy (PW-16). Had the FIR been written at 10 a.m., the inquest held between 7 a.m. and 9.30 a.m. would never have been possible. We see no reason to disbelieve the inquest report (Exhibit P-21). The version of Sub Inspector M. Konda Reddy (PW-20) is also supported by the fact that he registered the offence and mentioned in the proforma FIR the time as 6.30 a.m. We have seen the evidence of Sub Inspector M. Konda Reddy (PW-20) very closely on this aspect. There is no cross-examination on this aspect excepting the bald suggestion that the time of the offence and the time of the report were manipulated to cover up the lapses on the part of the investigating agency. We do not see any justification to this bald suggestion, particularly in view of a clear endorsement by the Magistrate that the FIR reached the Magistrate at 7.30 a.m. Once this aspect of the timing is proved, the same must clinch the issue and then it cannot be imagined that Heeramani (PW-1) who was in the company of her relatives on her husband's side, would falsely implicate her own brother-in-law. The theory

of false implication is just not possible as the lady hardly had any time to think about the false implication of her brother-in-law. The lady is illiterate. She could not have just created the theory that it was her brother-in-law who was the culprit, unless that was the truth. On this backdrop, when we read the FIR, it completely corroborates her evidence.

8. The first information report given by this witness is complete in all the details. She very specifically stated that on that day her husband did not go for the duty and on that night she and her husband and her cousin were sleeping and she woke up her husband to attend the call of nature. Thereafter, she and her husband slept and while they were talking to each other the accused came from behind and axed the husband on his temporal, nose and under the nose. She also spoke about her raising cries and her relatives, namely, Balunayak (PW-2), her father-in-law, Maloth Bhikri (PW-3), her mother-in-law, Amar Singh (PW-4), her elder brother-in-law, his wife Kausalya (PW-5) and the other brother-in-law Phool Singh (PW-6) and his wife Dwali (PW-7) having come on the spot. She has also referred to the fact that on seeing them the accused fled away. She has further stated that after they brought the husband to the hospital in the auto of one Mohan Rao, the doctor told them that her husband was dead. She has also given reasons for the accused to attack her husband. The name of scribe is also to be found in the first information report. There were no contradictions in her evidence. She has supported the first information report fully.

9. It was stated by the learned defence counsel that the scribe has given an altogether different time regarding writing of the first information report and had stated in the examination-in-chief as well as the cross examination the totally different timing. Very strangely, it has come in the cross examination itself by the defence that there was rumour among the people gathered there that the accused had killed the deceased. The first information report was scribed by PW-14 Rayala Sathyanarayana who said in his cross examination that it was

at about 10 a.m. that he scribed the FIR. The learned defence counsel very heavily relied on this assertion and pointed out that though the FIR is shown to have been registered at 6.30 a.m., in fact it was scribed at 10 O' clock. We have seen the evidence and we are of the firm opinion that his assertion that the FIR was scribed at 10 O' clock cannot be correct, particularly, in view of the registration of the offence at 6.30 a.m. in the morning and the copy of the FIR having reached the Magistrate at 7.30 a.m. It is obvious that the witness was falsely claiming the time of the FIR to be 10 O' Clock. Bhukya Dhalsingh (PW-13) is a resident of another village called Jethyathanda. He is related to the accused as well as Heeramani (PW-1). He could reach the hospital at about 8 or 9 p.m. He asserted that Heeramani (PW-1) and others were in the hospital and he was told by Heeramani (PW-1) that the accused killed her husband. Of course, this evidence would be of no consequence excepting to the evidence of judging the behaviour of Heeramani (PW-1) in revealing the name of the accused in his cross examination by the defence. He was made to say that there was rumour among the people gathered there that the accused had killed the deceased. The evidence of M. Jithendar Reddy (PW-19) completely supports the theory that the FIR was received at 6.30 a.m. and at the same time was registered. He has also asserted that he sent the printed registered FIR to the Additional JFCM, Mothagudem and also marked the copies to concerned officers. There is absolutely no cross examination of this witness excepting a bald suggestion that the time of the report was manipulated. All this evidence clearly shows that Heeramani (PW-1) was a truthful witness. She stood her cross examination extremely well.

10. It is not the quantity but the quality of the evidence which clinches the issue in the criminal trial of this type. The quality of the evidence of Heeramani (PW-1) is very high and her evidence alone is sufficient for the conviction of the accused. We will, however, consider the evidence of other witnesses like Balunayak (PW-2), the father of the deceased who claimed that

he was called at 12 midnight or at 1 a.m. by his deceased son that somebody had hit him and had broken his head. He claimed to have tied the towel to the head of the deceased and gave him water. At that time Heeramani (PW-1) and her children were sleeping in the house and the door was bolted from outside. He claimed to have opened the door and it is then that Heeramani (PW-1) came out. He was declared hostile and the whole statement made by him being totally contradictory was got proved by the Public Prosecutor.

11. He has of course failed to say anything about the bolted door from outside and about his having woken up his daughter in law i.e. Heeramani (PW -1) in his statement before the police. Those are clear omissions. On the other hand, the story told by him in contradictory portions of his statement under Section 161, Cr.P.C. suggests that he is not a truthful witness. This is apart from the fact that he was extremely interested in saving the life of accused who is his son and further this part of his evidence was not supported by another witness including his wife Maloth Bhikri (PW-3) and the other witness, namely, Amar Singh (PW-4). Amar Singh (PW-4) significantly enough deposed that on the night of death of Krishna he heard the cries of Heeramani (PW-1) at 1.30. a.m. which is the time told by Heeramani (PW-1) also. He was awakened by the cries of PW-1 and not by the cries of the deceased as was claimed by Balunayak (PW-2). That is the corroboration to the evidence of PW-1 at least in respect of the time. It also wipes out the story of Balunayak (PW-2) that the deceased had shouted. Significantly enough, no other witness has stated to have been awakened by the cries of the deceased. In his cross examination by the defence, it has come that Heeramani (PW-1) had told him in the hospital that the accused was the person responsible for the injuries. Thus, Heeramani (PW-1) had told the name of the accused even to this witness which is a relevant piece of evidence. The evidence of Kausalya (PW-5) and Phool Singh (PW-6) is of no consequence excepting to the extent that he was present along with Amar Singh (PW-4) and his father

Balunayak (PW-2) in the hospital. He tried to improve upon his story to the effect that Heeramani (PW-1) had expressed to him as to who was the assailant. He was also declared hostile. Therefore, his evidence would be of no consequence. Similar is the story of Banoth Dwali (PW-7), Vankudoth Haridas (PW-8), Maloth Haridas (PW-9), Maloth Badru (PW-10), Maloth Devadas (PW-11) and Banoth Khalu (PW-12). All these witnesses were declared hostile and their evidence is of no consequence excepting to the extent stated earlier. We have already referred to the evidence of Bhukya Dhalsingh (PW-13) and Rayala Sathyanarayana (PW-14) in the earlier part of the judgment. The panch witnesses, namely, Banothu Srinivas (PW-15) and Malothu Balu (PW-16) have also turned hostile. When we compare the evidence of all these persons who were the relatives of the deceased, it is significant that it has nowhere come that Heeramani's (PW-1) paternal relatives were there. In fact she was surrounded by all the relatives of her husband and yet she has named her husband's younger brother as the accused in her FIR. We cannot imagine that she would be falsely implicating the accused in presence of all the relatives of her husband's side. Therefore, we are of the opinion that Heeramani (PW-1) is a completely reliable witness.

12. It was argued that in this case, the discrepancy of the murder weapon was not properly proved and Shaik Gouse (PW-17) was a stock witness who was a criminal. We also do not propose to believe the evidence of discovery for the reasons given by the Courts below; however, that would not give any benefit to the accused whose presence on the spot and whose act of hacking the deceased has been fully proved by the evidence of Heeramani (PW-1). It was tried to be argued by Shri Dey, learned defence counsel, that the prosecution did not examine the two child witnesses. We do not think that that could be viewed against the prosecution. After all, they were of the tender age and to put them in the witness box would have been hazardous. Besides the prosecution had put all the witnesses in the witness box who had rushed on hearing the

shrieks by Heeramani (PW-1) and initially all those witnesses had allegedly seen the appellant/accused. It is a different affair that all of them turned hostile, obviously in order to save the appellant/accused who was their own kith and kin. We, therefore, do not view this to be a suspicious circumstance.

13. The learned defence counsel Shri Dey also argued that the weapon was different. While in the FIR, Heeramani (PW-1) had said the weapon to be Kota Kathi (hunting sickle), the learned defence counsel pointed out that the weapon which was seized was an axe. We do not attach much importance to this insignificant discrepancy as it may be that Heeramani (PW-1) could not differentiate between the hunting sickle and the axe, both of which are fitted with a wooden handle. We have also some suspicious circumstances mentioned in the judgment of the trial Court. The first is regarding existence of bulb. The trial Court held that the time of incident was not mentioned in the FIR (Exhibit P-1), but ignored the fact that the subject of bulb was brought in the cross-examination by the defence. The second circumstance is about Heeramani (PW-1) sitting on the cot and talking with her husband and not mentioning that the husband was also lying on the cot. In our opinion, this circumstance is absolutely insignificant as it has been shown that her husband was actually lying on the cot as per her version in the Court. Third circumstance is the possibility of their not talking. That is absolutely insignificant and has to be ignored. It is nothing unnatural. Fourth circumstance is the account of darkness. We have already explained that circumstance that even in the light that was available, it was quite possible for Heeramani (PW-1) to identify, which identification was further corroborated by her immediately naming the accused. Fifth circumstance is about the position of the deceased which we have already explained. This circumstance could not be availed by the trial Court. Sixth circumstance is about existence of only one cot near the fence at some distance which was seen in photos. We have already explained this circumstance to be insignificant as there was possibility of removing the cots since

the panchnama took place at about 11 O' clock in the morning. Seventh circumstance is about blood stained clothes of Heeramani (PW-1) not being seized to establish her presence. We have explained this circumstance that there was very good explanation given by the investigating officer. Eighth circumstance is obviously incorrect, that being the delay in giving the report. Ninth circumstance is the cousin of Heeramani (PW-1) not supporting the prosecution. That by itself cannot be a suspicious circumstance, particularly, on the backdrop of the FIR having been registered at 6.30 a.m. and the same having been received by the Magistrate at 7.30 a.m. Tenth circumstance is about the relatives completely turning hostile and not supporting the version. This could not be held to be a suspicious circumstance for the simple reason that they were all interested in the accused. Eleventh circumstance is that there was no strong motive to kill. The motive looses all its significance in the wake of eye-witness's account. Twelfth circumstance is that there were possibilities of some other persons attacking the deceased. There is absolutely no basis for this wild imagination. We have already referred to the thirteenth circumstance about bill book and held it to be not a suspicious circumstance. Fourteenth circumstance is merely inferential. Fifteenth circumstance is that Heeramani (PW-1) did not try to obstruct the deceased to give him blow after first blow. That circumstance depends upon the individual reaction. We do not attach any importance to such a circumstance. Last circumstance is again about the cot. We do not think that that is any relevant circumstance. Therefore, it is clear that the trial court got swayed away by the so-called irrelevant suspicious circumstances which resulted into the acquittal of the appellant. The High Court has, in its judgment, dealt with all the other aspects in detail and has also considered the evidence without being influenced by all these irrelevant and imaginary suspicious circumstances. We wholly approve of the judgment of the High Court and confirm the same. In the result, the appeal has no merits and it is dismissed.

N.J. Appeal dismissed.

STATE OF HARYANA & ORS.
v.
M/S MALIK TRADERS
(Civil Appeal No. 7033 of 2011)

AUGUST 17, 2011

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Contract:

Tender – Inviting of bids for collection of toll – Terms of bid requiring to keep the offer/bid open for acceptance upto 90 days after the last date of receipt of bid – Letter of acceptance issued to bidder within the bid validity period – Bidder failed to deposit security amount and the first instalment within the stipulated period – Letter of acceptance issued to bidder cancelled and bid security forfeited – HELD: A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him – In the instant case, the bidder had agreed to keep the bid open for 90 days after the last date of receipt of the bid and that he would be bound by the communication of acceptance of the bid within the said period of 90 days – Therefore, the bidder could not have withdrawn the bid within the said 90 days – Besides, since the bidder withdrew his offer during the period of bid validity in violation of the agreement, the full value of Bid Security was liable to be forfeited – The purpose of bid security is to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence – Such conditions are included to ensure that only genuine parties make the bids – The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in

violation of the agreement – High Court was not justified in quashing the letters accepting the bid of the respondent and the letter cancelling the acceptance of the bid and forfeiting the Bid Security – Order of High Court set aside – Contract Act, 1872 – s.5.

The respondent was the second highest bidder for the bid of collection of toll. In terms of the written offer/ bid, the respondent agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. As the highest bidder failed to deposit the security amount and the first instalment within the stipulated period, the letter of acceptance issued to that bidder was cancelled and a letter of acceptance dated 26.11.2008 was issued to the respondent within the stipulated period of 90 days. Since the respondent also failed to deposit the security amount and the first instalment within the stipulated period, the letter of acceptance issued to the respondent was cancelled by Memo dated 17.12.2008, and the Bid Security of Rs. 20 lakhs was forfeited. Bids were re-invited for collection of toll and this time the respondent being the highest bidder, its bid was accepted and it deposited the security amount and the first instalment in terms of the letter of acceptance. Thereafter the respondent filed a writ petition before the High Court for refund of the forfeited amount of the Bid Security of Rs. 20 lakhs in respect of the earlier bid contending that before the receipt of the letter of acceptance, it, by letter dated 15.11.2008, had informed the authority concerned that it was not interested in the work and the amount of Bid Security be refunded to it. The writ petition was allowed by the High Court holding that since the offer was withdrawn before it was accepted, there could be no acceptance of the offer and, as such, there could not be any consequence of the writ petitioner not honouring the commitment. Aggrieved, the State Government filed the appeal.

Allowing the appeal, the Court

HELD: 1. It is true that as per s. 5 of the Contract Act, 1872, a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. It is also true that before receipt of the letter of acceptance dated 26.11.2008, the respondent had sent a letter dated 15.11.2008 withdrawing its offer. However, admittedly, in paragraph 8 of the written offer/bid, the respondent had agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. The respondent had also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the said period of 90 days. Therefore, respondent could not have withdrawn the bid before the expiry of the period of 90 days. It is not disputed that the acceptance of the respondent's bid was communicated to the respondent within the said period of 90 days. Therefore, the respondent was bound by the said acceptance of the bid, despite its withdrawal by the respondent in the meanwhile. [para 10] [379-D-H]

1.2 In paragraph 10 of the offer/bid, the respondent had also agreed that the full value of the Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the respondent withdraw or modify its offer/bid during the period of bid validity (90 days) or extended validity period. Since the respondent withdrew its offer during the period of bid validity in violation of the agreement in paragraph 8 of the offer/bid, the full value of Bid Security was liable to be forfeited in terms of the agreement contained in paragraph 10 of the offer/bid. Under the cover of the provisions contained in s. 5 of the Act, the respondent cannot escape from the obligations and liabilities under the agreements contained in its offer/bid. The right to

withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. [para 10] [379-G-H; 380-A-F]

1.3 A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him. Forfeiture of such Bid Security amount does not, in any way, affect any statutory right u/s 5 of the Act. The Bid Security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement. [para 10] [380-E-H; 381-A]

National Highways Authority of India v. *Ganga Enterprises & Anr.* **2003 (3) Suppl. SCR 114 = (2003) 7 SCC 410 – relied on.**

2. The High Court was not justified in quashing the letter dated 26.11.2008 accepting the bid of the respondent and the letter dated 17.12.2008 forfeiting the Bid Security amount of Rs. 20 lakhs. The order of the High Court is set aside. Consequently, the writ petition stands dismissed. [para 12] [383-C]

Case Law Reference:

2003 (3) Suppl. SCR 114 relied on para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7033 of 2011.

From the Judgment & Order dated 07.07.2009 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 2266 of 2009.

P.N. Mishra, Manjit Singh, Vivekta Singh, Harkesh, Kamal Mohan Gupta for the Appellants.

A.K. Sanghi, D.K. Garg, Dipak Kumar Jena, Minakshi Ghosh Jena, Abhishek Garg, Dhananjay Garg for the Respondent.

The Judgment of the Court was delivered by

CYRIAC JOSEPH, J. 1. Leave granted.

2. This appeal is filed against the judgment dated 7.7.2009 rendered by a Division Bench of the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009, allowing the said writ petition. The appellants were the respondents in the writ petition and the sole respondent herein was the petitioner therein.

3. Facts in brief are stated hereunder:

On 18.9.2008, the appellant State of Haryana invited tenders from interested persons for appointment as Entrepreneur/Agent for collection of toll at Toll Bridge over river Yamuna on Karnal-Meerut Road, near U.P. Border. The respondent M/s. Malik Traders was one of the 13 bidders who submitted tenders. As required by the terms and conditions of the Bid, all the bidders, including the respondent, deposited the Bid Security of Rs. 20 lakhs in the form of bank guarantee or FDR in favour of the Executive Engineer. M/s. Gaurav Traders who quoted Rs. 8,83,30,000/- was the highest bidder and the respondent M/s. Malik Traders who quoted Rs. 7,97,66,180/- was the second highest bidder.

4. As required under the terms and conditions of the bid, the respondent in paragraph 8 of its written offer/bid agreed to keep the bid open for acceptance upto 90 days after the last

date of receipt of bid. The respondent also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. In paragraph 10 of the offer/bid, the respondent also agreed that the full value of Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the respondent withdraw or modify its bid/offer after the last date and time for the receipt of bids, during the period of bid validity (90 days) or extended validity period.

5. Since M/s. Gaurav Traders was found to be the highest bidder, a letter of acceptance was issued to it on 25.9.2008. However, it failed to deposit the security amount and the first instalment as per the letter of acceptance. Therefore, as per condition No. 9.3(B) of the Detailed Notice Inviting Tender (DNIT) and condition No. 6 of the acceptance letter, the Bid Security of Rs. 20 lakhs deposited by M/s. Gaurav Traders was forfeited and the letter of acceptance was cancelled and withdrawn vide letter dated 16.10.2008 of the competent authority. Thereafter, a letter of acceptance dated 26.11.2008 was issued to the respondent M/s. Malik Traders who was the second highest bidder. As per condition No. 6 of the said letter of acceptance, the respondent was required to deposit the security amount and the first instalment within 21 days from the receipt of the letter of acceptance. However, the respondent failed to deposit the security amount and the first instalment as required by the letter of acceptance. Hence, vide Memo No. 5029 dated 17.12.2008 issued by the Executive Engineer, Provincial Division No. III, PWD, B&R Branch, Karnal, the letter of acceptance was cancelled and withdrawn and the Bid Security of Rs. 20 lakhs was forfeited.

6. It has to be mentioned that before receipt of the letter of acceptance, the respondent had sent a letter dated 15.11.2008 informing the Executive Engineer that the respondent was not interested in the work and, therefore, the

amount of Bid Security deposited on 19.9.2008 may be refunded. However, the appellants did not consider or act upon the said letter dated 15.11.2008 of the respondent, as the respondent had agreed to keep its bid open for acceptance upto 90 days after the last date of receipt of bid and the said period of 90 days had not expired. In this connection, it has also to be mentioned that the letter of acceptance dated 26.11.2008 was issued to the respondent before the expiry of the above-mentioned period of 90 days.

7. After cancellation of the letter of acceptance issued to the respondent and after expiry of the above-mentioned period of 90 days on 17.12.2008, the Executive Engineer vide Bid Notice No. 5160 dated 31.12.2008 re-invited bids for the collection of toll at toll point on the Bridge over river Yamuna on Karnal-Meerut Road. The respondent again participated in the bid, offering an amount of Rs. 4,94,91,810/-. It may be noted that the amount offered by the respondent in the subsequent bid was less than its offer in the first bid with a difference of Rs. 3.03 crores. Since the respondent's bid was the highest bid among the bids submitted pursuant to the Bid Notice dated 31.12.2008, a letter of acceptance was issued to the respondent on 6.2.2009. The respondent deposited the security amount and the first instalment in terms of the said letter of acceptance.

8. After the second letter of acceptance dated 6.2.2009 was issued to the respondent, the respondent on 7.2.2009 filed C.W.P. No. 2266 of 2009 in the Punjab & Haryana High Court praying for quashing the first letter of acceptance dated 26.11.2008 of the Executive Engineer and the Memo No. 5029 dated 17.12.2008 cancelling the said letter of acceptance and forfeiting the Bid Security of Rs. 20 lakhs. Even though the appellants opposed the grant of prayers in the writ petition, a Division Bench of the High Court vide order dated 7.7.2009 allowed the writ petition quashing the letter of acceptance dated 26.11.2008 and the Memo dated 17.12.2008 and also directed

the Executive Engineer (appellant No. 5) to refund the Bid Security amount of Rs. 20 lakhs to the respondent within two months from the date of receipt of a copy of the order. Aggrieved by the said order dated 7.7.2009 passed by the High Court in C.W.P. No. 2266 of 2009, the respondents in the writ petition have filed this appeal.

9. We have considered the pleadings in the case, the submissions made by the learned senior counsel for the parties and the materials placed on record.

10. For allowing the writ petition, the only reason stated by the High Court is that, since the writ petitioner (respondent herein) had withdrawn its offer before it was accepted, there could be no acceptance of the offer and there could not be any consequence of the petitioner not honouring the commitment. However, we cannot agree with the view taken by the High court. It is true that as per Section 5 of the Indian Contract Act, 1872 (hereinafter referred to as "the Act"), a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. It is also true that before receipt of the letter of acceptance dated 26.11.2008, the respondent had sent a letter dated 15.11.2008 withdrawing its offer. However, admittedly, in paragraph 8 of the written offer/bid, the respondent had agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. The respondent had also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. Hence, the respondent could not have withdrawn the bid before the expiry of the period of 90 days. It is not disputed that the acceptance of the respondent's bid was communicated to the respondent within the said period of 90 days. Therefore, the respondent was bound by the said acceptance of the bid, despite its withdrawal by the respondent in the meanwhile. In paragraph 10 of the offer/bid, the respondent had also agreed that the full value of the Bid Security would be forfeited without prejudice to any

other right or remedy available to the Executive Engineer or his successor in office or his representative, should the respondent withdraw or modify its offer/bid during the period of bid validity (90 days) or extended validity period. Since the respondent withdrew its offer during the period of bid validity in violation of the above-mentioned agreement in paragraph 8 of the offer/bid, the full value of Bid Security was liable to be forfeited in terms of the agreement contained in paragraph 10 of the offer/bid. Thus, even though under Section 5 of the Act a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, the respondent was bound by the agreement contained in its offer/bid to keep the bid open for acceptance upto 90 days after the last date of receipt of bid and if the respondent withdrew its bid before the expiry of the said period of 90 days the respondent was liable to suffer the consequence (i.e. forfeiture of the full value of Bid Security) as agreed to by the respondent in paragraph 10 of the offer/bid. Under the cover of the provisions contained in Section 5 of the Act, the respondent cannot escape from the obligations and liabilities under the agreements contained in its offer/bid. The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him. Forfeiture of such Bid Security amount does not, in any way, affect any statutory right under Section 5 of the Act. The Bid Security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very

purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.

11. In taking the above view, we are supported by the decision of this Court in *National Highways Authority of India v. Ganga Enterprises & Anr.* [(2003) 7 SCC 410] which was rendered in a similar case. In the said case, the appellant, National Highways Authority of India, by a notice, called for tenders by 31.7.1997 for collection of toll on a portion of a particular highway. The notice provided that toll plazas would be got completed by the appellant and handed over to the selected enterprise. The notice required the bidders to furnish: (i) a bid security in a sum of Rs. 50 lakhs in the form of a bank draft or bank guarantee, and (ii) a performance security in the form of a bank guarantee of Rs. 2 crores. The bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid or failed within the specified period to furnish the performance security and sign the agreement. The bid was to remain valid for a period of 120 days after the last date of bid submission. In terms of the tender document, the respondent firm gave its bid or offer and furnished a bank guarantee in a sum of Rs. 50 lakhs. It was an "on-demand bank guarantee" stating that it could be enforced on demand if the bidder withdrew his bid during the period of bid validity or failed to furnish the performance security or failed to sign the agreement. While the validity period of the bid was to end on 28.11.1997, the respondent withdrew its bid on 20.11.1997 and did not furnish the performance guarantee. Therefore, the appellant although found the respondent to be the highest bidder and accepted its offer on 21.11.1997, encashed the bank guarantee for Rs. 50 lakhs. The respondent then filed a writ petition in the High Court for refund of the amount. The High Court formulated two questions viz.: (a) whether the forfeiture of security deposit was without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition

was maintainable in a claim arising out of a breach of contract. Without considering Question (b), the High Court allowed the writ petition on the ground that the offer was withdrawn before it was accepted and thus no completed contract had come into existence. The High Court observed that in law a party could always withdraw its offer before acceptance. Therefore, it held that the invocation and encashment of the bank guarantee was illegal and void and was liable to be set aside. The appellant then approached the Supreme Court. Allowing the appeal, this Court held as follows:

> "In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a

person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted."

We respectfully agree with the above view of this Court.

12. Hence, the High Court was not justified in quashing the letter dated 26.11.2008 accepting the bid of the respondent and the letter dated 17.12.2008 forfeiting the Bid Security amount of Rs. 20 lakhs. The appeal is allowed and the order dated 7.7.2009 passed by the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009 is set aside. Consequently, the writ petition stands dismissed. There will be no order as to costs.

R.P. Appeal allowed.

P.V. INDIRESAN

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 7084 of 2011)

AUGUST 18, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

*Central Educational Institutions (Reservation in Admission) Act, 2006 – Central Educational Institutions under – Implementation of 27% reservation for other backward classes (OBC) – Direction "the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates" in the clarificatory order dated 14.10.2008 passed in *P.V. Indiresan's case, in regard to the decision of the Constitution Bench in **Ashoka Kumar Thakur's case – Meaning and interpretation of – Held: Use of the words 'cut-off-marks' in the order dated 14.10.2008, does not refer to the marks secured by the last candidate to be admitted in general category or in any particular category, or to the minimum marks to be possessed by OBC candidates, determined with reference to the marks secured by the last candidate to be admitted under general category – Order dated 14.10.2008 means that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50% for general category candidates, the minimum eligibility marks for OBCs should not be less than 45% (that is 50 less 10% of 50) and the same is followed in case of qualifying marks in the entrance examination.*

Words and Phrases:

Cut-off marks' – Meaning of – Held: Term 'cut-off marks' in academic and judicial vocabulary has several meanings

*. *P.V. Indiresan vs. Union of India* 2009 (7) SCC 300; **Ashoka Kumar Thakur v. Union of India* (2008) 6 SCC 1: 2008 (4) SCR 1.

– Words 'cut off marks' to refer to 'eligibility marks' or 'qualifying marks', and their meaning would depend upon the context.

Words in dictionary – Use of – Held: Lies in choosing the appropriate meaning to the word, with reference to the context in which the word is used – All and every meanings given in a dictionary cannot be applied mechanically nor an inappropriate meaning that the word may carry can be chosen.

The Constitution Bench of this Court in ****Ashoka Kumar Thakur vs. Union of India* **(2008) 6 SCC 1, upheld the constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 as also the constitutional validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 providing reservation of 27% of seats to Other Backward Classes in the Central Educational Institutions.

The petitioner filed an application in ****A. K. Thakur's* **case alleging that some Central Educational Institutions were interpreting the said decision contrary to the law laid down therein and sought certain directions/ clarifications. The Constitution Bench by an order dated 14.10.2008 (record of proceedings reported in *****P. V. Indiresan Vs. Union of India* **2009 (7) SCC 300) disposed of the application holding that the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates.

Second respondent-Jawaharlal Nehru University interpreted the order dated 14.10.2008 to mean that the minimum marks for admission to be secured by an OBC candidate should not be less than the marks secured by the last student admitted under general category less 10%. On that basis the admissions for 2008-09 and 2009-10 were done and as a result, considerable number of

OBC seats got reverted to general category for non-availability of eligible OBC students with the required marks. Therefore, the standing committee on admissions of JNU, considered the ways and means to fulfill 27% quota for OBC students for 2010-11 and placed proposals before the Deans Committee. On consideration of the said proposals, the Deans Committee of JNU resolved in regard to the admissions of OBC candidates for the academic year 2010-2011, to treat the minimum qualifying marks in the entrance examinations as the cut-off to provide maximum relaxation of 10% to OBC candidates (creamy layer excluded) below the cut-off of general candidates. The Students Association issued notice to JNU that the change in the procedure for admissions to the seats reserved for OBCs proposed by the JNU was contrary to the clarificatory order dated 14.10.2008. The Deans Committee decided to restore/continue the procedure that was followed during the previous year (2009-2010), that is to admit only OBC candidates who secure marks within 10% band below the marks secured by the last candidate admitted in the general category and transfer all the unfilled OBC seats to general category. The two OBC students (respondents 3 and 4) filed a writ petition challenging the decision of the Deans Committee. The Single Judge of the High Court allowed the same holding that the UOI/Universities are entitled to only fix minimum eligibility criteria for admission in the reserved category at maximum 10% below the minimum eligibility criteria fixed for the General (Unreserved) category; and that the OBC candidates are not required to secure marks within the bandwidth of 10% below the cut-off marks of the last candidate admitted in the General (Unreserved) category. The appellant (non-party before the High Court) challenged the said order.

The question which arose for consideration in the instant appeal is with regard to the implementation of the

27% reservation for other backward classes in Central Educational Institutions under the Central Educational Institutions (Reservation in Admission) Act, 2006; and the meaning to be assigned to the direction *"the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates"* **in the clarificatory order dated 14.10.2008 in** ***P.V. Indiresan's* **case, in regard to the decision of the Constitution Bench in** ****Ashoka Kumar Thakur's* **case.**

The appellant contended that the "cut off marks of general category candidates" refers to the marks secured by the last candidate who secures a seat under general category and therefore only such OBC students who have secured marks in the bandwidth of 10% below the marks secured by the last general category candidate, will be entitled to admission.

The respondents contended that the words "cut off marks of general category candidates were used to refer to the minimum eligibility/qualifying marks prescribed for admission to the course under general category.

Disposing of the appeal, the Court

HELD: 1. The words 'cut off marks' has been used thrice in the second para of the order dated 14.10.2008 containing the operative direction has three distinct and different meanings :

(i) The use of the words, *'extent of cut off marks'* in the first sentence refers to the 'minimum eligibility marks' (or to the 'minimum qualifying marks' if there is entrance examination), for admission of OBC candidates.

(ii) The use of the words, "*maximum cut-off marks for OBCs"* in the first part of the second sentence refers to the percentage of marks by which the eligibility/qualifying marks could be lowered from the minimum eligibility/

qualifying marks prescribed for general category students. In other words, it refers to the difference between the minimum eligibility/qualifying marks for general category and minimum eligibility/qualifying marks for OBCs and directs that such difference should not be more than 10% of the minimum eligibility/qualifying marks prescribed for general category candidates.

(iii) The use of the words, "*cut off marks of general category candidates*" in the latter part of the second sentence, refers to the minimum eligibility marks (or to the minimum qualifying marks if there is an entrance examination) prescribed for general category candidates.

The use of the words 'cut-off-marks' in none of the three places in para 2 of the order dated 14.10.2008, refers to the marks secured by the last candidate to be admitted in general category or in any particular category, or to the minimum marks to be possessed by OBC candidates, determined with reference to the marks secured by the last candidate to be admitted under general category. The order dated 14.10.2008 means that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50% for general category candidates, the minimum eligibility marks for OBCs should not be less than 45% (that is 50 less 10% of 50). The minimum eligibility marks for OBCs can be fixed at any number between 45 and 50, at the discretion of the Institution. Or, where the candidates are required to take an entrance examination and if the qualifying marks in the entrance examination is fixed as 40% for general category candidates, the qualifying marks for OBC candidates should not be less than 36% (that 40 less 10% of 40). [Paras 39 and 40] [433-E-G-H; 434-A-H]

****P.V. Indiresan vs. Union of India* 2009 (7) SCC 300; **Ashoka Kumar Thakur v. Union of India* (2008) 6 SCC 1: 2008 (4) SCR 1 – Clarified.**

2.1 In English language, many words have different meanings and a word can be used in more than one sense. Every dictionary gives several meanings for each word. The proper use of a dictionary lies in choosing the appropriate meaning to the word, with reference to the context in which the word is used. All and every meanings given in a dictionary cannot be applied mechanically nor an inappropriate meaning that the word may carry can be chosen and then try to change the context in which it is used. The context in which the word is used determines the meaning of the word. A randomly chosen meaning for the word should not change the context in which the word is used. This is the fundamental principle relating to use of words to convey a thought or explain a position or describe an event. [Para 18] [410-A-D]

The Reader's Digest Word Power Dictionary **1996 Edn. p. 195;** *Collins Dictionary of the English Language* **1979 Edn. p. 369;** *The Illustrated Oxford Dictionary* **2003 Edn. p. 205 – referred to.**

2.2 The term 'cut-off marks' in academic and judicial vocabulary has several meanings. When rejecting a person's request for selection on the ground that his marks are less than the marks secured by the last candidate who was selected, by describing the marks secured by the last candidate as 'cut-off marks'. The words 'cut-off marks' are also used while notifying a body of applicants who form part of a merit list or the general public, the marks secured by the last selected candidate so that they can know that persons with lesser merit/ marks had not been selected or have no chance of being selected. 'Cut-off marks' are also used to refer to the minimum marks (either eligibility marks or qualifying marks) required for admission to a course. [Para 20] [412-F-H]

2.3 This Court has been regularly and routinely using the words 'cut off marks' to describe the minimum marks required to be secured in the qualifying examination for being eligible for admission or to describe the minimum qualifying marks to be obtained in an entrance examination. As this Court has routinely used the words 'cut off marks' to refer to 'eligibility marks' or 'qualifying marks', whenever this Court uses the words 'cut off marks', their meaning would depend upon the context. The words may refer to either the minimum marks to be secured in the qualifying examination or the entrance examination to be eligible for admission, or to the marks secured by the last candidate admitted in a particular category. [Para 23] [417-G-H; 418-A]

Dr. Jeevak Almast vs. Union of India **1988 (4) SCC 27: 1988 (2) Suppl. SCR 385;** *Ajay Kumar Agrawal and Ors. v. State of U.P*. **1991 (1) SCC 636: 1990 (3) Suppl. SCR 184;** *State of Uttar Pradesh v. Dr. Anupam Gupta* **1993 Supp (1) SCC 594;** *Ombir Singh and Ors. v. State of U.P.* **1993 Supp. (2) SCC 64;** *Hemani Malhotra vs. High Court of Delhi* **(2008) 7 SCC 11: 2008 (5) SCR 1066;** *K. Manjusree vs. State of A.P.* **(2008) 3 SCC 512: 2008 (2) SCR 1025;** *Parveen Jindal v. State of Haryana* **1993 Supp. (4) SCC 70 – referred to.**

2.4 The Oversight Committee on Reservation in Higher Educational Institutions, Government of India (Planning Commission) in its Interim Report and Final Report uses the words 'cut off marks' and 'threshold marks' to refer to minimum eligibility marks. Para 4.4.3 of the Report of the Oversight Committee refers to a situation where if the minimum eligibility marks for general category candidates is 50% and the minimum eligibility marks for SC/ST candidates are 40%, the minimum eligibility for OBC should be somewhere midway that is 45%. It should be noted that the observations of Bhandari J, in para 729 of the decision

in *A K Thakur's* case, which is the fulcrum of the entire argument of appellant are made in the context of the said observations of Oversight Committee and therefore, when Bhandari J uses the words 'cut off marks', he is also clearly referring to the eligibility marks. Even Pasayat, J has also used the words 'cut-off marks' to refer to minimum eligibility marks. The words "cut-off marks" are freely used to describe the prescribed minimum marks even in academic circles and Central Educational Institutions. Pasayat J. and Bhandari J. were concerned about the standards of excellence in higher education. Having regard to the fact that OBCs were far better placed economically and socially than SCs/STs, they wanted to ensure that the minimum percentage for OBCs was somewhere between the minimum marks for SC/ST and minimum marks for general category candidates. They did not want the minimum eligibility marks for OBCs should be the same as the minimum eligibility marks for Scheduled Castes and Scheduled Tribes. They were of the view that if very low eligibility marks were provided for OBC, the disparity would affect higher education standards. It is in that context, that Bhandari, J. observed that cut off marks for OBCs, should not be lower than 10 marks below that of general category thereby meaning that minimum eligibility marks for OBC should be set no lower than 10% below the eligibility marks for the general category. Pasayat J in fact specifically stated that the minimum marks for OBCs should be 5 marks less than the minimum eligibility marks for general category. [Paras 28, 29, 30] [423-D-E; 424-D-G; 425-E-H]

2.5 Neither *Dr. Preeti Srivastava's* **case, nor** *A.K. Thakur's* **case nor any other decision of this Court required that the reservation category candidates should possess marks which are within a narrow bandwidth below the cut off marks for the last student admitted in the general category. All the decisions spoke of**

difference/disparity in regard to eligibility marks and qualifying marks. Therefore, the context in which Bhandari J. concluded that "cut-off marks for OBCs should be set no lower than 10% marks below general category" (vide Paras 535 and 629) of *A K Thakur's* case, he meant that eligibility/qualifying marks for OBCs should be set not lower than 10% below the eligibility/qualifying marks of general category. Similar is the position regarding the observation of Pasayat J. in Para 358 of *A K Thakur's* case. Pasayat J. observed that the cut off marks for OBCs should be fixed by extending 5 grace marks, that is 5 marks below the *minimum eligibility marks fixed for general categories of students.* It cannot be understood as to how to the words *"minimum eligibility marks fixed for general categories of students'* used by Pasayat J can be read as 'cut off marks' of general category, that is marks secured by the last candidate admitted under general category. Therefore, it is held that the words "maximum cut-off marks for OBCs be 10% below the cut off marks of general category candidates" in the order dated 14.10.2008 of the Constitution Bench meant that if the minimum eligibility/ qualifying marks prescribed for general category candidates was 50%, the minimum eligibility/qualifying marks for OBCs should be 45%. [Para 31, 32] [427-D-H; 428-A-B]

2.6 The appellant canvasses the continuance of the procedure adopted by JNU during 2008-09 and 2009-10. During those years, JNU would fix the minimum eligibility marks as say 40% when the admission programme is announced. JNU would apply it only to general category candidates. It would not say what was the minimum eligibility marks for OBC candidates, but would decide the same, only after all the general category seats were filled, by fixing a band of marks upto 10% below the marks secured by the last candidate admitted under the

general category. If a OBC candidate secured the marks within that band, he would be given admission. Otherwise even if he had secured 70%, as against the minimum of 40% he would not get a seat, if the band of marks was higher. Such a procedure, was arbitrary and discriminatory, apart from being unknown in regard to admissions to educational institutions,. The minimum eligibility marks for admission to a course of study is always declared before the admission programme for an academic year is commenced. An institution may say that for admissions to its course, say Bachelor's degree course in science, the candidate should have successfully completed a particular course of study, say 10+2, with certain special subjects. Or it can say that the candidate should have secured certain prescribed minimum marks in the said qualifying examination, which may be more than the percentage required for passing such examination. For example if a candidate may pass a 10+2 examination by securing 35% marks, an institution can say at its discretion that to be eligible for being admitted to its course of study, the candidate should have passed with at least a minimum of 40% or 50% or 60%. Whatever be the marks so prescribed, it should be uniform to all applicants and a prospective applicant should know, before he makes an application, whether he is eligible for admission or not. But the 'cut-off' procedure followed by JNU during those days had the effect of rewriting the eligibility criteria, after the applications were received from eligible candidates. If the minimum eligibility prescribed for an admission in an institution was 50% and a candidate had secured 50%, he could not be denied admission, if a seat was available, based on a criterion ascertained after the last date for submission of applications. No candidate who fulfils the prescribed eligibility criteria and whose rank in the merit list is within the number of seats available for admission, can be turned down, by saying that he should have

secured some higher marks based on the marks secured by some other category of students. A factor which is neither known nor ascertained at the time of declaring the admission programme cannot be used to disentitle a candidate to admission, who is otherwise entitled for admission. If the total number of seats in a course is 154 and the number of seats reserved for OBCs is 42, all the seats should be filled by OBC students in the order of merit from the merit list of OBC candidates possessing the minimum eligibility marks prescribed for admission. (subject to any requirement for entrance examination.) When an eligible OBC candidate is available, converting an OBC reservation seat to general category is not permissible. [Para 33] [428-B-H; 429-A-E]

3. The issue before the High Court was with reference to the meaning of the words cut-off marks. The submissions in regard to the question whether OBC candidates who are selected on the basis of their own merit without the benefit of reservation, should be counted towards 27% reservation, was not the subject matter of the writ petition from which this appeal arises. Further, the said issue was not directly raised, but was referred only in an indirect manner in the pleadings before this Court and Union of India had no occasion to deal with this larger issue. Therefore the alternative contention which has wide ramifications is not decided, though it is noted that the appellant has raised an important issue which merits serious consideration in an appropriate case. [Para 38] [433-B-D]

Chattar Singh vs. State of Rajasthan **1996 (11) SCC 742: 1996 (6) Suppl. SCR 6;** *Indra Sawhney vs. Union of India* **1992 Supp. (3) SCC 217;** *R.K. Sabharwal vs. State of Punjab* **1995 (2) SCC 745: 1995 (2) SCR 35 – referred to.**

4. The decision dated 07.09.2010 of the Single Judge of the High Court is affirmed subject to the aforesaid

clarifications/observations and subject to the following conditions :

(i) In regard to the admissions for 2011-2012, if any Central Educational Institution has already determined the 'cut-off marks' for OBCs with reference to the marks secured by the last candidate in the general category, and has converted the unfilled OBC seats to general category seats and allotted the seats to general category candidates, such admissions shall not be disturbed. But where the process of conversion and allotment is not completed, the OBC seats shall be filled by OBC candidates.

(ii) If in any Central Educational Institution, the OBC reservation seats remain vacant, such institutions shall fill the said seats with OBC students. Only if OBC candidates possessing the minimum eligibility/qualifying marks are not available in the OBC merit list, the OBC seats shall be converted into general category seats.

(iii) If the last date for admissions has expired, the last date for admissions shall be extended till 31.8.2011 as a special case, to enable admissions to the vacant OBC seats. [Para 41] [435-A-E]

Case Law Reference:

2008 (4) SCR 1	**Clarified**	**Para 21, 26, 27, 28, 30, 31, 32**
1988 (2) Suppl. SCR 385	**Referred to**	**Para 24.1**
1990 (3) Suppl. SCR 184	**Referred to**	**Para 24.2**
1993 Supp (1) SCC 594	**Referred to**	**Para 24.3**
1993 Supp. (2) SCC 64	**Referred to**	**Para 24.4**
2008 (5) SCR 1066	**Referred to**	**Para 24.5**

2008 (2) SCR 1025	**Referred to**	**Para 24.6**
1993 Supp. (4) SCC 70	**Referred to**	**Para 25**
1996 (6) Suppl. SCR 6	**Referred to**	**Para 35**
1992 Supp. (3) SCC 217	**Referred to**	**Para 36**
1995 (2) SCR 35	**Referred to**	**Para 36**
2009 (7) SCC 300	**Clarified**	**Para 39, 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7084 of 2011.

From the Judgment & Order dated 07.09.2010 of the High Court of Delhi at New Delhi in W.P. No. 4857 of 2010.

K.K. Venugopal, Prof. Ravi Varma Kumar, A. Mariarputham, P.P. Rao, Sanjay Parikh, Mamta Saxena, A.N. Singh, Gopal Sankaranarayanan, Rohit Bhat, Vikas Mehta, M.L. Lahoty, Paban K. Sharma, Sukumar Agarwal, Yusuf Khan, Megha Gaur, Annam D.N. Rao, Mohinder Jit Singh, A. Subba Rao, Gargi Khanna, D.S. Mahra, Kiran Suri, Puneet Jain, Apeksha Sharan, Utsav Sidhu, Filza Moorie for the appearing parties.

The Judgment of the Court was delivered by

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

2. This appeal raises a short but important question relating to the implementation of the 27% reservation for other backward classes (for short 'OBCs') in Central Educational Institutions under the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No.5 of 2007) (for short 'CEI Act'). The question relates to the meaning of the words "cut-off marks" used in the clarificatory order dated 14.10.2008 in *P.V. Indiresan & Ors. v. Union of India* - (2009) 7 SCC 300, in regard to the decision of the Constitution Bench

in Ashoka Kumar Thakur v. Union of India - (2008) 6 SCC 1.

Background

3. The constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 as also the constitutional validity of CEI Act were considered and upheld by a Constitution Bench of this Court on 10.4.2008 reported in Ashoka Kumar Thakur vs. Union of India (for short 'A.K. Thakur'). Four separate opinions were rendered in the said decision by the learned Chief Justice of India, Pasayat J. (for himself and Thakker J), Raveendran J. (one of us) and Bhandari J. On the basis of the four opinions, the Constitution Bench formulated the following common order on which there was unanimity :-

> "668. The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005, is not constitutionally valid so far as private unaided educational institutions are concerned.
>
> 669. Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2(g) of Act 5 of 2007 being clarified as follows: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.
>
> 670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.

> 671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.

4. The petitioner herein made an application in A. K. Thakur alleging that some central educational institutions were interpreting the decision contrary to the law laid down therein and sought the following directions/clarifications :

> (a) that the limit of cut-off marks for admission of students in the OBC quota in Central Educational Institutions be a maximum 10 marks below the cut-off for the general category;
>
> (b) that all vacant seats in the reserved quota after the seats have been filled in accordance with (a) above shall automatically revert to the general category;

5. The said application was heard and disposed of by the Constitution Bench by the following Order dated 14.10.2008 (record of proceedings reported in *P V Indiresan Vs. Union of India* – 2009 (7) SCC 300) :

> "1. The applicants have prayed for two reliefs in this application. This application is an offshoot of the judgment passed by the Constitution Bench of this Court on 10.4.2008.
>
> 2. A question had been raised in this application as to *what should be the extent of cut-off marks for admission of students of OBCs in the Central Educational Institutions.* Having heard the learned Solicitor General of India and learned Senior Counsel on both the sides and also having regard to the observations made in the judgments pronounced by this Court, we make it clear that *the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates*.

3. We are told that in many of the Central Educational Institutions the seats which are to be filled up by OBC candidates are still remaining vacant. These institutions may endeavour to fill up these vacant seats by other eligible students at the earliest i.e at least by the end of October 2008 observing inter se merit of the candidates. All other rules and regulations regarding admissions shall be strictly followed. The application is disposed of accordingly."

(emphasis supplied)

The Government of India by official memorandum dated 17.10.2008 directed that the said order dated 14.10.2008 be implemented by the Central Educational Institutions by ensuring that the maximum cut-off marks of OBCs are not kept lower than 10% from the cut-off marks for general category candidates as directed by this Court.

6. The Jawaharlal Nehru University (for short 'JNU'), second respondent herein, interpreted the said order of this Court dated 14.10.2008 to mean that the minimum marks for admission to be secured by an OBC candidate should not be less than the marks secured by the last student admitted under general category less 10%. The admissions for 2008-09 and 2009-10 were done on that basis. As a result, it would appear considerable number of OBC seats got reverted to general category for non-availability of eligible OBC students with the required marks. Therefore, the standing committee on admissions of JNU, at its meeting held on 10.6.2010, considered the ways and means to fulfill 27% quota for OBC students for 2010-11. The Committee noted the difference between eligibility, qualifying marks and cut-off marks as under:

"Eligibility for applying for admission refers to the pre-requisite of the last qualifying examination such as school leaving, graduation, etc. [Eg. : for admission to MA course, the applicant should have secured a minimum of 50% marks in the BA Course].

Qualifying marks refer to the minimum marks in the entrance examination decided by the University in advance which it deems fit to preserve the academic standards. [Eg.: For admission, the candidate possessing eligibility, should secure a minimum of 30% in the entrance examination].

Cut-off marks for the merit list are decided on the basis of number of seats available in each programme/division, in the merit list prepared of all candidates having obtained equal to or above qualifying marks. [Eg.: The marks secured by the candidate allotted/admitted to the last of the General category seats, becomes the cut-off marks for general category]."

As there was some divergence in views as to whether the procedure followed in 2008-09 and 2009-10 should be continued, the following two proposals were placed before the Deans Committee:

(i) The current policy and procedure to consider the cut-off as per the definition given above and to provide for OBC category (creamy layer excluded) a maximum relaxation of 10% below the cut-off marks arrived for unreserved category candidates. However, in accordance with the *Ashok Kumar Thakur* judgment after giving maximum possible relaxation, wherever the non-creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students.

Or

(ii) To consider the minimum qualifying marks in the entrance examination approval by it as the cut-off to provide maximum relaxation of 10% to OBC candidates (creamy layer excluded) below the cut-off of general candidates as per the interpretation of the Supreme Court judgment by fixing cut-off in advance for admission in

various programmes of study to OBC candidates (creamy layer excluded) to be implemented in this year, i.e. 2010-11 admissions. The merit list will be drawn as per the admission policy of the University and approval intake and offers. However, in accordance with the Ashok Kumar Thakur judgment after giving maximum possible relaxation, wherever the non-creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students."

7. The Deans Committee of JNU discussed the issue at its meeting dated 17.6.2010, considered the proposals of the Standing Committee on Admissions and resolved as follows in regard to the admissions of OBC candidates for the academic year 2010-2011:

"The Deans Committee after detailed discussion decided to accept the second proposal of the Standing Committee on Admissions viz. to treat the minimum qualifying marks in the entrance examinations as the cut-off to provide maximum relaxation of 10% to OBC candidates (creamy layer excluded) below the cut-off of general candidates as per the interpretation of the Supreme Court Judgment by fixing cut-off in advance for admission to various programmes of study to OBC candidates (creamy layer excluded) for inviting them for viva-voce as well as for admission to various programmes of study to be implemented in this year i.e. 2010-11 admissions. The merit list will be drawn as per the admission policy of the University and approved intake and offers. Further, in accordance with the *Ashok Kumar Thakur* judgment after giving maximum possible relaxation, wherever the non-creamy layer OBC candidates fail to fill the reservation, the remaining seats would revert to general category students.

Hence to be eligible to be invited for viva voce examination a candidate must secure following marks out of 70 in the

written examination.

Programme	General Category	OBC	SC/ST/PH categories
M.Phil/Ph.D.M.Tech/ Ph.d.Pre-Ph.D/ Ph.D MPH/ PH.D	35% i.e 24.50 marks	31.5% i.e. 22.05 marks	25% i.e. 17.50 marks
MA, BA and Part time programmes where viva-vice is prescribed	25% i.e. 17.50 marks	22.5% i.e. 15.75 marks	15% i.e. 10.50 marks

To be eligible for admission a candidate must secure a minimum overall score out of 100 as given in the table below:

Programme	General Category	OBC	SC/ST/PH categories
M.Phil/Ph.D.M.Tsech/ Ph.d.Pre-Ph.D/Ph.D MPH/PH.D	40% i.e 40 marks	36% i.e. 36 marks	30% i.e. 30 marks
MA/M.Sc/MCA, BA (Hons.) 1st & 2nd Year Part Time (COP & Advanced Diploma in Mass Media in Urdu)	30% i.e. 30 marks	27% i.e. 27 marks	25% i.e. 25 marks

The Committee further resolved that the above recommendations will be implemented only for this year, i.e. 2010-2011 and admission policy will be reviewed after the current admission process is over and statistics are available for implementation from the next year i.e. 2011-2012."

8. A legal notice dated 27.6.2010 was issued to the JNU on behalf of a students association contending that the change in the procedure for admissions to the seats reserved for OBCs proposed by the JNU was contrary to the clarificatory order of this Court dated 14.10.2008, and threatening initiation of contempt proceedings, if the said decision dated 17.6.2010 of the Deans Committee was implemented. As a consequence, JNU sought legal opinion. JNU was advised that while the procedure sought to be adopted by JNU for 2010-2011, vide its resolution dated 17.6.2010 may not be contempt of court, it may not stand judicial scrutiny and could be viewed as an attempt to circumvent the law declared in A. K. Thakur and therefore, it should continue the policy and procedure adopted during the previous two years. As a consequence on 12.7.2010 the Deans Committee reviewed the earlier decision dated 17.6.2010 and decided to restore/continue the procedure that was followed during the previous year (2009-2010), that is to admit only OBC candidates who secure marks within 10% band below the marks secured by the last candidate admitted in the general category and transfer all the unfilled OBC seats to general category.

9. The revised decision dated 12.7.2010 of the Deans Committee was challenged by two OBC students (respondents 3 and 4) in a writ petition [W.P.(C) No.4857/2010] filed in the Delhi High Court. A learned Single Judge of the High Court allowed the writ petition by impugned order dated 7.9.2010 holding as under:

> "Procedure followed by the second respondent (JNU) and the stand of the first respondent (UOI) regarding reservation for OBCs is thus declared to be bad. It is declared that the first respondent UOI/Universities are entitled to only fix minimum eligibility criteria for admission in the reserved category at maximum 10% below the minimum eligibility criteria fixed for the General (Unreserved) category. The OBC candidates to avail of reservation provided for them in the CEI Act are not required to, in admission test or in the eligibility exam, secure marks within the bandwidth of 10% below the cut-off marks of the last candidate admitted in the General (Unreserved) category."

10. The said order was challenged by the appellant herein, a non party before the High Court with an application seeking leave to challenge the order of the learned Single Judge directly before this Court, without filing a letter patent appeal. As the matter involved interpretation of the words "cut-off marks" employed by this Court in the order dated 14.10.2008, this Court granted such permission on 27.9.2010 to the appellant.

Contentions of Parties

11. The appellant contends that 'cut-off marks' refers to the marks secured by the last candidate admitted to a particular course of study or under a particular category. 'Cut-off marks' are decided with reference to a merit list of candidates prepared (with reference to the eligibility marks and/or where there is an entrance examination, with reference to the qualifying marks) on the basis of number of seats available in a programme. The marks secured by the last candidate admitted from such merit list to the programme denotes the 'cut-off marks' for admission to that programme. The appellant submitted that the words "10% below the cut-off marks of general category candidates" would mean 10% below the marks secured by the last candidate admitted under general category. That is if the last candidate admitted under general category had secured 80% marks, and the lowering of minimum marks was 10% for OBCs, then OBC candidates who have secured marks in the band width of 79 to 72 marks (that is 80 less 10%) would alone be entitled to claim admission. This would also mean that until admissions to general category seats are determined and the 'cut off' marks that is the marks secured by the last general category candidate is ascertained, admissions to OBC reservation seats cannot be commenced,

as the bandwidth of marks to be possessed by OBC candidates for admission would depend upon the marks secured by the last candidate admitted under general category.

12. On the other hand, the learned counsel for the third and fourth respondents (the OBC category candidates who were the writ petitioner before the High Court) contended that the CEI Act does not stipulate or provide any minimum "cut off marks" for OBC category candidates who are entitled to the benefit of 27% reservation. It is also submitted that there is no mandatory direction either in *A K Thakur* or *Indiresan* to fix the cut off marks for the general category or cut off marks for OBC category candidates. It is submitted that the words "*the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates*" in the order dated 14.10.2008 would mean that the minimum eligibility marks (or minimum qualifying marks if there is an entrance examination) for general category, can be lowered or reduced by not more than 10% to prescribe the minimum eligibility marks for OBC candidates. That is, if 50% was the minimum eligibility marks for admission to general category seats, the maximum cut off marks for OBC being 10% below the general category candidates, the minimum eligibility marks for OBC cannot be less than 45% (that is 50% minus 10% of 50%).

13. The respondents further submitted that neither the Constitution Bench which decided *A. K. Thakur* which made the clarificatory order dated 14.10.2008, nor the appellant at whose instance the order of clarification was issued, had proceeded on the basis that cut off marks would refer to the marks secured by the last candidate admitted to the general category. The object of appellant in making the application seeking clarification of the order in *A. K. Thakur* was to ensure that the lowering of the minimum eligibility/qualifying marks for admission of OBCs candidates did not lead to a large disparity with the general candidates affecting the excellence of higher education. Therefore, the appellant wanted a ceiling for the lowering of the minimum marks for admission of OBC

candidates to be prescribed. It was in that context the Constitution Bench ordered that the minimum marks for admission of OBC candidate should not be less than 10% below the minimum eligibility/qualifying marks for general category candidates.

14. The grievance of OBC candidates was not in regard to the determination of minimum eligibility/qualifying marks. For example, as noticed above, if the minimum eligibility marks for general category is fixed as 60 for English or 70 for journalism, they have no grievance if the minimum eligibility marks being fixed at 54 marks for English and 63 for journalism in regard to OBC candidates. The OBC candidates have also no grievance if they are required to pass an entrance examination and are required to secure the minimum qualifying marks in the entrance examination. Their grievance is with reference to determining the minimum eligibility/qualifying marks for admission of OBC students with reference to the marks secured by the last candidate admitted under the general category. Their grievance is to linking of their admissions to an uncertain and fluctuating benchmark which would depend upon the quality of the last student admitted under the general category. According to the respondents by adopting the method of determining the 'cut off' marks for OBCs with reference to 'cut off' marks of last general category candidate defeats the purpose of reservation of 27% seats for OBC candidates and denies the just and legitimate entitlement of OBCs for admission. It is pointed out that the adoption of such a procedure in 2008-2009 and 2009-2010 had resulted in large number of seats meant for OBCs being transferred to general category candidates.

Question for consideration

15. The problem or question for consideration arising out of the rival contentions may be appreciated with reference to the following illustration:

"A central educational institution has 100 seats in its B.Com. programme. Eligibility for admission is with reference to the marks secured in the qualifying examination [that is 10+2 or its equivalent]. The minimum eligibility prescribed for admissions is 50% marks for general category, 45% for OBCs and 40% for SC/ST. Having regard to the reservation policy applicable to the institution, out of 100 seats, 50 seats have to be filled by general category candidates, 27 seats are to be filled by OBC candidates and 23 seats (15 + 7.5 rounded off to 23) are to be filled by SC/ST candidates. 300 candidates seek admission, of whom 160 belong to general category, 90 belong to OBCs and 50 belong to SC/ST. The college prepares a common merit list and the first 50 candidates in the said common merit list are granted admission under the general category. The first candidate in the merit list has secured 98 marks and the 50th candidate in the merit list who is the last candidate in the general category has secured 80 marks. The college also prepares a separate list of 90 OBC candidates merit list, 30 SC candidates and 20 ST candidates. Out of the OBC candidates list of 90 candidates, the first 15 have found a place in the first 50 in the common merit list on their own merit and are admitted and treated them as general category candidates, leaving 75 candidates in the OBC list. Out of the said 75 OBC candidates, 20 candidates have secured marks ranging from 79 to 72, and the remaining 55 have secured marks ranging 71 to 46."

According to the respondents (OBC candidates), the first 27 candidates from the OBC candidates list, that is 20 candidates who have secured between 79 to 72 marks and the next 7 candidates in the order of merit (who have secured less than 72) are entitled to be selected to the 27 seats reserved for OBCs. According to the appellant as the last candidate in the general category has secured 80 marks, and as the "maximum cut off marks for OBCs should be 10% below the cut off marks

of general category candidates", the general category cut off marks should be 80 and the OBC cut off marks should be 72% (80 minus 8); and only those OBC candidates who have secured marks in the band of 79 to 72 are entitled to be selected under the OBC category. Out of the list of 90 OBC candidates the first ten having been admitted as general category candidates on their own merit, the next 20 OBC candidates who have secured marks between 79 to 72 are entitled to be granted admission under the OBC category. The remaining 55 candidates having obtained less than the cut off marks 72 marks are not entitled to admission. As a consequence, even though there were still 55 candidates in the OBC candidates merit list, who had secured more than the required minimum of 45% in the qualifying examination, they are not entitled to get admission; and the seven OBC seats which remain unfilled, would have to be transferred as general category seats and will be filled by the general category candidates from the common merit list in the order of merit.

16. The appellant (and other intervenors who claim to be concerned about excellence in education) contend that '*cut off* marks' are different from '*eligibility marks*' or '*qualifying marks*'. There is no dispute that eligibility marks refers to the minimum marks a candidate is required to have in the last qualifying examination (for example, 10+2 examination for admissions to a Bachelor's degree programme or the graduation examination for admissions to a post graduate programme) as a condition precedent for seeking admission to the higher course of study which the appellant seeks admission. Similarly, there is no dispute that *qualifying marks* refers to the minimum marks required to be secured in the special entrance examination, that may be held to determine the inter-se merit of candidates from different universities/ sources and to ensure that candidates to be admitted possess the minimum academic standards required or expected for a special course of study; and it is only those securing the qualifying marks in the entrance examination, where it is a part

of the admission process, who will be included in the merit list for admission, or will become eligible for being called for viva voce. [For example, it is stated that in Delhi University, admissions to degree courses, except for English and Journalism Courses, are on the basis of 'eligibility marks' that is the prescribed minimum marks in 10+2 examination. Those who seek admission in degree courses in English and Journalism will have to participate in special entrance examinations. A candidate seeking admission to Bachelor's degree in Journalism is required to have eligibility marks of 70% in 10+2 examination and also pass the entrance examination; and a candidate seeking admission to Bachelor's degree in English is required to have eligibility marks of 60% in 10+2 examination and also pass the entrance examination]. In *Dr. Preeti Srivastava vs. State of M.P.* – (1999) 7 SCC 120, this Court referred to the difference between *eligibility* and *qualification*, thus :

> "At times, in some of the judgments, the words "eligibility" and "qualification" have been used interchangeably, and in some cases a distinction has been made between the two words – "eligibility" connoting the minimum criteria for selection that may be laid down by the University Act or any Central statute, while "qualifications" connoting the additional norms laid down by the colleges or by the State."

Eligibility Marks and *Qualifying Marks* are pre-determined, and notified in the Admission Prospectus, so that a candidate intending to apply for admission knows what eligibility marks he should possess in the qualifying examination or what qualifying marks he should secure in the entrance examination (if there is an entrance examination).

17. The question for our consideration in this appeal by special leave is the meaning to be assigned to the direction "*the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates*" in the order dated 14.10.2008 of this Court.

The Interpretation

18. In English language, many words have different meanings and a word can be used in more than one sense. Every dictionary gives several meanings for each word. The proper use of a dictionary lies in choosing the appropriate meaning to the word, with reference to the context in which the word is used. We cannot mechanically apply all and every meanings given in a dictionary. Nor can we choose an inappropriate meaning that the word may carry and then try to change the context in which it is used. The context in which the word is used determines the meaning of the word. A randomly chosen meaning for the word should not change the context in which the word is used. This is the fundamental principle relating to use of words to convey a thought or explain a position or describe an event. We may demonstrate this with reference to the dictionary meanings of the word 'cut-off'.

19. The Reader's Digest Word Power Dictionary gives the following meanings and illustrative uses with reference to such meanings, for the word 'cut-off' [1996 Edition, Page 195] :

"Cut Off

*to remove
Cut off the thorns on the stem otherwise you will pick yourself
*to prevent from leaving or reaching a place; to be isolated
The village was cut off by floods
I feel so *cut off* when I stay on my parents' farm
*to disconnect or stop supplying something
He was *cut off* before he could finish his telephone conversation
*to disinherit
He was *cut off* without a cent
*to block
We must *cut off* all escape routes
***expiry, final deadline**

Post your entry now, because the cut-off date is today"

(emphasis supplied)

The *Collins* Dictionary of the English Language gives the thirteen meanings to the word cut-off [1979 Edition, Page 369] :

"1. to remove by cutting.

2. to intercept or interrupt something, esp. a telephone conversation.

3. to discontinue the supply of : to cut off the water.

4. to bring to an end.

5. to deprive of rights; disinherit : she was cut off without a penny.

6. to sever or separate : she was cut off from her family.

7. to occupy a position so as to prevent or obstruct (a retreat or escape).

8. *(a) the act of cutting off; limit or termination. (b) (as modifier) : the cut off point*.

9. Chiefly U.S. a route or way that is shorter than the usual one; short cut.

10. a device to terminate the flow of a fluid in a pipe or duct.

11. the remnant of metal, plastic, etc., left after parts have been machined or trimmed.

12. Electronics. (a) the value of voltage, frequency, etc., below or above which an electronic device cannot

function efficiently. (b) (as modifier) : cut off voltage.

13. a channel cutting across the neck of a meander, which leave an oxbow lake.

14. another name for oxbow (the lake)."

(emphasis supplied)

The *Illustrated Oxford Dictionary* gives the following meanings to the word cut-off [2003 Edition, Page 205] :

"**1. The point at which something is cut off.**

2. A device for stopping a flow.

3. (US) a short cut.

4. (in plural) shorts, esp. made by cutting the legs off jeans.

(emphasis supplied)

What is appropriate for our purpose are the meanings 'the point at which something is cut off' in *Oxford*, 'limit' or 'the cut off point' in *Collins* and the meaning 'final deadline' in *Reader's Digest*.

20. The term 'cut-off marks' in academic and judicial vocabulary has several meanings. When rejecting a person's request for selection on the ground that his marks are less than the marks secured by the last candidate who was selected, by describing the marks secured by the last candidate as 'cut-off marks'. The words 'cut-off marks' are also used while notifying a body of applicants who form part of a merit list or the general public, the marks secured by the last selected candidate so that they can know that persons with lesser merit/marks had not been selected or have no chance of being selected. 'Cut-off marks' are also used to refer to the minimum marks (either eligibility marks or qualifying marks) required for admission to a course.

21. Both sides relied upon certain observations of Pasayat, J. and Bhandari J, in *A K Thakur* in support of the interpretation put forth by them. While appellant argued that the said observations clearly indicated that minimum marks for admission of OBC candidates should be a prescribed percentage below the marks secured by the last candidate under general category (cut off marks for general category), the respondents argued that the observations clearly meant that the minimum marks for admission of OBC candidates should be a prescribed percentage below the minimum eligibility/ qualifying marks prescribed for general candidates. We may therefore refer to the said observations. Pasayat J stated in his summing up :

> *"358. To sum up, the conclusions are as follows*:
>
> (1) For implementation of the impugned Statute creamy layer must be excluded.
>
> (2) There must be periodic review as to the desirability of continuing operation of the Statute. This shall be done once in every five years.
>
> (3) *The Central Government shall examine as to the desirability of fixing a cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five marks grace can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories*."
>
> (emphasis supplied)

In the course of his judgment, Bhandari, J. referred to cut-off marks at two places (vide paras 371 and 535). They are extracted below :

> "If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Article 21A. We must provide educational opportunity from day one. Only then will the casteless/classless society be within our grasp. Once children are of college-going age, it is too late for reservation to have much of an effect. The problem with the Reservation Act is that most of the beneficiaries will belong to the creamy layer, a group for which no benefits are necessary. Only non-creamy layer OBCs can avail of reservations in college admissions, and once they graduate from college they should no longer be eligible for post-graduate reservation. 27% is the upper limit for OBC reservation. The Government need not always provide the maximum limit. *Reasonable cut off marks should be set so that standards of excellence greatly effect. The unfilled seats should revert to the general category*.
>
> x x x x x
>
> The best universities are the best, in part, because they attract the best students. The same can be said for almost any organization. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. Once the creamy is excluded, cut-off marks would likely drop considerably in order to fill the 27% quota for non creamy layer OBCs. When the creamy layer is not removed, as in the case of Tamil Nadu, the difference in cut off marks for the general and backward categories may be insignificant. (See para 408 of Indira Sawhney). Of course, the extent to which standards of excellence would suffer would vary by institution. *As I mention below, I urge the Government to*

set OBC cut off marks no lower than 10 marks below that of the general category. This is only a recommendation.

(emphasis supplied)

In his judgment, Bhandari, J. observed thus in regard to the question '*would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut off marks that are slightly lower than that of the general category?*' :

"627. *Balaji* (supra) concluded that reservation must be reasonable. The Oversight Committee has made a recommendation that will ensure the same. At page 34 of Volume I of its Report, the Oversight Committee recommended that institutions of excellence set their own cut off marks such that quality is not completely compromised. *Cut offs or admission thresholds as suggested by the Oversight Committee are reproduced*:

4.4.2. The Committee recognizes that those institutions of higher learning which have established a global reputation (e.g. IITs, IIMs, IISc, AIIMS and other such exceptional quality institutions), can only maintain that if the highest quality in both faculty and students is ensured. Therefore, the committee recommends that the *threshold for admission should be determined by the respective* institutions alone, as is done today, so that the level of its excellence is not compromised at all.

4.4.3. *As regards 'cut-offs' in institutions other than those mentioned in para 7, these may be placed somewhere midway between those for SC/ST and the unreserved category, carefully, calibrated so that the principles of both equity and excellence can be maintained*.

4.4.4. The Committee strongly feels that the students who currently tend to get excluded must be given every single opportunity to raise their own levels of attainment, so that

they can reach their true potential. The Government should invest heavily in creating powerful, well designed and executed remedial preparatory measures to achieve this objective fully.

628. Standards of excellence however should not be limited to the best aided institutions. The Nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme.

629. Finding 68% reservation in educational institutions excessive, *Balaji* admonished States that reservation must be reasonable and balanced against other societal interests. States have "to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations." To strike such a balance, *Balaji* slashed the impugned reservation from 68 to less than 50%. *Balaji* thus serves as an example in which this Court sought to ensure that reservation would remain reasonable. We heed this example. *There should be no case in which the gap of cut off marks between OBC and general category students is too large. To preclude such a situation, cut off marks for OBCs should be set no lower than 10 marks below the general category. To this end, the Government shall set up a committee to look into the question of setting the OBC cut off at not more than 10 marks below that of the general category.* Under such a scheme, whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to general category students."

(emphasis supplied)

In his summary of findings also, Bhandari, J., again referred to cut-off marks as under :

> "11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category ?
>
> It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, *cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category*."
>
> (emphasis supplied)

22. The clarificatory order dated 14.10.2008 in P.V. Indiresan vs. Union of India [2009 (7) SCC 300] which stated that the "*maximum cut off marks for OBCs be 10% below the cut off marks of general category candidates*" is sought to be interpreted differently by the appellant and respondents, with reference to the said observation. The appellant contends that the "cut off marks of general category candidates" refers to the marks secured by the last candidate who secures a seat under general category and therefore only such OBC students who have secured marks in the bandwidth of 10% below the marks secured by the last general category candidate, will be entitled to admission. On the other hand the respondents contend that the words "cut off marks of general category candidates were used to refer to the minimum eligibility/qualifying marks prescribed for admission to the course under general category.

23. We find that this court has been regularly and routinely using the words 'cut off marks' to describe the minimum marks required to be secured in the qualifying examination for being eligible for admission or to describe the minimum qualifying marks to be obtained in an entrance examination. As this court has routinely used the words 'cut off marks' to refer to 'eligibility marks' or 'qualifying marks', whenever this Court uses the words 'cut off marks', their meaning would depend upon the context.

The words may refer to either the minimum marks to be secured in the qualifying examination or the entrance examination to be eligible for admission, or to the marks secured by the last candidate admitted in a particular category.

24. We may refer to some of the cases where this court has used the term 'cut off marks' to refer to the eligibility marks or qualifying marks.

24.1) In *Dr. Jeevak Almast vs. Union of India* [1988 (4) SCC 27] this Court observed : "The scheme contained the provision that the cut-off base for selection for admission shall be 50 per cent marks", while referring to the All India Entrance Examination. This clearly demonstrates that the words 'cut-off' base was used to refer to the qualifying marks the minimum eligibility marks in the qualifying examination.

24.2) In *Ajay Kumar Agrawal and Ors. v. State of U.P.* [1991 (1) SCC 636] this court while referring to the minimum marks required for being eligible for admission to post graduate course described the minimum qualifying marks in the qualifying examination, as 'cut off base' marks. We extract below the relevant portion as follows :-

> "11. It is not disputed that in Uttar Pradesh the prevailing practice was a 50 per cent base for allowing Post Graduate Study to doctors with MBBS qualifications but taking their University examination as the base without any separate selection test, it is not the case of any of the parties before us that the selection is bad for any other reason. We are of the view that it is in general interest that the 50 per cent cut-off base as has been adopted should be sustained."

24.3) In *State of Uttar Pradesh v. Dr. Anupam Gupta* [1993 Supp (1) SCC 594], this court extracted the following provision from a Government order relating to eligibility marks for admission which was minimum of 50% for general category

candidates and 40% for reserved category candidates :-

> "(2) This examination shall have 100 per cent objective type questions. The eligibility criteria for admission to post-graduate courses shall be 50 per cent minimum qualifying marks for candidates of general category and 40 per cent minimum qualifying marks for candidates of reserved categories (SC/ST)."

Thereafter it used the words cut off marks to refer to the minimum eligibility marks for general category candidates and reservation category candidates:

> "… Thus it could be seen that this Court consistently laid down the criteria for conducting entrance examination to the post graduate degree and diploma courses in Medicine and the best among the talented candidates would be eligible for admission. 50% cut off marks was also held to be valid to achieve excellence in post graduate speciality. Accordingly we uphold the prescription of *50% cut off marks to general candidates and 40% to SCs and STs together* with 1.65% weightage of total marks i.e. 50 marks in total in entrance examination as constitutional and valid."
>
> (emphasis supplied)

24.4) In *Ombir Singh & Ors. v. State of U.P.* [1993 Supp. (2) SCC 64] this court while upholding the prescription of 50% and 40% respectively as the minimum eligibility marks in the qualifying examination followed the decisions in Ajay Kumar Agarwal and Dr.Anupam Gupta by relying upon and reiterating the passages in those decisions which use the words cut-off marks to refer to qualifying marks. We extract below the relevant portions of the said decision:

> "So far as the validity of the admission rules fixing 50% marks for the general category candidates and 40% marks for the SC/ST category candidates to be obtained at the

> entrance examination as minimum qualifying marks for being eligible for admission to the Post-Graduate medical courses, the same are not subject to any challenge ……..
>
> "…. It may be further mentioned that this Court in *Ajay Kumar Agrawal and Ors. v. State of U.P.* [1991 (1) SCC 636] observed as under:-
>
> "It is not disputed that in Uttar Pradesh the prevailing practice was a 50 per cent base for allowing Post Graduate Study to doctors with MBBS qualifications but taking their University examination as the base without any separate selection test, it is not the case of any of the parties before us that the selection is bad for any other reason. We are of the view that it is in general interest that the 50 per cent cut-off base as has been adopted should be sustained."
>
> 3. The matter again came up for consideration before this Court and in *State of Uttar Pradesh and Ors. v. Dr. Anupam Gupta* [1993 Supp. 1 SCC 594], it was held as under:-
>
> "Thus it could be seen that this Court consistently laid down the criteria for conducting entrance examination to the post graduate degree and diploma courses in Medicine and the best among the talented candidates would be eligible for admission. 50% cut off marks was also held to be valid to achieve excellence in post graduate speciality. Accordingly we uphold the prescription of 50% cut off marks to general candidates and 40% to SCs and STs together with 1.65% weightage of total marks i.e. 50 marks in total in entrance examination as constitutional and valid."
>
> 4. Thus, we further hold that any challenge to the above rule laying down minimum percentage of marks for eligibility for admission to Post-Graduate courses is no longer reintegra."

24.5) In *Hemani Malhotra vs. High Court of Delhi* – (2008) 7 SCC 11, we find that this Court has used the words 'cut-off marks' to refer to describe 'minimum qualifying marks' following Justice Shetty Commission Report which also used the term 'cut-off marks' while referring to 'minimum qualifying marks'. In that case, the advertisement inviting applications stated that "minimum qualifying marks in the written examination shall be 55% for general candidates and 50% for SC and ST candidates". The subsequent resolution of the full court provided that the "minimum qualifying marks in viva voce will be 55% for general candidates and 50% for SC/ST candidates. This Court while considering the correctness of the said resolution observed thus :

> "This Court further notices that Hon'ble Justice Shetty Commission has recommended in its Report that 'The vive- voce test should be in a thorough and scientific manner and it should be taken anything between 25 to 30 minutes for each candidate. What is recommended by the Commission is that the vive-voce test shall carry 50 marks and there shall be no cut off marks in vive-voce test.- This Court notices that in *All-India Judges Association and Ors. v. Union of India* – (2002) 4 SCC 247, subject to the various modifications indicated in the said decision, the other recommendations of the *Shetty Commission* (supra) were accepted by this Court. It means that prescription of cut off marks at vive-voce test by the respondent was not in accordance with the decision of this Court."

24.6) In *K. Manjusree vs. State of A.P.* – (2008) 3 SCC 512, this Court used the words 'cut-off percentage' to refer to minimum qualifying marks. The relevant portion is extracted below :

> "The sub- committee was also of the view that apart from applying the minimum marks for the written examination for determining the eligibility of the candidates to appear in the interview the same cut off percentage should be applied for interview marks, and those who fail to secure such minimum marks in the interview should be considered as having failed."

25. This Court also used the word 'threshold marks' to describe the minimum qualifying marks. In Parveen Jindal v. State of Haryana [1993 Supp. (4) SCC 70] this court referred to Rule 7 of the Haryana Service of Engineers Class I, PWD (Irrigation Branch) Rules, 1964 which prescribes the qualifying marks, relevant portion of which is extracted below:

> "Provided that a candidate shall not be considered qualified for appointment, unless he obtains not less than forty per cent marks in each subject and also not less than fifty per cent marks in the aggregate, and no candidate who does not obtain the qualifying marks shall be called for interview by the commission.

This Court, while referring to the contentions of the appellant therein, used the word 'threshold' marks to refer to the qualifying marks, as is evident from the following passage:

> "Whereas the Rules say that a candidate obtaining 50% marks in the written test is entitled to be called for viva-voce, the Commission has arbitrarily prescribed a threshold of 65% which it had no jurisdiction to do. As a result of the said arbitrary stipulation several of the appellants have been denied the opportunity of selection. The Commission must not be directed to make selections afresh for all the three wings/branches in the Public Works Department."

(emphasis supplied)

26. In *A K Thakur*, while referring to the observations of the Report (Vol.II) of the Oversight Committee (Planning Commission, Govt. of India) on Reservation in Higher Educational Institutions, Bhandari, J. used the words 'cut offs' or 'admission thresholds' as interchangeable words by

observing. "Cut-offs or admission thresholds as suggested by the Oversight Committee are reproduced" (vide : Para 627)

27. In *A K Thakur*, Pasayat, J. has also used the words "cut-off marks" to refer to minimum eligibility marks. While summing up his conclusions (in para 358 extracted above) he observed that the "Central Government shall examine as to the desirability of *fixing cut off marks* in respect of the candidates belonging to the Other Backward Classes (OBCs.)", and proceeded to observe "By way of illustration it can be indicated that five grace marks can be extended to such candidates below the *minimum marks fixed for general categories of students*." The suggestion made is that if the minimum eligibility marks for general category students is 50, the minimum eligibility marks for OBC candidates should be 45. This clearly shows the words "cut off marks" have been used to refer to minimum eligibility or qualifying marks.

28. Even the Oversight Committee on Reservation in Higher Educational Institutions, Government of India (Planning commission) in its Interim Report and Final Report uses the words 'cut off marks' and 'threshold marks' to refer to minimum eligibility marks. We extract below the relevant portions:

"Interim Report

The Oversight Committee considers expansion, inclusion and excellence as the moving spirit, behind the new reservation policy. The institutions of higher leaning should keep these three principles in view while *determining threshold marks for admission to OBC students*……(vide para 6 of the Preamble).

As regards *'cut offs' in institutions* other than those mentioned in para 7, these may be placed somewhere mid way between those for SC/ST and the unreserved category, carefully calibrated so that the principles of both equity and excellence can be maintained (vide para 8 of

Preamble).

Final Report (Vol.II)

4.4 Cut offs or admission thresholds:

4.4.1 The issue of threshold levels or cut offs for OBC candidates has already been addressed in the Interim Report (paras 7 and 8) as under :

x x x x x x x x x

4.4.3 As regards 'cut offs' in institutions other than those mentioned in para 7, these may be placed somewhere mid way between those for SC/ST and the unreserved category, carefully calibrated so that the principles of both equity and excellence can be maintained.

Para 4.4.3 of the Report of the Oversight Committee obviously refers to a situation where if the minimum eligibility marks for general category candidates is 50% and the minimum eligibility marks for SC/ST candidates are 40%, the minimum eligibility for OBC should be somewhere midway that is 45%. It should be noted that the observations of Bhandari J in paras 629 and 645 of the decision in *A K Thakur*, which is the fulcrum of the entire argument of appellant are made in the context of the aforesaid observations of Oversight Committee and therefore, when Bhandari J uses the words 'cut off marks', he is also clearly referring to the eligibility marks.

29. The words "cut-off marks" are freely used to describe the prescribed minimum marks even in academic circles and central educational institutions. For example, the prospectus of MBBS admissions in All India Institute of Medical Sciences (AIIMS) provides in Para 2 (dealing with eligibility) that a candidate should have obtained a minimum aggregate of 60% marks in the case of general and OBC candidates and 50% in the case of SC/ST candidates in aggregate. It also provides

that all candidates who are so found eligible, have to appear for a competitive entrance examination and Clause 4.1 refers to the minimum marks required to be secured in the MBBS Entrance Examination who could be admitted.

> "4.1 *Minimum cut-off marks in the MBBS Entrance Examination* : As per the decision of the governing body and institute body at it meeting held on 26.11.2009 with regard to cut-off marks in the MBBS entrance examination, the candidate belonging to general category will be required to have *50% minimum cut-off marks*. Those belonging to OBC category will be required to have *45% minimum cut-off* marks and those belonging to *SC/ST will have to ensure at least 40% minimum marks* in the MBBS entrance examination."

It will be seen from the above that the words 'cut-off marks' are used as the minimum marks required in the entrance examination.

30. Pasayat J and Bhandari J. were concerned about the standards of excellence in higher education. Having regard to the fact that OBCs were far better placed economically and socially than SCs/STs, they wanted to ensure that the minimum percentage for OBCs was somewhere between the minimum marks for SC/ST and minimum marks for general category candidates. They did not want the minimum eligibility marks for OBCs should be the same as the minimum eligibility marks for Scheduled Castes and Scheduled Tribes. They were of the view that if very low eligibility marks were provided for OBC, the disparity would affect higher education standards. It is in that context, that Bhandari, J. observed that cut off marks for OBCs, should not be lower than 10 marks below that of general category thereby meaning that minimum eligibility marks for OBC should be set no lower than 10% below the eligibility marks for the general category. Pasayat J in fact specifically stated that the minimum marks for OBCs should be 5 marks less than the minimum eligibility marks for general category.

31. The Constitution Bench of this Court in *Dr. Preeti Srivastava* (supra) observed as follows :

> "29. The submission, therefore, that there need not be any qualifying marks prescribed for the common entrance examination has to be rejected. We have, however, to consider whether different qualifying marks can be prescribed for the open merit category of candidates and the reserved category of candidates. Normally passing marks for any examination have to be uniform for all categories of candidates. We are, however, informed that at the stage of admission to the M.B.B.S. course, that is to say, the initial course in medicine, the Medical Council of India has permitted the reserved category candidates to be admitted if they have obtained the qualifying marks of 35% as against the qualifying marks of 45% for the general category candidates. It is, therefore, basically for an expert body like the Medical Council of India to determine whether in the common entrance examination viz. PGMEE, *lower qualifying marks can be prescribed for the reserved category of candidates as against the general category of candidates; and if so, how much lower. There cannot, however, be a big disparity in the qualifying marks for the reserved category of candidates and the general category of candidates at the post-graduate level.* This level is only one step below the apex level of medical training and education where no reservations are permissible and selections are entirely on merit. At only one step below this level the disparity in qualifying marks, if the expert body permits it, must be minimal. It must be kept at a level where it is possible for the reserved category candidates to come up to a certain level of excellence when they qualify in the speciality of their choice. It is public interest that they have this level of excellence."
>
> (emphasis supplied)

In *Dr. Preeti Srivastava*, the Constitution Bench held that if the qualifying marks for reserved category was 20% and the qualifying marks for general category was 45%, the disparity was too great to sustain the public interest at the level of postgraduate medical training and education. This Court noticed that for MBBS the difference in qualifying marks was only 10% that is 45% for general category and 35% for reserved category and that difference was not unreasonable. The Constitution Bench was of the view that prescribing different minimum qualifying marks for general category and reservation category was permissible so long as the difference was not too great; and that at post graduate level, the disparity in the qualifying marks between general category and reservation categories should be narrower than the disparity between the two categories at graduate level. It should be noted that neither *Dr. Preeti Srivastava*, nor *A.K. Thakur* nor any other decision of this Court required that the reservation category candidates should possess marks which are within a narrow bandwidth below the cut off marks for the last student admitted in the general category. All the decisions spoke of difference/disparity in regard to eligibility marks and qualifying marks.

32. Therefore, the context in which Bhandari J. concluded that "cut-off marks for OBCs should be set no lower than 10% marks below general category" (vide Paras 535 and 629) of *A K Thakur*, he meant that eligibility/qualifying marks for OBCs should be set not lower than 10% below the eligibility/qualifying marks of general category. Similar is the position regarding the observation of Pasayat J. in Para 358 of A K Thakur. Pasayat J. observed that the cut off marks for OBCs should be fixed by extending 5 grace marks, that is 5 marks below the *minimum eligibility marks fixed for general categories of students*. We fail to understand how the words "*minimum eligibility marks fixed for general categories of students*' used by Pasayat J can be read as 'cut off marks' of general category, that is marks secured by the last candidate admitted under general category. We, therefore, hold that the words "maximum cut-off marks for

OBCs be 10% below the cut off marks of general category candidates" in the order dated 14.10.2008 of the Constitution Bench meant that if the minimum eligibility/qualifying marks prescribed for general category candidates was 50%, the minimum eligibility/qualifying marks for OBCs should be 45%.

33. The appellant canvasses the continuance of the procedure adopted by JNU during 2008-09 and 2009-10. What in effect was that procedure? During those years, JNU would fix the minimum eligibility marks as say 40% when the admission programme is announced. JNU would apply it only to general category candidates. It would not say what was the minimum eligibility marks for OBC candidates, but would decide the same, only after all the general category seats were filled, by fixing a band of marks upto 10% below the marks secured by the last candidate admitted under the general category. If a OBC candidate secured the marks within that band, he would be given admission. Otherwise even if he had secured 70%, as against the minimum of 40% he would not get a seat, if the band of marks was higher. Such a procedure, was arbitrary and discriminatory, apart from being unknown in regard to admissions to educational institutions,. The minimum eligibility marks for admission to a course of study is always declared before the admission programme for an academic year is commenced. An institution may say that for admissions to its course, say Bachelor's degree course in science, the candidate should have successfully completed a particular course of study, say 10+2, with certain special subjects. Or it can say that the candidate should have secured certain prescribed minimum marks in the said qualifying examination, which may be more than the percentage required for passing such examination. For example if a candidate may pass a 10+2 examination by securing 35% marks, an institution can say at its discretion that to be eligible for being admitted to its course of study, the candidate should have passed with at least a minimum of 40% or 50% or 60%. Whatever be the marks so prescribed, it should be uniform to all applicants and a

prospective applicant should know, before he makes an application, whether he is eligible for admission or not. But the 'cut-off' procedure followed by JNU during those days had the effect of rewriting the eligibility criteria, after the applications were received from eligible candidates. If the minimum eligibility prescribed for an admission in an institution was 50% and a candidate had secured 50%, he could not be denied admission, if a seat was available, based on a criterion ascertained after the last date for submission of applications. No candidate who fulfils the prescribed eligibility criteria and whose rank in the merit list is within the number of seats available for admission, can be turned down, by saying that he should have secured some higher marks based on the marks secured by some other category of students. A factor which is neither known nor ascertained at the time of declaring the admission programme cannot be used to disentitle a candidate to admission, who is otherwise entitled for admission. If the total number of seats in a course is 154 and the number of seats reserved for OBCs is 42, all the seats should be filled by OBC students in the order of merit from the merit list of OBC candidates possessing the minimum eligibility marks prescribed for admission. (subject to any requirement for entrance examination.) When an eligible OBC candidate is available, converting an OBC reservation seat to general category is not permissible.

Alternative contention

34. The appellant also urged that there is a marked distinction between scheduled castes and scheduled tribes who have faced historical discrimination and social handicap apart from being socially and educationally backward and the Other Backward Classes who were only socially and educationally not forward, but did not suffer from such historical discrimination and social handicap [vide ground 'G' of the special leave petition]. The appellant contended all benefits associated with reservations for SCs/STs need not, and in fact,

cannot, be extended to reservations for OBCs. Expanding the said submission, the appellant contended that the principle that when candidates belonging to a reserved category get selected in the open competition field on the basis of their own merit, they will not be counted against the reservation quota, but will be treated as open competition candidates, will apply only to SCs/STs and not to the OBCs. In other words, his submission is that all OBC candidates selected and admitted to a course of study should be counted towards the 27% reservation for OBCs including those OBC candidates who get selected on their own merit without the benefit of reservation.

35. The appellants relied upon the decision of three Judge Bench of this court in *Chattar Singh vs. State of Rajasthan* [1996 (11) SCC 742] wherein this court held that by a process of interpretation, OBCs cannot be treated or declared to be similar to SCs/STs. This court also held that Scheduled Castes and Scheduled Tribes on one hand and the OBCs on the other are to be treated as distinct classes for the purpose of reservation. This Court observed:

> "Though OBCs are socially and economically not forward, they do not suffer the same social handicaps inflicted upon Scheduled Castes and Scheduled Tribes. ….. The object of reservation for the Scheduled Castes and Scheduled Tribes is to bring them into the mainstream of national life, while the object in respect of the backward classes is to remove their social and educational handicaps……The Founding Fathers of the Constitution, having been alive to the dissimilarities of the socio-economic and educational conditions of the Scheduled Castes and Scheduled Tribes and other segments of the society have given them separate treatment in the Constitution. The Constitution has not expressly provided such benefits to the OBCs…"

The appellant also relied upon the following observations of one of us (Raveendran, J.) at para 653 of *Ashoka Kumar Thakur* (supra) :

"I agree with the decision of the learned Chief Justice that reservation of 27% for other backward classes is not illegal. I would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward classes under an enactment enabled by Article 15(5) of the Constitution for consideration in an appropriate case."

The appellant therefore contended that unlike in the case of Scheduled Castes and Scheduled Tribes, the OBC candidates who get selected in the open competition field on the basis of their own merit, should be counted against the 27% OBC quota under an enactment enabled by section 15(5) of the Constitution.

36. The respondents on the other hand contended that the following observations in *Indra Sawhney vs. Union of India* [1992 Supp. (3) SCC 217] were intended to apply not only to Scheduled Castes and Scheduled Tribes, but also to OBCs : -

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

The respondents also relied upon the following observations of a Constitution Bench in *R.K. Sabharwal vs. State of Punjab* [1995 (2) SCC 745] :

"When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward

class then the percentage has to be followed strictly. *The prescribed percentage cannot be varied or charged simply because some of the members of the backward class have already been appointed/promoted against the general seats.* As mentioned above the roster point which is reserved for a backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. *The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing Reservation for the said class but so long as the instructions/Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointees/promotes belonging to the backward classes against the general category posts the given percentage has to be provided in addition*."

(emphasis supplied)

37. The appellants' counsel replied by contending that the observations in *Indra Sawhney* and *R.K.Sabharwal* will not help the contention of the OBC candidates. According to him, para 811 of *Indra Sawhney* refers only to Scheduled Castes and therefore extendable to Scheduled Tribes but not to OBCs. He submitted that the observations in *Sabharwal* did not apply to an enactment enabled by Article 15(5). He also pointed out that the CEI Act merely provides a reservation of 27% seats for OBCs. but is silent as to whether those OBCs. who get selected in the open competition field on the basis of their own merit, should be counted against the quota reserved for OBCs. or not. It was submitted that the principles evolved with reference to SCs and STs or reservations in employment, cannot be applied to reservations under section 3 of the CEI Act enabled

by Article 15(5). A plain reading of this provision, it is submitted, would mean that all persons belonging to OBCs admitted to the institution shall be counted against 27%.

38. The issue before the High Court was with reference to the meaning of the words cut-off marks. The submissions in regard to the question whether OBC candidates who are selected on the basis of their own merit without the benefit of reservation, should be counted towards 27% reservation, was not the subject matter of the writ petition from which this appeal arises. Further, this issue was not directly raised, but was referred only in an indirect manner in the pleadings before this Court and Union of India had no occasion to deal with this larger issue. We therefore do not propose to decide the alternative contention which has wide ramifications except to note that the appellant has raised an important issue which merits serious consideration in an appropriate case.

Conclusions

39. The words 'cut off marks' has been used thrice in the second para of the order dated 14.10.2008 containing the operative direction. It is used in the first sentence of the para while posing the question for decision, that is 'what should be the *extent of cut off marks* for admission of students of OBCs in CEIs'. It is used in the second sentence of the para while giving the answer to the question posed, that is "we make it clear that the *maximum cut off marks for OBCs be 10% below the cut off marks of general category candidates*. The words 'cut off marks' occurring in three places in the second para of the order dated 14.10.2008 has three distinct and different meanings :

(i) the use of the words, '*extent of cut off marks*' in the first sentence refers to the 'minimum eligibility marks' (or to the 'minimum qualifying marks' if there is entrance examination), for admission of OBC candidates.

(ii) The use of the words, "*maximum cut-off marks for OBCs*" in the first part of the second sentence refers to the percentage of marks by which the eligibility/qualifying marks could be lowered from the minimum eligibility/qualifying marks prescribed for general category students. In other words, it refers to the difference between the minimum eligibility/ qualifying marks for general category and minimum eligi ility/qualifying marks for OBCs and directs that such difference should not be more than 10% of the minimum eligibility/ qualifying marks prescribed for general category candidates.

(iii) The use of the words, "*cut off marks of general category candidates*" in the latter part of the second sentence, refers to the minimum eligibility marks (or to the minimum qualifying marks if there is an entrance examination) prescribed for general category candidates.

The use of the words 'cut-off-marks' in none of the three places in para 2 of the order dated 14.10.2008, refers to the marks secured by the last candidate to be admitted in general category or in any particular category, or to the minimum marks to be possessed by OBC candidates, determined with reference to the marks secured by the last candidate to be admitted under general category.

40. The order dated 14.10.2008 means that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50% for general category candidates, the minimum eligibility marks for OBCs should not be less than 45% (that is 50 less 10% of 50). The minimum eligibility marks for OBCs can be fixed at any number between 45 and 50, at the discretion of the Institution. Or, where the candidates are required to take an entrance examination and if the qualifying marks in the entrance examination is fixed as 40% for general category candidates, the qualifying marks for OBC candidates should not be less than 36% (that 40 less 10% of 40).

41. We therefore, dispose of this appeal, affirming the decision dated 7.9.2010 of the learned Single Judge of the High Court, subject to the clarifications/observations above, and subject to the following conditions :

(i) In regard to the admissions for 2011-2012, if any Central Educational Institution has already determined the 'cut-off marks' for OBCs with reference to the marks secured by the last candidate in the general category, and has converted the unfilled OBC seats to general category seats and allotted the seats to general category candidates, such admissions shall not be disturbed. But where the process of conversion and allotment is not completed, the OBC seats shall be filled by OBC candidates.

(ii) If in any Central Educational Institution, the OBC reservation seats remain vacant, such institutions shall fill the said seats with OBC students. Only if OBC candidates possessing the minimum eligibility/qualifying marks are not available in the OBC merit list, the OBC seats shall be converted into general category seats.

(iii) If the last date for admissions has expired, the last date for admissions shall be extended till 31.8.2011 as a special case, to enable admissions to the vacant OBC seats.

N.J. Appeal disposed of.

STATE BANK OF INDIA AND ANR.
v.
M/S. EMMSONS INTERNATIONAL LTD. AND ANR.
(Civil Appeal No. 1709 of 2007)

AUGUST 18, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

Bank/Banking: Letter of credit – Held: Where the customer of bank instructs the bank to open a credit, the bank acts at its peril if it departs from the precise terms of the mandate – A contract is concluded between the issuing bank and the seller no sooner the bank issues the credit and communicates it to the seller – Under an irrevocable credit, the issuing bank gives an unequivocal and binding undertaking to the seller that it will pay against documents/ bills drawn in compliance with the terms of credit – A draft with accompanying documents must be in strict accord with the letter of credit – If the documents presented comply with the terms of the credit, the issuing bank must honour its obligation in accordance with the terms of credit – In the instant case, second respondent placed a purchase order to the seller for Rs. 43 lacs – Letter of credit was established by the issuing bank in favour of the seller – Issuing bank received negotiated documents under the letter of credit from 'negotiating bank' and pointed out discrepancies – Monetary claim was filed by seller against the issuing Bank and the advising Bank – Trial Court dismissed the seller's claim, however, High Court granted a decree to the seller as prayed in the suit – The order of the High Court was made ignoring and overlooking the finding of the trial court that the seller accepted the encashment of bill and document on collection basis – High Court was required to address itself to the said issue which surely had bearing on the final outcome of the case – It failed to follow the fundamental rule governing the exercise of its

jurisdiction u/s.96, CPC that where the first appellate court reverses the judgment of the trial court, it is required to consider all the issues of law and fact – This flaw vitiated the entire judgment of the High Court – Judgment of the High Court set aside and First Appeal restored for re-hearing and fresh decision – Code of Civil Procedure, 1908 – s.96.

The second respondent-buyer placed a purchase order on first respondent-seller for supply of 2000 MT of Syrian Rock Phosphate for Rs.43 lacs. The payment terms provided 'against 180 days issuance of a letter of credit'. At the request of buyer, a letter of credit for Rs.43 lacs was established by appellant no.1 (issuing bank) in favour of the seller. Appellant no.2 was the advising bank. The seller supplied the material and the buyer was said to have accepted the documents. On July 8, 1997, the issuing bank received negotiated documents under the letter of credit from negotiating bank for payment. On that day itself, the issuing bank pointed out the discrepancies to the negotiating bank that the certificate from negotiating bank mentioning all the terms of credit were not furnished. The issuing bank, thus, advised the negotiating bank to rectify the discrepancies within seven days of submission of documents. In the correspondence between the negotiating bank and the issuing bank, the negotiating bank took stand that the discrepancies notified by the issuing bank were rectified and the documents complied with the requirement of credit. However issuing bank continued to insist that the documents were discrepant and were not acceptable to it. The seller filed a monetary suit against the issuing bank and advising bank. The buyer was impleaded as formal party. The trial court held that the issuing bank had properly dishonoured the documents relating to the letter of credit and the seller was not entitled to get any amount or interest from the issuing bank and the advising bank on the basis of that letter of credit. The trial court also

concluded that seller accepted the encashment of bill and document on collection basis. In light of these findings, the trial court dismissed the seller's claim. The seller filed appeal before the High Court. The High Court allowed the seller's appeal. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeal, the Court

Held: 1. The legal position is fairly well-settled that a draft with accompanying documents must be in strict accord with the letter of credit. If the documents presented comply with the terms of the credit, the issuing bank must honour its obligation in accordance with the terms of credit. [Para 13] [446-D-E]

United Commercial Bank v. Bank of India and others **(1981) 2 SCC 766 – relied on.**

2. Where the customer of bank instructs the bank to open a credit, the bank acts at its peril if it departs from the precise terms of the mandate. A contract is concluded between the issuing bank and the seller no sooner the bank issues the credit and communicates it to the seller. Under an irrevocable credit, the issuing bank gives an unequivocal and binding undertaking to the seller that it will pay against documents/bills drawn in compliance with the terms of credit. [Paras 14, 16] [447-B, D]

Lord Diplock in Commercial Banking Co. of Sydney Ltd. v. JalsardPty. Ltd. **(1973) AC 279 – referred to.**

3. The issue no. 5 framed by the trial court was whether the seller accepted the encashment of bill and document on collection basis. It cannot be said that issue no. 5 was immaterial or finding of the trial court on that issue was inconsequential. The High Court did not advert to issue no.5 at all nor did it upset or consider the

finding of the trial court on that issue. The High Court was hearing the first appeal and as a first appellate court it ought to have considered and addressed itself to all the issues of fact and law before setting aside the judgment of the trial court. The judgment of the High Court suffered from a grave error as it ignored and overlooked the said finding of the trial court. The High Court was required to address itself to issue no. 5 which surely had bearing on the final outcome of the case. The High Court failed to follow the fundamental rule governing the exercise of its jurisdiction under Section 96 of the Code of Civil Procedure, 1908 that where the first appellate court reverses the judgment of the trial court, it is required to consider all the issues of law and fact. This flaw vitiated the entire judgment of the High Court. The judgment of the High Court, therefore, cannot be sustained. The first appeal is restored for rehearing and fresh decision. [Paras 18, 20, 26, 27] [450-A, D, F; 452-E-G]

Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs. **(2001) 3 SCC 179: 2001 (1) SCR 948;** *Madhukar and Others v. Sangram and Others* **(2001) 4 SCC 756: 2001 (3) SCR 138;** *H.K.N. Swami v. Irshad Basith (Dead) by LRs.* **(2005) 10 SCC 243;** *Jagannath v. Arulappa and Anr.* (2005) 12 SCC 303; *Chinthamani Ammal v. Nandagopal Gounder and Anr.* **(2007) 4 SCC 163: 2007 (2) SCR 903 – relied on.**

Halsbury's Laws of England; Davis' Law Relating To CommercialLetters of Credit, **2nd Edn. (at page 76);** *Paget's Law of Banking* **8th Edn. (at page 648) – referred to.**

Case Law Reference:

(1981) 2 SCC 766	**relied on**	**Para 13**
(1973) AC 279	**referred to**	**Para 15**
2001 (1) SCR 948	**relied on**	**Para 21**
2001 (3) SCR 138	**relied on**	**Para 22**
(2005) 10 SCC 243	**relied on**	**Para 23**
(2005) 12 SCC 303	**relied on**	**Para 24**
2007 (2) SCR 903	**relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1709 of 2007.

From the Judgment & Order dated 11.11.2006 of the High court of Madhya Pradesh in First Appeal No. 225 of 2002.

R.K. Sanghi (for Anil Kumar Tandale) for the Appellants.

Shyam Divan, C.D. Mulherkar, S.S. Khemka (for Punit Dutt Tyagi) for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This civil appeal, by special leave, is from the judgment and decree of the Madhya Pradesh High Court whereby the Division Bench of that Court allowed the first appeal of the present 1st respondent—M/s. Emmsons International Ltd.—and set aside the judgment and decree of the trial court (First Additional District Judge, Bhopal) and decreed the 1st respondent's monetary claim.

2. Unialkem Fertilizers Limited—2nd respondent in this appeal (hereinafter referred to as 'the buyer') placed a purchase order on M/s. Emmsons International Limited (hereinafter referred to as 'the seller') for supply of 2000 MT of Syrian Rock Phosphate at the rate of Rs. 2100/- per metric ton for an aggregate amount of Rs. 43,86,411/-. The payment terms provided 'against 180 days issuance of letter of credit'. On June 18, 1997, at the request of the buyer, a letter of credit for Rs. 43,86,411/- was established by the appellant No. 1 — State Bank of India, Industrial Finance Branch, Bhopal (hereinafter referred to as 'the issuing bank') in favour of the seller; the

appellant No. 2 — State Bank of India, New Delhi Main Branch, New Delhi being the advising Bank. The seller supplied the material vide sale invoice, high seas delivery, bills of lading, etc. and the buyer is said to have accepted the documents.

3. The letter of credit established by the issuing bank, inter alia, made the following stipulations:

" . . . . . THIS DOCUMENTARY CREDIT WHICH IS AVAILABLE *BY NEGOTIATION OF YOUR DRAFT AT 180 DAYS* FROM DESPATCH DRAWN FOR 100.00% OF INVOICE VALUE ON UNIALKEM FERTILIZERS LTD., E-5 PLOT NO. 4, RAVI SHANKAR NAGAR, BHOPAL, 462 016 BEARING THE CLAUSE "DRAWN UNDER DOCUMENTARY CREDIT NO. 0192097 LC000087 OF STATE BANK OF INDIA, INDUSTRIAL FINANCE BRANCH, GR. FLOOR, L.H.O. PREMISES, HOSHANGABAD ROAD, BHOPAL – 462 011 (INDIA)." *ACCOMPANIED BY DOCUMENTS LISTED IN ATTACHED SHEET (S)* EVIDENCING DISPATCH OF GOODS AS PER THE ATTACHED SHEETS.

FOR LIST OF REQUIRED DOCUMENTS, MERCHANDISE DESCRIPTION AND OTHER INSTRUCTIONS PLEASE SEE *THE ATTACHED CONTINUATION SHEETS WHICH FORM AN INTEGRAL PART OF THIS CREDIT*.

SHIPMENT FROM : SYRIA TO KANDLA, INDIA

SHIPMENT TERMS : CIF

PARTIAL SHIPMENT : ALLOWED

TRANSSHIPMENT : NOT ALLOWED

INSTRUCTION TO THE ADVISING BANK:

- ALL BANK CHARGES (OTHER THAN ISSUING BANK CHARGES) ARE FOR ACCOUNT OF BENEFICIARY.

- *DISCREPANT DOCUMENTS TO BE SENT STRICTLY ON COLLECTION BASIS*.

- ALL DOCUMENTS TO INDICATE L/C NO. 0192097 LC 000087 AND DATE 18/06/97.

- NEGOTIATIONS UNDER THIS CREDIT ARE RESTRICTED TO STATE BANK OF INDIA, NEW DELHI, MAIN BRANCH, 11, SANSAD MARG, POST BOX NO. 430, NEW DELHI – 110 001.

- *EXCEPT IN SO FAR AS OTHERWISE EXPRESSELY STATED THIS DOCUMENTARY CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS (UCP) (1993 REVISION) OF THE INTERNATIONAL CHAMBERS OF COMMERCE (PUBLICATION NO. 500)*

WE HEREBY ENGAGE WITH DRAWERS AND/OR BONAFIDE HOLDERS THAT *DRAFT DRAWN AND NEGOTIATED IN CONFORMITY WITH THE TERMS OF THIS CREDIT WILL BE DULY HONOURED ON PRESENTATION AND* THAT DRAFTS ACCEPTED WITHIN THE TERMS OF THIS CREDIT WILL BE DULY HONOURED AT MATURITY. THE AMOUNT OF EACH DRAFT MUST BE ENDORSED ON THE REVERSE OF THIS CREDIT BY THE NEGOTIATION BANK....."

(*Emphasis supplied by us*)

4. The terms of Letter of Credit were amended on June 23, 1997 to the following effect :

"AT THE REQUEST OF THE APPLICANT UNIALKEM

FERTILIZERS LTD., E-5 PLOT NO. 4, RAVI SHANKAR NAGAR, BHOPAL – 462 016. WE HAVE TODAY AMENDED OUR CAPTIONED LETTER OF CREDIT AS UNDER :

FIRST PAGE OF LETTER OF CREDIT LINE SECOND TO READ AS : NEGOTIATION OF YOUR DRAFT AT 180 DAYS FROM THE DATE OF DELIVERY ORDER DATED 18/06/97 INSTEAD OF EXISTING PLEASE MAKE THE FOLLOWING AMENDMENTS TO ATTACHED SHEET NO. 1 OF L/C POINT NO. 01 TO BE DELETED POINT NO. 02 TO BE DELETED *POINT NO. 04 TO READ AS COPY OF CERTIFICATE OF SYRIAN ORIGIN ISSUED BY CHAMBER OF COMMERCE INSTEAD OF EXISTING. POINT NO. 05 TO READ AS COPY OF CERTIFICATE OF QUALITY AND QUANTITY ISSUED BY CHAMBER OF COMMERCE* INSTEAD OF EXISITING POINT NO. 12 TO READ AS DRAFT DRAWN UNDER THIS LETTER OF CREDIT ARE NEGOTIABLE BY THE STATE BANK OF INDIA, MAIN BRANCH, NEW DELHI AND ORIENTAL BANK OF COMMERCE, OVERSEAS BANK, NEHRU PLACE, NEW DELHI ALSO INSTEAD OF EXISTING.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED."

(*Emphasis supplied by us*)

5. On July 8, 1997, the issuing bank received negotiated documents under the letter of credit from Oriental Bank of Commerce (hereinafter to be referred as 'negotiating bank') for payment. On that day itself, the issuing bank pointed out the following discrepancies to the negotiating bank :

(i) certificate from the negotiating bank mentioning all the terms of credit have not been furnished;

(ii) the certificate of Syrian Origin is not issued by Chamber of Commerce.

The issuing bank, thus, advised the negotiating bank to rectify the discrepancies within seven days of submission of documents.

6. Thereafter, between July 10, 1997 and February 7, 1998, the correspondence ensued through telegrams and letters between the negotiating bank and the issuing bank. According to the negotiating bank, the discrepancies notified by the issuing bank were rectified and the documents complied with the requirement of the credit. On the other hand, the issuing bank continued to insist that the documents were discrepant; the documents presented were not acceptable to it and it was holding the documents on collection basis at the risk and responsibility of the negotiating bank.

7. It was then that the seller brought an action by way of a summary suit for a decree in the sum of Rs. 63,74,356/- (principal amount of Rs. 43,86,411/- and interest of Rs. 19,87,945/-) together with the interest at the rate of 18 per cent per annum from the date of the suit to the date of decree and thereafter the interest at the same rate on decretal amount till realization against the issuing bank and the advising bank. The buyer was impleaded as a formal party.

8. The issuing bank (defendant no. 1) made an application for leave to defend which was granted by the trial court. The issuing bank then filed written statement justifying its action of not honouring the credit on diverse grounds, namely; (i) the certificate of origin issued by Chamber of Commerce was different from the certificate of origin dated March 30, 1997 issued by the supplier of the material; (ii) neither the description of goods nor the quantity or weight matched with each other in the above documents; (iii) the certificate of origin has been issued in favour of MMTC and not in favour of the seller; (iv) at the request of the negotiating bank, the documents were

retained by it but only on collection basis in order to remit the amount after collecting the same from the buyer and (v) it has acted in accord with Uniform Customs and Practice for Documentary Credits (for short, ' UCP500').

9. On the pleadings of the parties, the trial court framed the following five issues :

"Issue No. 1. Whether respondent Nos. 1 & 2 have dishonoured the documents relating to the "letter of credit" against the rules and practice?

Issue No. 2. Whether applicant is eligible to get Rupees 43,86,411/- and 18 percent interest p.a. over it from respondent Nos. 1 & 2 on the basis of letter of credit given by them?

Issue No. 3. Assistance and expenses?

Issue No. 4 Whether respondent is eligible to get Rs.14,258/- as handling/collection fee from applicant?

Issue No. 5. Whether applicant has accepted the encashment of bill and document on collection basis?"

It may be noted that trial court has referred to the seller as applicant and the issuing bank (defendant no. 1) and the advising bank (defendant no. 2) as respondent nos. 1 and 2 respectively.

10. The parties tendered oral as well as documentary evidence in support of their respective case.

11. The trial court after viewing the evidence and hearing the arguments held that the issuing bank has properly

dishonoured the documents relating to the letter of credit and the seller was not entitled to get any amount or interest from the issuing bank and the advising bank on the basis of that letter of credit. The trial court has also concluded that seller accepted the encashment of bill and document on collection basis. In light of these findings, the trial court vide its decision dated February 4, 2002 dismissed the seller's claim.

12. The seller filed first appeal against the judgment and decree of the trial court before the High Court of Madhya Pradesh. As noted above, the Division Bench of that Court allowed the seller's appeal and granted a decree to the seller as prayed in the suit.

13. The legal position appears to be fairly well-settled that a draft with accompanying documents must be in strict accord with the letter of credit. If the documents presented comply with the terms of the credit, the issuing bank must honour its obligation in accordance with the terms of credit. In *United Commercial Bank* v. *Bank of India and others*[1], this Court referred to few decided cases of the English Courts, Halsbury's Laws of England and also couple of books on the subject by eminent authors—Davis' Law Relating To Commercial Letters of Credit, 2nd Edn. (at page 76) and Paget's Law of Banking, 8th Edn. (at page 648)—and it was held that the documents tendered by the seller must comply with the terms of the letter of credit and that the banker owes a duty to the buyer to ensure that the buyer's instructions relative to the documents against which the letter of credit is to be honoured are complied with. It was stated that the description of the goods in the relative bill of lading must be the same as the description in the letter of credit, that is, the goods themselves must in each case be described in identical terms, even though the goods differently described in the two documents are, in fact, the same. The Court reiterated, ' . . . . . a bank issuing or confirming a letter of credit is not concerned with the underlying contract between

1. (1981) 2 SCC 766

the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit'.

14. Where the customer of bank instructs the bank to open a credit, the bank acts at its peril if it departs from the precise terms of the mandate.

15. Lord Diplock in *Commercial Banking Co. of Sydney Ltd.* v. *Jalsard Pty. Ltd.*[2] stated at page 286 of the Report that the issuing banker and his correspondent bank have to make decisions as to whether a document which has been tendered by the seller complies with the requirements of a credit.

16. It needs no emphasis that a contract is concluded between the issuing bank and the seller no sooner the bank issues the credit and communicates it to the seller. Under an irrevocable credit the issuing bank gives an unequivocal and binding undertaking to the seller that it will pay against documents/bills drawn in compliance with the terms of credit.

17. The relevant clauses of Articles 13, 14 and 19 of UCP 500 read as under:

"Article 13.

Standard for Examination of Documents

a Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to

2. (1973) AC 279.

be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

b The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

c . . . . . .

Article 14.

Discrepant Documents and Notice

a . . . . . .

b Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

c If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgement approach the Applicant for a waiver of the discrepancy(ies). This does not, however,

extend the period mentioned in sub. Article 13 (b).

d . i. . . . . .

ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.

iii. . . . . .

e If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

f . . . . . .

Article 19.

Bank-to-Bank Reimbursement Arrangements

a . . . . . .

b Issuing Banks shall not require a Claiming Bank to supply a certificate of compliance with the terms and conditions of the Credit to the Reimbursing Bank.

c . . . . . .

d . . . . . .

e . . . . . ."

18. In light of the above legal position, we heard Mr. R.K. Sanghi, learned counsel for the appellants and Mr. Shyam Divan, learned senior counsel for the 1st respondent for some time. In the course of hearing, however, it transpired that the

High Court in its judgment that runs into 56 foolscap pages while reversing the judgment of the trial court, has not at all adverted to issue no. 5 framed by the trial court nor it considered or upset the finding of the trial court on that issue.

19. Mr. Shyam Divan, learned senior counsel for the seller - 1st respondent fairly stated that the finding on issue no. 5 recorded by the trial court has not at all been considered in the impugned judgment although, he strenuously urged that once the discrepancies on the basis of which the issuing bank refused the documents were rectified and the time allowed for encashment had expired, the issuing bank was obliged to honour the letter of credit and the case set up by the issuing bank that the seller had accepted the encashment of bill and document on collection basis was false and frivolous.

20. Having regard to the controversy set up by the parties in the course of trial, in our view, it cannot be said that issue no. 5 is immaterial or finding of the trial court on that issue is inconsequential. The High Court was hearing the first appeal and, as a first appellate court it ought to have considered and addressed itself to all the issues of fact and law before setting aside the judgment of the trial court. The judgment of the High Court suffers from a grave error as it ignored and overlooked the finding of the trial court on issue no. 5 that the seller accepted the encashment of bill and document on collection basis. The High Court was required to address itself to issue no. 5 which surely had bearing on the final outcome of the case.

21. In *Santosh Hazari* v. *Purushottam Tiwari (Deceased) by L.Rs.*[3], this Court held (at pages 188-189) as under :

> "……..The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of

3. (2001) 3 SCC 179.

mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. … while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it……"

22. The above view has been followed by a 3-Judge Bench decision of this Court in *Madhukar and Others v. Sangram and Others*[4], wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

23. In the case of *H.K.N. Swami v. Irshad Basith (Dead) by LRs.*[5], this Court (at pages 243-244) stated as under :

"The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title……".

24. Again in *Jagannath v. Arulappa and Another*[6] while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court (at pages 303-304) observed as follows :

4. (2001) 4 SCC 756.

5. (2005) 10 SCC 243.

6. (2005) 12 SCC 163.

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion. In the present case, we find that the High Court has not adverted to many of the findings which had been recorded by the trial court. For instance, while dismissing the suits filed by the respondents, the trial court had recorded a finding on Issue 5 that the defendant-appellant had taken actual possession of the suit properties in Execution Petition No. 137 of 1980 arising out of OS No. 224 of 1978. Without reversing this finding, the High Court simply allowed the appeals and decreed the suits filed by the plaintiff-respondents in toto. Similarly, there are other issues on which findings recorded by the trial court have not been set aside by the High Court. The points involved in the appeals before the High Court required a deeper consideration of the findings recorded by the trial court as well as the evidence and the pleadings on record."

25. The decided cases of this Court in *Jagannath6* and *H.K.N. Swami*[5] were noticed by this Court in a later decision in the case of *Chinthamani Ammal v. Nandagopal Gounder and Another*[7].

26. In our view, the High Court failed to follow the fundamental rule governing the exercise of its jurisdiction under Section 96 of the Code of Civil Procedure, 1908 that where the first appellate court reverses the judgment of the trial court, it is required to consider all the issues of law and fact. This flaw vitiates the entire judgment of the High Court. The judgment of the High Court, therefore, cannot be sustained.

27. For the above reasons, we accept the appeal, set aside the impugned judgment of the High Court and restore First Appeal No. 225 of 2002 for re-hearing and fresh decision. All contentions of the parties are kept open to be agitated at the time of the hearing of the first appeal. No order as to costs.

D.G. Appeal disposed of.

7. (2007) 4 SCC 163.

RAMESH KUMAR & ANR.
v.
FURU RAM & ANR. ETC.
(Civil Appeal Nos. 7085-7086 of 2011)

AUGUST 18, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

SUIT:

Suits for declaration that the decrees obtained in suits filed u/ss 14 and 17 of Arbitration Act were null and void as they were vitiated by fraud – Decreed by trial court on the ground that the arbitration awards were not registered – First appellate court and High Court dismissed the suits holding that the suits were filed only for declaring that the arbitration agreements and awards were invalid and the suit for such declaration were not maintainable in view of ss. 32 and 33 of Arbitration Act – HELD: Challenge to the validity of the arbitration agreement and the awards was incidental to challenge to the order making the awards rule of the court and the decrees drawn in pursuance of such orders – Therefore, ss. 32 and 33 were no bar to the suits – The decrees in suits u/s 14 and 17 of Arbitration Act were obtaining by committing fraud upon the plaintiffs, the court and the State Government evading liability to pay stamp duty and registration charges – Judgment of first appellate court and High Court set aside and judgments and decrees of trial court decreeing the suits restored.

ARBITRATION ACT, 1940:

ss. 14 and 17 – Reference agreements – Awards – Applications for making the awards rule of the court– HELD: The entire procedure was fraudulent as (i) there was no dispute between the parties, (ii) there was no reference of any dispute to arbitration, (iii) the reference agreements were prepared

and executed in pursuance of a pre-existing arrangement to have collusive awards and (iv) the arbitrator was not required to decide any dispute between the parties nor was there any adjudication of the dispute by the arbitrator – Reference to arbitration was to avoid stamp duty and registration charges – Obtaining sham and collusive arbitration awards when there was no dispute and then obtaining a nominal decree in terms of the said awards would be a fraud committed upon the court and the State Government by evading liability to pay the stamp duty and registration charges – The irregularities, illegalities, suppressions and misrepresentations which culminated in the orders making the awards the rule of the court and directing that the awards be made decrees of the court, show that the decrees in terms of the awards were obtained by fraud – Stamp fraud – Registration Act, 1908 – s. 17 – Administration of justice – Fraud committed upon court.

FRAUD – Connotation of – Explained.

REGISTRATION ACT, 1908:

ss. 17 and 49 – Compulsorily registrable documents – Held: If the decree or order of the court is not rendered on merits, but expressed to be made on a compromise and comprises any immoveable property which was not the subject mater of the suit or proceeding, such order or decree is compulsorily registrable – Further, clause (iv) of sub-s. (2) of s. 17 excludes decrees or orders but does not exclude awards of arbitrator – Any arbitration award which purports or operates to create, declare any right, title or interest in any immovable property of the value of more than Rs. 100 is compulsorily registrable – In the instant case, the awards are clearly documents which purport or operate to create and declare a right, title or interest in an immoveable property of the value of more than Rs.100 which was not the subject matter of the dispute or reference to arbitration – Therefore, the awards were compulsorily registrable, but as they were not registered they

could not be acted upon u/s 49 of the Registration Act, 1908 nor could a decree be passed in terms of such unregistered awards.

CONSTITUTION OF INDIA, 1950:

Article 136 – Scope of – Held: Normally Supreme Court would not interfere with a finding of fact relating to fraud and misrepresentation – But, in the instant case, as material evidence produced by the plaintiffs-appellants had been ignored and as the courts below failed to draw proper inferences therefrom and had ignored a cause of fraud, the Court is constrained to interfere with reference to a question of fact – When the first appellate court and High Court held that the decree was not null and void, the plaintiffs-appellants were entitled to urge all grounds to show that the entire transaction and arbitration proceedings were fraudulent and the decree was also a result of fraud – In the instant case, there is variance and divergence between the pleading and documentary evidence, pleading and oral evidence and between the oral and documentary evidence – It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted – It is thus clear that the entire case of the respondents is liable to be rejected – The different versions clearly demonstration fraud and misrepresentation on the part of the respondents – Pleadings – Evidence.

ADVOCATE:

Acts of an advocate in arbitration proceedings and before the court – An advocate engaged by respondents through their counsel to make awards in their favour – He was appointed as an arbitrator – On the following day, he made the awards and gave the same to respondents – He signed the written statements of defendants (appellants) in the proceedings u/ss 14 and 17 of Arbitration Act as their counsel – Though he was the third defendant in the said two suits, he appeared as the counsel for defendants 1 and 2 without their consent or knowledge – He made a statement before the court in the proceedings u/ss 14 and 17 of the Arbitration Act on behalf of defendants 1 and 2 that they have no objection for decrees being made – Held: The acts of the advocate are fraudulent.

The appellants filed two suits bearing C.S. No. 63 of 1997 and C.S. No. 64 of 1997 in the Court of the Civil Judge, Junior Division, Kurukshetra against 'FR' and 'KR' (the respondents in the instant appeals) seeking declaration that the judgments and decrees dated 30.3.1992 in two suits bearing C. S. No. 366 of 1992 and C.S. No. 367 of 1992 u/ss 14 and 17 of the Arbitration Act, 1940 were null and void. It was also claimed that the agreements dated 12.3.1992 and the awards dated 13.3.1992 and the proceedings in the said suits before the Court of Sr. Sub-Judge, Kurukshetra and the mutation proceedings pursuant to the said decrees were all null and void. The case of the plaintiffs-appellants was that they were brothers and co-owners of lands measuring 98 kanals and 19 marlas; that they entered into an agreement to sell the said lands to the sons of two brothers, namely, 'FR' and 'KR' for a sum of Rs. 14,22,000/- and received Rs. 1,00,000/- as earnest money. Since the respondents did not pay the money and failed to get the sale completed by the stipulated date, it was decided in a panchayat that the appellants would permit the respondents to cultivate their said lands for a period of one and a half years without any rent in satisfaction and discharge of the claim of refund of Rs. 1,00,000/-. The respondents on the pretext of reducing the terms of the settlement into writing took the plaintiffs to Kurukshetra and got some papers signed by them and, made them to appear in court in that regard. Subsequently, during the pendency of a pre-emption suit, the plaintiffs came to know about the proceedings and the decrees drawn in C.S. No. 366/1992 and C.S. No. 367/1992. The respondents-defendants in their written statements

alleged that they were ready to get the sale deeds registered but the appellants evaded and, therefore, the matter was referred to arbitration and the awards made by the arbitrator and the decrees made in terms of the awards were lawful and valid. The trial court decreed the suits holding that the awards were compulsorily registrable and as the same were not registered under the Registration Act, they were invalid and the consequent judgments and decrees were also invalid. However, the first appellate court and the High Court in second appeal held in favour of the defendants-respondents holding that the suits for declaration were not maintainable.

In the instant appeals filed by the plaintiffs, the questions for consideration before the Court were: (i) whether the suits by appellants were not maintainable; (ii) whether the courts below were justified in holding that there was no fraud or misrepresentation on the part of the respondents in obtaining the decrees in terms of the awards dated 13.3.1992; (iii) whether the arbitration awards dated 13.3.1992 were invalid for want of registration; and (iv) whether the orders dated 30.3.1992 directing that the said awards be made the rule of the court were invalid.

Allowing the appeals, the Court

HELD:

Question (i):

1.1 The appellants were seeking a declaration in C.S. Nos. 63 and 64 of 1997 that the proceedings before the Court of Sr. Sub-Judge, Kurukshetra, in the two suits No. 366 and 367 of 1992 u/ss 14 and 17 of the Arbitration Act 1940 resulting in the orders dated 30.3.1992 and decrees made pursuant to the said orders dated 30.3.1992 were

null and void as they were vitiated by fraud and misrepresentation and for the consequential relief of setting aside the mutations based on such decrees and possession of the lands. The challenge to the validity of the agreements dated 12.3.1992 and awards dated 13.3.1992 was incidental to challenge the orders dated 30.3.1992 and the decrees drawn in pursuance of such orders. [para 11] [473-F-H]

1.2 The first appellate court and the High Court have, therefore, erroneously proceeded on the basis that the suits were filed only for declaring that the arbitration agreements dated 12.3.1992 and awards dated 13.3.1992 were invalid and that the suits for such declaration were not maintainable having regard to the bar contained in ss. 32 and 33 of the Arbitration Act. What has been lost sight of is the fact that the challenge was to the orders dated 30.3.1992 making the awards rule of the court. To establish that the said judgments and decrees were obtained by fraud and misrepresentation and, therefore, invalid, it was also contended that the agreements dated 12.3.1992 and the awards dated 13.3.1992 and the proceedings initiated u/ss 14 and 17 of the Arbitration Act seeking decrees in terms of the awards were all fraudulent. Therefore, ss. 32 and 33 of Arbitration Act were not a bar to the suits (C.S. Nos. 63 and 64 of 1997) filed by the appellants. [para 11] [473-H; 474-A-D]

Question (ii):

2.1 The manner in which the agreements dated 12.3.1992 were entered, the awards dated 13.3.1992 were made and the said awards were made rule of the court, clearly discloses a case of fraud. Ingredients of fraud are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. 'Fraud' is 'knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment'. 'Fraud' is also defined as a

concealment or false representation through a statement or conduct that injures another who relies on it in acting. Any conduct involving deceit resulting in injury, loss or damage to some one is fraud. [para 12] [474-E-G]

The Black's Law Dictionary and *P.Ramnatha Aiyar's Advanced Law Lexicon* **(3rd Edition, Book 2, Page 1914-1915). – referred to.**

2.2 Any wilful attempt to defeat or circumvent any tax law in order to illegally reduce one's tax liability is a tax evasion which is termed as a tax fraud. The stamp duty payable under Stamp Act is considered to be a species of tax levied on certain transfer documents and instruments. Any wilful attempt to defeat the provision of the Stamp Act or illegally evade one's liability to pay stamp duty will be a stamp evasion which would amount to a fraud. [para 14] [476-D-E]

2.3 In the instant case, one of the plaintiffs was examined as PW-1 and a member of the Panchayat was examined as PW-2. The evidence of PW1 and PW2 is consistent and narrate the events described in the plaints in the two suits showing the deceit and fraud practiced upon the plaintiffs. The plaintiffs exhibited two documents, that is, revenue extracts showing the mutation in favour of the respondents and the decrees made in pursuance of the orders dated 30.3.1992 by the Sr. Sub-Judge in CS Nos.366 and 367 of 1992. [para 15] [475-F-G]

2.4 The defendants – respondents did not step into the witness box to give their version, which leads to an adverse inference that if the defendants had examined themselves, their evidence would have been unfavourable to them (s.114 of Evidence Act, 1872 read with illustration (g)). They however examined five witnesses : the arbitrator, as DW-1; their power of attorney holder as DW 2, their Advocate who appeared

in C.S.No.366 and 367 of 1992, as DW-3; a member of the panchayat as DW4; and, a court officer, as DW-5 examined in connection with the production of documents from the court. The oral evidence of DW1 to DW4 unfolds a story, different from what was pleaded by the respondents in their written statement. [para 16-17] [475-H; 476-A-C, E]

2.5 The respondents' version of what transpired as emerging from the evidence of DW1 to DW4 indicates the sale in terms of the agreement of sale dated 18.10.1991 did not take place, and it was agreed before the panchayat that the respondents should pay a sum of Rs.15,00,000 in addition to earnest money of Rs.1,00,000/-, thereby increasing the price to Rs.16,00,000/- instead of Rs.14,22,000/-; the respondents paid the entire balance of Rs.15,00,000/- in cash in a lump sum to the appellants in the presence of the panchayat; to avoid the heavy expenditure towards stamp duty and registration charges for the sale deed, it was agreed that arbitration awards would be obtained in favour of respondents and the appellants would agree for decrees in terms of the awards, so as to confer title upon the respondents, instead of executing sale deeds; two agreements dated 12.3.1992 were entered into appointing DW-1, as arbitrator; the said arbitrator recorded the statements of parties on 12.3.1992 and made awards dated 13.3.1992 declaring 'FR' to be the owner in possession of 49 Kanals 10 Marlas of land and 'KR' to be the owner of 49 Kanals and 9 Marlas of land; thereafter, and by orders dated 30.3.1992 the court directed that decrees be drawn up in terms of the award. [para 22] [480-A-G]

2.6 However, the documentary evidence produced by the defendants – respondents narrate a completely different story: The reference agreements dated 12.3.1992, the statements recorded by the arbitrator on 12.3.1992 and the awards dated 13.3.1992, all stated that

appellants had borrowed Rs.8 lacs from 'FR' and Rs.8 lacs from 'KR' in November 1991 and had agreed to repay the same with interest at the rate of 2% per month that as they were not able to repay the amounts borrowed with interest, they agreed to give 49 kanals 10 marlas of land to 'FR' and 49 kanals 9 marlas of land to 'KR' and delivered possession and confirmed the same before the arbitrator. The identical plaints dated 13.3.1992 in the two suits (CS Nos.366 and 367 of 1992) u/ss 14 and 17 of the Arbitration Act, 1940 filed by 'FR' and 'KR' state about the loan of Rs.8,00,000/- and making 'FR' and 'KR', owners of land in question. The written statements were also filed on the same day the suits were filed, that is, 16.3.1992. The written statements were not signed by either of the appellants but were signed by Advocate (DW-1) (defendant no.3 in those suits) as advocate for the defendants 1 and 2 (appellants). The brief written statements stated that paras 1 to 7 of the plaint were correct and admitted and that paras 8 and 9 were legal and that, therefore, the suit be decreed. The order-sheets dated 16.3.1992 in the said two suits, recorded that the appellants (defendants 1 and 2 in the suits) appeared and stated that they had no objection to decrees being made in terms of the award. The appellants signed the order-sheets and were identified by the arbitrator as their counsel. The cases (C.S.Nos.366 and 367 of 1992) thereafter came up before the Sr. Sub-Judge on 30.3.1992. The parties were not present. The orders of the court dated 30.3.1992 in both suits were identical, and the awards dated 13.3.1992 were made rule of the court. All this lends credence to the case of the appellants that the respondents had conspired with DW1 and DW3 and got certain documents prepared and persuaded appellants who were barely literate, to give their consent on 16.3.1992 by misrepresenting to them that they were giving consent for giving their lands for cultivation to respondents for a period of one and half years as per the

settlement. The trial court ignored relevant evidence and drew a wrong inference that there was no fraud or misrepresentation. [paras 23-27 and 29] [480-H; 481-A-D; 482-G-H; 483-A-C; 485-E-G]

2.7 Thus, there are different versions in the pleadings and evidence led by the respondents. The case set forth in the written statements of defendants-respondents was completely different from the case made out in the evidence of their witnesses DW1, DW2, DW3 and DW4. More interestingly, the case set forth in the written statements and the case made out in the oral evidence were completely different from what is stated in the documentary evidence. [para 28] [483-E-F]

2.8 It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted. In the instant case, there is variance and divergence between the pleading and documentary evidence, pleading and oral evidence and between the oral and documentary evidence. It is thus clear that the entire case of the respondents is liable to be rejected. The different versions clearly demonstrate fraud and misrepresentation on the part of the respondents. [para 28] [484-H; 485-A-B]

2.9 The fraudulent manner in which the orders were obtained from the Sr. Sub-Judge, Kurukshetra for making decrees in terms of the awards is evident from the proceedings in the case. [para 30] [485-G-H]

2.10 DW-1 was an advocate engaged by respondents through their counsel DW-3, to make awards in their favour. On 12.3.1992, he is appointed as arbitrator. On 13.3.1992, he makes the awards and gives them to respondents. On 16.3.1992, he signs the written statements of defendants (appellants) in the proceedings u/ss 14 and 17 of Arbitration Act, 1940 as their counsel.

Though he is the third defendant in the said two suits (C.S. Nos.366 and 367 of 1992), he appears as the counsel for defendants 1 and 2 without their consent or knowledge. On 30.3.1992, he makes a statement on behalf of defendants 1 and 2 that they have no objection for decrees being made. His acts are fraudulent. [para 31] [487-H; 488-A-C]

2.11 There is also the stamp fraud committed by the respondents. According to DW-1 to DW-4 under the agreement of sale dated 18.10.1991, the sale price agreed was Rs.14,22,000/-; that in the presence of a panchayat, there was a settlement and the price was increased to Rs.16,00,000 for 98 kanals 19 marlas of land; the respondents wanted *to avoid payment of stamp duty and registration charges on the sale deeds. They were advised by their lawyer that they could get decrees from a civil court in terms of an arbitration award so that sale deeds need not be executed and stamp duty and registration charges need not be paid. It was decided by the respondents on the advice of their lawyer to get arbitration awards declaring them as owners and also get court decrees in terms of the awards.* Thus, the agreements, arbitration awards and decrees were sham and nominal, the object of respondents being to evade the stamp duty and registration charges payable with respect to a sale deed, by obtaining decrees from the court in terms of the awards which declared their title. [para 33] [488-H; 489-A-E]

2.12 The case shows another facet of such stamp fraud. There can be a reference to arbitration only if there is a dispute and there is an agreement to settle the dispute by arbitration. If the parties had already settled the disputes before a panchayat for sale of half of the property to 'FR' and another half to 'KR' for a consideration of Rs.8,00,000 plus Rs.8,00,000/-, and appellant had received the entire consideration, and

delivered possession, *there was no dispute between the parties* that could be referred to arbitration. The respondents, on the advice of their advocate DW-3 decided to have nominal and sham arbitration proceedings and awards by DW-1 and get decrees made in terms of the awards, only to avoid stamp duty and registration charges. The entire procedure was fraudulent because (i) there was no dispute between the parties; (ii) there was no reference of any dispute to arbitration; (iii) the reference agreements dated 12.3.1992 were prepared and executed in pursuance of a pre-existing arrangement to have a collusive awards; (iv) the arbitrator was not required to decide any dispute between the parties, nor was there any adjudication of the dispute by the arbitrator. The references to arbitration, the proceedings before the arbitrator, the awards of the arbitrator, and the proceedings in court to get decrees in terms of the awards, and the decrees in terms of the award were all, thus, sham and bogus, the sole fraudulent object being to avoid payment of stamp duty and registration charges. [para 34] [489-F-H; 490-A-B-E-F]

2.13 The *modus operandi* adopted by the respondents to obtain title to lands without a conveyance and without incurring the stamp duty and registration charges due in respect of a conveyance by obtaining sham and collusive arbitration awards when there was no dispute, and then obtaining a nominal decree in terms of the said awards would be a fraud committed upon the court and the state government by evading liability to pay the stamp duty and registration charges. The irregularities, illegalities, suppressions and misrepresentations which culminated in the orders dated 30.3.1992 in CS NOs.366 and 367 of 1992 directing that the awards dated 13.3.1992 be made decrees of the court, show that the decrees in terms of the awards were

obtained fraudulently. [para 35] [490-G-H; 491-A-B]

2.14 Normally, this Court would not interfere with a finding of fact relating to fraud and misrepresentation. But as material evidence produced by the defendants – respondents had been ignored and as the courts below failed to draw proper inferences therefrom and had ignored a cause of fraud, this Court is constrained to interfere with reference to a question of fact. The suits were decreed by the trial court on the ground that the decrees were null and void and all the reliefs sought were granted. When the decrees dated 30.3.1992 were held to be null and void, the question of plaintiffs challenging any other finding in the judgment did not arise. Therefore, when the first appellate court and High Court held that the decree was not null and void, the plaintiffs-appellants were entitled to urge all grounds to show that the entire transaction and arbitration proceedings were fraudulent and the decree was also a result of fraud. [para 36] [491-B-E]

Question (iii):

3.1 Chapter III of Registration Act, 1908 relates to registrable documents. Section 17 enumerates the documents which are compulsorily registrable and the exceptions to the categories of documents. If the decree or order of the court is not rendered on merits, but expressed to be made on a compromise and comprises any immoveable property which was not the subject mater of the suit or proceeding, such order or decree is compulsorily registrable. Further, as clause (iv) of sub-s. (2) of s.17 excludes decrees or orders of *court*, but does not exclude awards of arbitrator, any arbitration award which purports or operates to create, declare any right, title or interest in any immoveable property of the value of more than Rs.100 is compulsorily registrable. [paras 37-38] [491-F; 492-G-H; 493-A-B]

3.2 In the instant case, the reference agreements dated 12.3.1992 were not in regard to any agreement of sale or any dispute relating to immoveable property, or in regard to the lands in regard to which the award was made. It did not refer to the lands in question. No dispute regarding immoveable property was referred to arbitration or was the subject matter of the arbitration. The alleged subject matter of arbitration was non-payment of Rs.8,00,000 said to have been borrowed by each of the appellants. The arbitrator recorded an alleged statement by the borrowers (appellants) that they had received Rs.8,00,000 from 'FR' and Rs.8,00,000/- from 'KR'; that they were not able to refund the same and, therefore, they had given lands measuring 49 Kanals 10 Marlas to 'FR' and another 49 Kanals 9 Marlas to 'KR'; and that 'FR' and 'KR' confirmed that they had obtained possession of the said land. The awards, therefore, declared that 'FR' and 'KR' had become the absolute owners of the lands in question. Thus, the awards are clearly documents which purport or operate to create and declare a right, title or interest in an immoveable property of the value of more than Rs.100 which was not the subject of the dispute or reference to arbitration. Therefore, the awards were compulsorily registrable. If they were not registered, they could not be acted upon u/s 49 of the Registration Act, 1908 nor could a decree be passed in terms of such unregistered awards. Unregistered awards which are compulsorily registrable u/s 17(1)(b) could neither be admitted in evidence nor could decrees be passed in terms of the same. The courts below have not considered or decided this aspect at all. [para 39-40] [493-B-G; 495-A]

Ratan Lal Sharma vs. Purshottam Harit **1974 (3) SCR 109 =AIR 1974 SC 1066; and** *Lachhman Dass vs. Ram Lal* **- 1989 (2) SCR 250 = 1989 (3) SCC 99 – relied on.**

Question (iv)

4.1 If an award was not genuine, but was collusive and sham, the court will not and in fact can not make it a rule of the court. There should be a dispute, there should be an agreement to refer the dispute to arbitration, there should be reference to arbitration, there should be an adjudication or decision by the arbitrator after hearing parties, for a valid arbitration. If the parties had already settled their disputes and the arbitration award was only a ruse to avoid payment of stamp duty and registration with respect to a sale deed and declare a title in persons who did not have title earlier, then the entire proceedings is sham and bogus. In fact, DW-1 was not really an arbitrator, nor the proceedings before him were arbitration proceedings and the awards were not really arbitration awards. If all these facts which have a bearing on the making of the award and the validity of the award are suppressed before the court and the court was misled into making decrees in terms of the awards, necessarily the proceedings are fraudulent and amounted to committing fraud on the court. In these circumstances the decrees in CS Nos.366 and 367 of 1992 on the file of the Sr. Sub-Judge, Kurukshetra were invalid. [para 41] [495-B-F]

4.2 The judgments of the first appellate court and High Court are set aside and the decrees of the trial court decreeing the suits filed by the appellants restored. [para 42] [495-G]

Case Law Reference:

1974 (3) SCR 109	**relied on**	**para 40**
1989 (2) SCR 250	**relied on**	**para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7085-7086 of 2011.

From the Judgment & Order dated 11.08.2009 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. Nos. 3229 & 3230 of 2004.

Abhay Kumar, Ashutosh Pande, Tenzing Tsering for the Appellants.

Ajay Pal, Prashant Shukla, Abhinav Ramkrishna for the Respondents`.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. For convenience parties will also be referred by their ranks in the suit or by name.

2. The appellants - two brothers, are the co-owners with equal shares, in lands measuring in all 98 Kanals and 19 marlas situated in village Udana, Tehsil Indri, District Karnal. They entered into an agreement to sell the said lands to the sons of Furu Ram and Kalu Ram (brothers) the respective first respondent in these two appeals, on 18.10.1991 for a consideration of Rs.14,22,000/- and received Rs.1,00,000 as earnest money. As per the terms of the agreement, the balance was to be paid by the purchasers at the time of registration of the sale deed and the sale was to be completed by 31.1.1992.

The case of appellants (Ramesh Kumar & Naresh Kumar)

3. The respondents were not in a position to pay the balance of the sale consideration and therefore failed to get the sale completed by 31.1.1992. The respondents requested for refund of the earnest money of Rs.100,000/-. The appellants were not willing to return the earnest money in view of the breach by the respondents. There was a panchayat in that behalf wherein it was decided that the appellants should permit the respondents to cultivate their said lands for a period of one and half years without any rent in satisfaction and discharge of

the claim for refund of Rs.100,000/-. In pursuance of the said panchayat settlement, appellants delivered possession of the suit lands to the respondents. The respondents represented that they would reduce the terms of the said settlement into writing and requested the appellants to come to Kurukshetra to sign some papers. The appellants trusted the respondents as it was a panchayat settlement and went to Kurukshetra, and signed the papers given by the respondents, under the bonafide belief that they were signing papers relating to the terms of the aforesaid settlement. The respondents also asked the appellants to appear in court and confirm the same. The appellants accordingly went to the court and nodded their assent when asked whether they were agreeable for the settlement.

4. Some months thereafter, a suit was filed against appellants in June 1992 by one Lal Singh and others claiming pre-emption. During the pendency of that suit, the appellants learnt that the respondents had obtained a mutation in their favour on the basis of some decrees obtained by them from the court of Senior Sub-Judge, Kurukshetra. On verification, the appellants were surprised to learn that consent orders had been passed by the court of Sr. Sub-Judge, Kurukshetra on 30.3.1992 in C.S.No.366/1992 and C.S.No.367/1992, directing decrees be drawn in terms of arbitration awards dated 13.3.1992 made by one Chandra Bhushan Sharma, Advocate, Kurukshetra, appointed as per reference agreements dated 12.3.1992.

5. According to appellants, the agreements dated 12.3.1992, the arbitration awards dated 13.3.1992, the consent decrees dated 30.3.1992 and the mutations in favour of respondents were all illegal, null and void and *non-est*, being the result of fraud and misrepresentation on the part of respondents. According to appellants, the allegations in the said agreements, awards and as also the plaints in CS Nos.366 and 367 of 1992 that appellants had borrowed Rs.8

lacs from Furu Ram and Rs.8 lacs from Kalu Ram agreeing to repay the same with interest at 2% per month, that they had given their lands to Furu Ram and Kalu Ram as they were not able to repay the two loans of Rs.800,000/- each, were all false. They alleged that they had not engaged any counsel for appearance in CS Nos.366 and 367 of 1992, nor signed any written statements, nor participated in any arbitration proceedings, nor made any statements agreeing for making decrees in terms of any award. The appellants claimed that they only signed some papers which respondents had represented to be documents relating to giving their lands on licence basis for one and half years instead of returning the earnest money deposit of Rupees One Lakh. The appellants therefore filed two suits on 11.11.1993 (renumbered as CS No.63 and 64 of 1997) in the court of the Civil Judge, Junior Division, Kurukshetra, against Furu Ram and Kalu Ram respectively for a declaration that the judgments and decrees dated 30.3.1992 in C.S.No.366/1992 and 367/1992 (by which the awards dated 13.3.1992 were made the rule of the court), the agreements dated 12.3.1992, the awards dated 13.3.1992, the proceedings in C.S.No.366/1992 and 367/1992 and the mutations in pursuance of the said decrees were all null and void, non-est and not binding on them and for the consequential relief of possession of the suit properties. In the said suits (CS No.63 of 1997 and 64 of 1997) the arbitrator 'C.B. Sharma' was impleaded as the second defendant.

The case of respondent (Furu Ram and Kalu Ram)

6. In their respective written statements in the two suits, Furu Ram and Kalu Ram alleged that they were ready to get the sale deeds registered on the date fixed for sale as per the agreement of sale dated 18.10.1991, but the appellants evaded, and therefore the matter was referred to Arbitrator C B Sharma by both parties for settlement. It was further alleged that the Arbitrator recorded the statements of appellants as well as respondents and made the awards. They contended that the

awards made by the arbitrator and the decrees made in terms of the awards were lawful and valid.

The Proceedings

7. In the two suits filed by appellants (C.S.Nos.63 and 64 of 1997) the trial court framed appropriate issues as to whether judgments and decrees dated 30.3.1992 were null and void; whether plaintiffs were entitled to possession; whether the suits were not maintainable; whether the suits were not within time; and whether plaintiffs were estopped from filing the suits, by their own conduct; and whether the suits were bad for misjoinder/non-joinder of parties. Parties led oral and documentary evidence in support of their cases.

8. The trial court decreed the two suits of appellants by common judgment dated 7.2.1998. The trial court held that as the awards dated 13.3.1992 created a right in immovable properties in favour of the respondents who did not have any pre-existing right therein, they were compulsorily registrable; and as the arbitration awards were not registered under the Registration Act, 1908, they were invalid and consequently the judgments and decrees dated 30.3.1992 of the court, making decrees in terms of the said awards were also invalid. In view of the said finding the trial court declared that the decrees dated 30.3.1992, the agreements dated 12.3.1992, the awards dated 13.3.1992 and the mutations were illegal, null and void, not binding on the plaintiffs and granted the relief of possession. In the course of the said judgment, the trial court however held that the evidence of the advocate Sudhir Sharma (DW-3) and the arbitrator C.B. Sharma (DW-1) showed that the appellants had full knowledge of the facts and circumstances of the two cases (CS Nos.366 and 367 of 1992) and only thereafter they filed written statements admitting the claims; and that therefore the case of the appellants that the consent decrees dated 30.3.1992 were obtained by fraud and misrepresentation could not be accepted.

9. The respondents filed appeals against the said common judgment and decrees dated 7.2.1998 of the trial court. The said appeals, filed on 19.3.1998, renumbered as C.A. No.37/2003 and 38/2003, were allowed by the first appellate court (Addl. District Judge, Kurukshetra) by judgment dated 3.8.2004 and the common judgment and decrees of the trial court in the two suits were set aside and the suits filed by the appellants were dismissed with costs. The first appellate court held that the consent decrees in terms of the awards could not be challenged on the ground that they were not registered; that having regard to section 32 of the Arbitration Act, 1940, no suit would lie on any ground whatsoever, for a decision upon the existence, effect or validity of an award, nor could any award be enforced, set aside, modified or in any way affected, otherwise than as provided under the said Act; that an award could be challenged or contested only by an application under section 33 of the Act, and an award could be set aside only on any of the grounds mentioned in section 30 of the said Act. The first appellate court further held that as no application was filed under sections 30 and 33 of the said Act by appellants for setting aside the awards and as the awards had been made rule of the court, the suits for declaration filed by the appellants were barred by section 32 of the Arbitration Act, 1940, and were not maintainable. The second appeals filed by the appellants against the said common judgment of the first appellate court were dismissed by the High Court by judgment dated 11.8.2009 holding that decrees passed by a court in terms of the arbitration awards under section 17 of the Arbitration Act, 1940, did not require registration and that arbitration awards could be challenged only by applications under section 33 of the said Act.

Questions for consideration

10. The said common judgment of the High Court is challenged in these appeals by special leave. On the contentions urged, the questions that arise for our consideration are as under:

(i) Whether the suits by appellants were not maintainable?

(ii) Whether the courts below were justified in holding that there was no fraud or misrepresentation on the part of the respondents in obtaining the decrees in terms of the awards dated 13.3.1992?

(iii) Whether the arbitration awards dated 13.3.1992 were invalid for want of registration?

(iv) Whether the orders dated 30.3.1992 directing that the said awards be made the rule of the court, invalid?

Re: Question (i)

11. The appellants sought a declaration that the orders dated 30.3.1992 passed by the Senior Sub-Judge, Kurukshetra in C.S.No.366 and 367 of 1992 (directing that decrees be drawn in terms of the awards dated 13.3.1992) and the decrees drawn in terms of the awards as also the agreements dated 12.3.1992 and the awards dated 13.3.1992 which led to such decrees, were null and void, as they were the result of fraud and misrepresentation; and that the mutations obtained on the basis of the said decrees were also null and void. In other words, the appellants were seeking a declaration that the proceedings before the court of Sr. Sub-Judge, Kurukshetra, in the two suits under sections 14 and 17 of the Arbitration Act 1940 resulting in the orders dated 30.3.1992 and decrees made pursuant to the said orders dated 30.3.1992 were null and void as they were vitiated by fraud and misrepresentation and for the consequential relief of setting aside the mutations based on such decrees and possession of the lands. The challenge to the validity of the agreements dated 12.3.1992 and awards dated 13.3.1992 was incidental to challenge the orders dated 30.3.1992 and the decrees drawn in pursuance of such orders. The first appellate court and

the High Court have therefore erroneously proceeded on the basis that the suits were filed only for declaring that the arbitration agreements dated 12.3.1992 and awards dated 13.3.1992 were invalid and that suits for such declaration were not maintainable having regard to the bar contained in sections 32 and 33 of the Arbitration Act, 1940. What has been lost sight of is the fact that the challenge was to the orders dated 30.3.1992 making the awards rule of the court. To establish that the said judgments and decrees were obtained by fraud and misrepresentation and therefore invalid, it was also contended that the agreements dated 12.3.1992 and the awards dated 13.3.1992 and the proceedings initiated under sections 14 and 17 of the Arbitration Act, 1940 seeking decrees in terms of the awards were all fraudulent. Therefore, sections 32 and 33 of Arbitration Act, 1940 were not a bar to the suits (C.S.Nos. 63 and 64 of 1997) filed by the appellants.

Re : Question (ii)

12. The manner in which the agreements dated 12.3.1992 were entered, the awards dated 13.3.1992 were made and the said awards were made rule of the court, clearly disclose a case of fraud. Fraud can be of different forms and different hues. It is difficult to define it with precision, as the shape of each fraud depends upon the fertile imagination and cleverness who conceives of and perpetrates the fraud. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. 'Fraud' is 'knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment'. 'Fraud' is also defined as a concealment or false representation through a statement or conduct that injures another who relies on it in acting. (vide The Black's Law Dictionary). Any conduct involving deceit resulting in injury, loss or damage to some one is fraud.

13. Section 17 of the Indian Contract Act, 1872 defines 'fraud' thus :

"17. 'Fraud' defined.-'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is in itself, equivalent to speech."

The word 'fraud' is used in section 12 of Hindu Marriage Act, 1955 in a narrower sense. The said section provides that a marriage shall be voidable and annulled by a decree of nullity if the consent of the petitioner was obtained by 'fraud' as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent. In the context in which it is used refers to misrepresentation, false statement, deception, concealment.

14. Differently nuanced contextual meanings of the word 'fraud' are collected in P.Ramnatha Aiyar's Advanced Law Lexicon (3rd Edition, Book 2, Page 1914-1915). We may extract two of them :

"Fraud, is deceit in grants and conveyances of lands, and bargains and sales of goods, etc., to the damage of another person which may be either by suppression of the truth, or suggestion of a falsehood. (Tomlin)

The colour of fraud in public law or administrative law, as it is developing, is assuming different shade. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised."

Any wilful attempt to defeat or circumvent any tax law in order to illegally reduce one's tax liability is a tax evasion which is termed as a tax fraud. The stamp duty payable under Stamp Act is considered to be a species of tax levied on certain transfer documents and instruments. Any wilful attempt to defeat the provision of the Stamp Act or illegally evade one's liability to pay stamp duty will be a stamp evasion which would amount to a fraud.

15. One of the plaintiffs (Naresh Kumar) was examined as PW-1 and Raj Kumar, a member of the Panchayat was examined as PW-2. The evidence of PW1 (Naresh Kumar) and PW2 (Raj Kumar) is consistent and narrate the events described in the plaints in the two suits showing the deceit and fraud practiced upon the appellants. The plaintiffs exhibited two documents that is revenue extracts showing the mutation in favour of the respondents and the decrees made in pursuance of the orders dated 30.3.1992 by the Sr. Sub-Judge in CS Nos.366 and 367 of 1992.

16. The defendants – respondents did not step into the witness box to give their version, which leads to an adverse inference that if the defendants had examined themselves, their

evidence would have been unfavourable to them (vide section 114 of Evidence Act, 1872 read with illustration (g) thereto). They however examined five witnesses : C.B. Sharma, the arbitrator, was examined as DW-1; Ram Kumar, their power of attorney holder was examined as DW 2; Sudhir Sharma, their Advocate who appeared in C.S.No.366 and 367 of 1992,- was examined as DW-3; Chander Pal, said to be a member of the panchayat was examined as DW4; and Devi Dayal, a court officer, was examined as DW-5 in connection with the production of documents from the court. They also got exhibited among other documents, the agreement of sale dated 18.10.1991, the reference agreements dated 12.3.1992 appointing C. B. Sharma as arbitrator, the statements of parties allegedly recorded by the Arbitrator on 12.3.1992, the awards dated 13.3.1992 made by the Arbitrator, the plaints, written statements and order-sheets all dated 16.3.1992 and the final order dated 30.3.1992 in CS Nos.366 and 367 of 1992, the decrees in terms of the awards and the declarations made by appellants on 31.3.1992.

17. The oral evidence of defendants' witnesses (DW1 to DW4) unfolds a story, different from what was pleaded by them in their written statement. We may refer to the said evidence briefly.

18. C. B. Sharma who was examined as DW-1 stated that the parties gave him the agreements dated 12.3.1992 appointing him as arbitrator, that as arbitrator he recorded the statements of the appellants and the respondents and on that basis, made the awards dated 13.3.1992. He states that appellants appeared before the court and consented to the award as per proceedings Ex.D4 dated 16.3.1992 and he identified them as their counsel before the court. On further questioning, he admitted that he was not aware about the transaction of sale and purchase between the parties or whether there was any dispute at all in regard to sale or purchase of land. He stated that the parties submitted an arbitration agreement in regard to a loan and that he gave the

awards in regard to the loan; and that *the reference agreements dated 12.3.1992 were not in regard to any dispute relating to property nor about the sale or purchase thereof nor about specific performance of any agreement of sale and that the dispute was only in regard to money and he was not appointed as arbitrator to settle any dispute in regard to any land*. He also stated that he did not charge any fee in regard to the arbitration or making the awards.

19. DW2 - Ram Kumar, (son of Furu Ram), power of attorney holder of defendants, stated that the agreement of sale in regard to 98 kanals 19 marlas was got executed for a consideration of Rs.14 lakhs in favour of three sons of Furu Ram (Ram Swaroop, Veer Singh and Ram Kumar) and four sons of Kalu Ram (Bhagat Ram, Jagir Singh, Ramesh Kumar and Lala Ram); that Rs.One lakh was given as earnest money under agreement dated 18.10.1991; that there was a dispute in regard to the price and the dispute was decided by a panchayat consisting of Chander Pal, Purushottam, Harbhajan, C. B. Sharma (Advocate) and Sudhir Sharma (Advocate) and Rs.15 lakhs was paid in cash in their presence to the appellants; that after paying the money it was decided that a court decree should be obtained in favour of the respondents and C.B. Sharma was then appointed as the arbitrator to obtain a decree; that C. B. Sharma made the awards and decrees were obtained from the court on the basis of the said awards.

20. DW-3 - Sudhir Sharma who was the counsel for the respondents stated that there was a dispute in regard to the sale price of the property agreed to be sold by appellants to respondents. There was a panchayat on 12.3.1992 where it was agreed that the sale price should be increased by Rs.200,000/-. In addition to the earnest money of Rs.100,000/-, earlier paid, another sum of Rs. fifteen lakhs was paid in cash by the defendants to the plaintiffs in full and final settlement before the members of the panchayat. The parties felt that the expenses of stamp duty and registration of sale deed would

be high and agreed for an arbitration award and a decree in terms of it. The panchayat resolved the dispute at around 1.30 p.m. Both parties and C.B. Sharma thereafter came to his chamber. The agreements dated 12.3.1992 referring disputes to arbitration, were prepared by the arbitrator C.B. Sharma. The said agreements were signed by the parties in his (Sudhir Sharma's) office. The parties had also given their statements to C.B. Sharma in his office. The arbitrator made the awards on 13.3.1992. On the instructions of respondents (Furu Ram and Kalu Ram), he filed the two suits under sections 14 & 17 of the Act for making decree in terms of the two awards in the sub-court on 16.3.1992. The owners of the land Ramesh Kumar and Naresh Kumar were impleaded as defendants 1 and 2 in the said two suits and the Arbitrator C.B. Sharma was impleaded as the third defendant. C.B. Sharma, represented defendants and 1 and 2 as their counsel in the two suits. The court recorded the statements of both parties. After the statements of the appellants (defendants in those suits) were recorded by the court, they were identified by their counsel C.B. Sharma. He stated (in cross-examination) that the payment of Rs.15 lakhs was made after the appellants made statements before court agreeing for a decree in terms of awards.

21. DW-4 Chander Pal Singh stated that he was instrumental in getting the parties to enter into the agreement of sale; that dispute arose as respondents wanted to register sale deeds showing a lesser consideration and appellants wanted the sale deed for the full consideration; that therefore a panchayat was conveyed; that he was present when the negotiations took place before the panchayat and settlement was reached by agreeing for a price of Rs.16 lakhs; that Rs.15 lakhs was paid by Ram Kumar (Power of Attorney Holder of respondents) to appellants in the presence of Panchayat consisting of himself, Purushottam, Harbhajan and Sudhir Sharma. Sudhir Sharma, counsel for respondents got C.B.Sharma as Arbitrator to make an award. After the decrees were made in terms of the awards, he tore the receipt for Rs.15 lakhs given by appellants.

22. The respondents' version of what transpired as emerging from the evidence of their four witnesses (DW1 to DW4) (shorn of inconsistencies in the evidence) can thus be summarized as follows : The sale in terms of the agreement of sale dated 18.10.1991 did not take place, as the appellants unreasonably demanded an increase in price for executing the sale deed. The dispute was brought up before a panchayat. It was agreed before the panchayat that the respondents should pay a sum of Rs.15,00,000 in addition to earnest money of Rs.1,00,000/-, thereby increasing the price to Rs.16,00,000/- instead of Rs.14,22,000/-. The respondents paid the entire balance of Rs.15,00,000/- in cash in a lump sum to the appellants in the presence of the panchayat. To avoid the heavy expenditure towards stamp duty and registration charges for the sale deed, it was agreed that arbitration awards would be obtained in favour of respondents and the appellants would agree for decrees in terms of the awards, so as to confer title upon the respondents, instead of executing sale deeds. In pursuance of it, the parties entered into two agreements dated 12.3.1992 appointing C.B. Sharma, Advocate, as arbitrator. The said arbitrator recorded the statements of parties on 12.3.1992 and made awards dated 13.3.1992 declaring Furu Ram to be the owner in possession of 49 Kanals 10 Marlas of land and Kalu Ram to be the owner of 49 Kanals and 9 Marlas of land. Thereafter, Furu Ram and Kalu Ram filed petitions under sections 14 and 17 of the Arbitration Act, 1940 in the Court of the Senior Sub Judge, Kurukshetra praying that the awards in their favour be made the rule of the court. By orders dated 30.3.1992 the court directed decrees be drawn up in terms of the award. In pursuance of the decrees, Furu Ram and Kalu Ram also got the lands mutated to their names. The decrees dated 30.3.1992 in terms of the awards were valid and binding, and neither the decrees nor the awards were fraudulent.

23. We may now refer to the documentary evidence produced by the defendants – respondents, which narrate a completely different story.

24. The reference agreements dated 12.3.1992, the statements recorded by the Arbitrator on 12.3.1992 and the awards dated 13.3.1992, all stated that appellants had borrowed Rs.8 lacs from Furu Ram and Rs.8 lacs from Kalu Ram in November 1991 and had agreed to repay the same with interest at the rate of 2% per month that as they were not able to repay the amounts borrowed with interest, they agreed to give 49 kanals 10 marlas of land to Furu Ram and 49 kanals 9 marlas of land to Kalu Ram and delivered possession and confirmed the same before the arbitrator. The arbitral awards stated that the disputes relating to payment of Rs.8 lacs with interest thereon were referred to the Arbitrator, that the appellants had admitted borrowing Rs.8 lacs from Furu Ram and Rs.8 lacs from Kalu Ram and further admitted that being unable to pay the said amount, had given 49 kanals 10 marlas of land to Furu Ram and 49 kanals 9 marlas of land to Kalu Ram and therefore, Furu Ram has become the owner of 49 Kanals and 10 Marlas of land and Kalu Ram had become the owner of 49 kanals and 9 marlas of land.

25. The identical plaints dated 13.3.1992 in the two suits (CS Nos.366-367 of 1992) under sections 14 and 17 of the Arbitration Act, 1940 filed by Furu Ram and Kalu Ram read as under :

"Application u/s 14/17 of the Arbitration Act to make the award dated 13.3.1992 the rule of the court.

Sir,

It is prayed as under:-

1. That the respondents no.1 and 2 had borrowed a sum of Rs.8,00000/- from the applicant-plaintiff.

2. That the respondents no.1 and 2 failed to repay the amount and interest to applicant - plaintiff.

3. That vide agreement dt.12-3-1992 the respondent no.3 was appointed as Arbitrator to decide the matter.

4. That the respondent no.3 has decided the matter vide award dated 13-3-1992.

5. That the applicant - plaintiff has been declared as owner in possession of the property mentioned in the award enclosed herewith.

6. That the applicant - plaintiff has been put in possession of the said property at the spot and is debarred from recovering the amount and interest from the respondents no.1 and 2.

7. That the respondents no.1 and 2 have refused to admit the award.

8. That the agreement and award were executed at Thanesar, Kurukshetra so this learned court has got jurisdiction to try this application.

9. That the required court fees is paid on the application.

It is, therefore, prayed that the award dated 13-3-1992 may kindly be made the rule of the court whereby the plaintiff-applicant may kindly be declared as owner in possession of the land measuring 49 Kanals 10 Marlas detailed as under:-"

[Note : The other plaint by Kalu Ram was identical except the extent which was 49 kanals 9 marlas and the description of the lands].

26. The written statements were also filed on the same day the suits were filed, that is 16.3.1992. The written statements were not signed by either of the appellants but were signed by C.B. Sharma (defendant no.3 in those suits) as advocate for the defendants 1 and 2 (appellants). The brief written statements stated that paras 1 to 7 of the plaint were correct and admitted and that paras 8 and 9 were legal and that therefore the suit be decreed.

27. The order-sheets dated 16.3.1992 in the said two suits, recorded that the appellants (defendants 1 & 2 in the suits) appeared and stated that they had no objection for decrees being made in terms of the award. The appellants signed the order-sheets and were identified by the arbitrator C.B. Sharma as their counsel. The cases (C.S.Nos.366 and 367 of 1992) thereafter came up before the learned Sr.Sub-Judge on 30.3.1992. The parties were not present. The orders of the court dated 30.3.1992 in both suits were identical and they are extracted below :

> "Present : Counsel for the parties.
>
> Heard. Since the parties are not at issue, so the award dated 13.3.1992 – Ex C1 is made the rule of the court. Decree sheet be prepared accordingly and the award dated 13.3.1992 – Ex C1 shall form the part of the decree sheet. The file be consigned to the record room."

28. We find three different versions from the pleadings and evidence led by the respondents. The case set forth in their written statements was completely different from the case made out in the evidence of their witnesses DW1, DW2, DW3 and DW4. More interestingly, the case set forth in the written statements and the case made out in the oral evidence were completely different from what is stated in the documentary evidence. Let us refer to them briefly.

(a) The written statements filed by the respondents merely stated that the appellants did not execute the sale deed, on the date fixed for sale, as per agreement of sale dated 18.10.1991 and therefore, and the said dispute was referred to arbitration and awards were made by the arbitrator on the basis of their statements and decrees were made in terms of the award.

(b) The evidence of DW1 to DW4 was that appellants unreasonably demanded the price to be increased from Rs.14,22,000/- to Rs.16,00,000/-, that the resultant dispute was

referred to Panchayat, that a price of Rs.16,00,000/- was agreed before the Panchayat on 12.3.1992, that immediately the respondents paid the balance of Rs.15,00,000/- in cash to the appellants in the presence of the panchayat, that the respondents felt that the stamp duty and registration expenses were high and that therefore, it was agreed on the suggestion of their counsel that they should resort to the process of getting an arbitration award and decree to convey the title instead of execution of a sale deed. It was stated that C. B. Sharma was appointed as the arbitrator who made the awards and decrees were obtained in terms of the awards.

(c) The documentary evidence, that is the reference agreements, the statements recorded by the Arbitrator, the awards, the plaints in the suits under sections 14 and 17 of Arbitration Act, 1940, on the other hand do not refer to the agreement of sale or the payment of price. They showed that the appellants had borrowed Rs.8 lakhs from Furu Ram and Rs.8 lakhs from Kalu Ram, about four months prior to 12.3.1992, and had agreed to repay the same with interest at 2% per month; that thereafter, Furu Ram and Kalu Ram demanded the money and the appellants were not in a position to repay the loans and therefore a dispute arose; and that by mutual consent, C.B. Sharma was appointed as an Arbitrator and parties agreed to be bound by his decision. The appellants allegedly made statements before C.B. Sharma (Arbitrator) admitting that they had taken Rs.8 lakhs from Furu Ram and Rs.8 lakhs from Kalu Ram as loans, agreeing to repay the same with interest at 2% per month, and that as they did not have the means to repay the same, they had given 49 Kanals 10 Marlas to Furu Ram and 49 Kanals 9 Marlas of land to Kalu Ram and also delivered possession of respective lands to Furu Ram and Kalu Ram.

It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted. In this case, there is variance and divergence between the pleading and

documentary evidence, pleading and oral evidence and between the oral and documentary evidence. It is thus clear that the entire case of the respondents is liable to be rejected. The different versions clearly demonstration fraud and misrepresentation on the part of the respondents.

29. The trial court in its judgment in C.S.Nos.63 and 64 of 1997 inferred from the evidence of DW1 (C.B. Sharma) and DW3 (Sudhir Sharma) that appellants had knowledge of the full facts and circumstances of the cases filed under sections 14 and 17 of the Arbitration Act and that with such knowledge, they had filed written statements therein, admitting the facts and, therefore it could not be said that the judgments and decrees dated 30.3.1992 were obtained by misrepresentation and fraud. But the documentary evidence produced by the respondents clearly showed that in CS Nos. 366 and 367 of 1992, no notice/summons were issued to defendants; that appellants (defendants 1 & 2) did not sign the written statements which admitted the plaint averments; that the arbitrator who was the third defendant in those suits, very strangely appeared as advocate for defendants 1 and 2 (appellants) and signed the written statement and made a statement before the court on 30.3.1992 that defendants did not have any objection to the awards. All this lends credence to the case of appellants that respondents had conspired with DW1 and DW3 and got certain documents prepared and persuaded appellants who were barely literate, to give their consent on 16.3.1992 by misrepresenting to them that they were giving consent for giving their lands for cultivation to respondents for a period of one and half years as per the settlement. The trial court ignored relevant evidence and drew a wrong inference that there was no fraud or misrepresentation.

30. Let us now refer to the fraudulent manner in which the orders were obtained from the Sr. Sub-Judge, Kurukshetra for making decrees in terms of the award. According to the evidence of respondents, the events took place as under :

Stage I (12.3.1992)		
(a)	Settlement before the Panchayat that appellants should sell the property to the respondents for Rs.16 lacs	12.3.1992
(b)	Decision of respondents to avoid stamp duty and registration charges and instead have an arbitration award through Advocate C. B. Sharma as arbitrator and then get decrees in terms of the awards	12.3.1992
(c)	Reference agreements prepared by CB Sharma for referring the dispute to himself	12.3.1992
(d)	The signing of the reference agreement by parties	12.3.1992
(e)	Statements of parties recorded by CB Sharma in the office of Sushil Sharma, Advocate for respondents wherein appellants confirmed that they had given the lands to respondents	12.3.1992
Stage II (13.3.1992)		
(a)	Awards made by the Arbitrator	13.3.1992
(b)	Plaints under sections 14 and 17 of Arbitration Act prepared by Sushil Sharma, on behalf of respondents	13.3.1992
Stage III (16.3.1992)		
(a)	CS Nos.366 and 367 of 1992 under	16.3.1992

	sections 14 and 17 of the Arbitration Act filed by respondents on	
(b)	Written statements in the said suits signed by C.B. Sharma as Advocate for appellants (defendants in the suit) filed on	16.3.1992
(c)	The statements of appellants that they were consenting to the decree, recorded by the court on	16.3.1992
	Stage IV	
(a)	Orders made directing decrees being drawn up in terms of the award	30.3.1992
(b)	Undated declaration by appellants confirming that they had agreed for decrees in favour of Furu Ram and Kalu Ram attested by an Executive Magistrate (with the endorsement "I know Naresh Kumar and Ramesh Kumar and they have signed in my presence made" by Sushil Sharma, advocate for respondents)	31.3.1992

The above narration will show that even according to the evidence produced by the respondents the entire arbitration was sham and nominal, that an alleged Panchayat had settled the dispute on 12.3.1992, that thereafter, Sushil Sharma, advocate for respondents and C.B. Sharma, an advocate who was made to act as an Arbitrator at the instance of respondents created a bunch of documents and obtained the signatures of the appellants and created proceedings for obtaining decrees in terms of the awards.

31. C. B. Sharma was an advocate engaged by respondents through their counsel Sushil Sharma, to make awards in their favour. On 12.3.1992, he is appointed as

arbitrator. On 13.3.1992, he makes the awards and gives them to respondents. On 16.3.1992, he signs the written statements of defendants (appellants herein) in the proceedings under sections 14 and 17 of Arbitration Act, 1940 as their counsel. Though he is the third defendant in the said two suits (C.S. Nos.366 and 367 of 1992), he appears as the counsel for defendants 1 and 2 without their consent or knowledge. On 30.3.1992, he makes a statement on behalf of defendants 1 and 2 that they have no objection for decrees being made. We fail to understand how a counsel can do these things. His acts are fraudulent.

32. We may next refer to the inconsistencies and improbabilities in the evidence. According to respondents, the appellants had refused to execute the sale deed, for the price of Rs.14,22,000/- and demanded an increase in the price; that in the presence of a panchayat, an increase in price was agreed on 12.3.1992, and that the entire balance price of Rs.15,00,000/- was immediately paid in cash on 12.3.1992 in the presence of the panchayat. While DW2 says that Rs.15,00,000/- was paid in cash in the presence of the Panchayat. DW-3 Sudhir Sharma states that the payment was made after the appellants made a statement before the court agreeing for a decree in terms of the awards, that is on 16.3.1992. Further, it is highly improbable that the respondents would have attended the Panchayat readily carrying Rs.15,00,000/- in cash and paid it immediately after the settlement. If the said evidence is accepted, the entire documentary evidence showing that two sums of Rs.800,00/- each were given as loans to appellants about four months prior to 12.3.1992 and the lands were given to respondents as appellants could not repay the same are proved to be false and fraudulent.

33. We may next refer to the stamp fraud committed by respondents. According to the DW-1 to DW-4 under the agreement of sale dated 18.10.1991, the sale price agreed

was Rs.14,22,000/-, that in the presence of a panchayat, there was a settlement and the price was increased to Rs.16,00,000 for 98 kanals 19 marlas of land, that the said price was paid half being the sale price in regard to an extent of 49 Kanals 10 marlas sold to Furu Ram and the remaining half being the sale price in regard to an extent of 49 Kanals 9 Marlas sold by appellants to Furu Ram and Kalu Ram. The respondents wanted *to avoid payment of stamp duty and registration charges on the sale deeds. They were advised by their lawyer that they could get decrees from a civil court in terms of an arbitration award so that sale deeds need not be executed and stamp duty and registration charges need not be paid. It was decided by the respondents on the advice of their lawyer to get arbitration awards declaring them as owners and also get court decrees in terms of the awards*. . On the same day (12.3.1992) their lawyer got reference agreements prepared through the arbitrator C.B. Sharma which were executed by the parties to get arbitration awards by consent. In short the agreements, arbitration awards and decrees were sham and nominal, the object of respondents being to evade the stamp duty and registration charges payable with respect to a sale deed, by obtaining decrees from the court in terms of the awards which declared their title.

34. Let us refer to another facet of such stamp fraud. There can be a reference to arbitration only if there is a dispute and there is an agreement to settle the dispute by arbitration. If the parties had already settled the disputes before a panchayat for sale of half of the property to Furu Ram and another half to Kalu Ram for a consideration of Rs.8,00,000 plus Rs.8,00,000/-, and appellant had received the entire consideration, and delivered possession, there was no dispute between the parties, that could be referred to arbitration. The respondents, on the advice of their advocate Sudhir Sharma decided to have a nominal and sham arbitration proceedings and awards by C.B. Sharma and get decrees made in terms of the awards, only to avoid stamp duty and registration charges. The entire procedure was

fraudulent because (i) there was no dispute between the parties; (ii) there was no reference of any dispute to arbitration; (iii) the reference agreements dated 12.3.1992 were prepared and executed in pursuance of a pre-existing arrangement to have a collusive awards; (iv) the arbitrator was not required to decide any dispute between the parties, nor was there any adjudication of the dispute by the arbitrator. DW-1 who claims to be the arbitrator clearly stated in his evidence, that the reference under the agreements dated 12.3.1992 was in regard to a dispute relating to loan of Rs.800,000/- advanced to each appellant. Therefore, the statements in the two awards that the reference agreements dated 12.3.1992 were in regard to a dispute in regard to the failure to repay the two loans of Rs.800,000/- each and interest thereon; that the appellants admitted before the Arbitrator that they had borrowed Rs.8,00,000 from Furu Ram and Rs.8,00,000 from Kalu Ram; that the appellants did not have the means to repay the same and that instead of repaying the amount with interest, that they had therefore given to Furu Ram an extent of 49 Kanals 10 Marlas and to Kalu Ram, 49 Kanals 9 marlas of land; that Furu Ram and Kalu Ram confirmed that they had already taken the said lands in lieu of the amount due to them, are also false and at all events, sham averments to create two awards. The references to arbitration, the proceedings before the arbitrator, the awards of the arbitrator, and the proceedings in court to get decrees in terms of the awards, and the decrees in terms of the award were all thus sham and bogus, the sole fraudulent object being to avoid payment of stamp duty and registration charges.

35. The modus operandi adopted by the respondents to obtain title to lands without a conveyance and without incurring the stamp duty and registration charges due in respect of a conveyance by obtaining a sham and collusive arbitration awards when there was no dispute, and then obtaining a nominal decree in terms of the said awards would be a fraud committed upon the court and the state government by evading liability to pay the stamp duty and registration charges. The

irregularities, illegalities, suppressions and misrepresentations which culminated in the orders dated 30.3.1992 in CS NOs.366 and 367 of 1992 directing that the awards dated 13.3.1992 be made decrees of the court, show that the decrees in terms of the awards were obtained fraudulently.

36. Normally, this Court would not interfere with a finding of fact relating to fraud and misrepresentation. But as material evidence produced by the defendants – respondents had been ignored and as the courts below failed to draw proper inferences therefrom and had ignored a cause of fraud, we are constrained to interfere with reference to a question of fact. The suits were decreed by the trial court on the ground that the decrees were null and void and all the reliefs sought were granted. When the decrees dated 30.3.1992 were held to be null and void, the question of plaintiffs challenging any other finding in the judgment did not arise. Therefore when the first appellate court and High Court held that the decree was not null and void, the plaintiffs-appellants were entitled to urge all grounds to show that the entire transaction and arbitration proceedings were fraudulent and the decree was also a result of fraud. Be that as it may.

Re : Point (iii)

37. Chapter III of Registration Act, 1908 relates to registrable documents. Section 17 enumerates the documents which are compulsorily registrable and the exceptions to the categories of documents which are compulsorily registrable. The relevant portions of the said sections are extracted below:

"17. Documents of which registration is compulsory

(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian

Registration Act, 1877 or this Act came or comes into force, namely:-

xxx xxx xxx

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

xxx xxx xxx

(vi) any decree or order of a court except a decree or order expressed to be made on a compromise, and comprising immovable property other than that which is the subject-matter of the suit or proceeding]."

38. A reading of these provisions make the following position clear (a) any non-testamentary document purporting or operating to create, declare any right, title or interest in any immoveable property of the value of more than Rs.100 is compulsorily registrable; (b) that an order or decree of a court is not compulsorily registrable even if it purports or operates to create, declare any right, title or interest in any immoveable property of the value of more than Rs.100; (c) that if the decree or order of the court is not rendered on merits, but expressed to be made on a compromise and comprises any immoveable property which was not the subject mater of the suit or proceeding, such order or decree is compulsorily registrable;

and (d) that as clause (iv) of sub-section (2) of section 17 excludes decrees or orders of court, but does not exclude awards of arbitrator, any arbitration award which purports or operates to create, declare any right, title or interest in any immoveable property of the value of more than Rs.100 is compulsorily registrable.

39. As noticed above, the reference agreements dated 12.3.1992 were not in regard to any agreement of sale or any dispute relating to immoveable property, or in regard to the lands in regard to which the award was made. It did not refer to the lands in question. No dispute regarding immoveable property was referred to arbitration or was the subject matter of the arbitration. The alleged subject matter of arbitration was non-payment of Rs.8,00,000 said to have been borrowed by each of the appellants. The arbitrator recorded an alleged statement by the borrowers (appellants) that they had received Rs.8,00,000 from Furu Ram and Rs.8,00,000/- from Kalu Ram; that they were not able to refund the same and therefore they had given lands measuring 49 Kanals 10 Marlas to Furu Ram and another 49 Kanals 9 Marlas to Kalu Ram; and that Furu Ram and Kalu Ram confirmed that they had obtained possession of the said land. The awards therefore declared that Furu Ram and Kalu Ram had become the absolute owners of the lands in question. Thus the awards are clearly documents which purport or operate to create and declare a right, title or interest in an immoveable property of the value of more than Rs.100 which was not the subject of the dispute or reference to arbitration. Therefore the awards were compulsorily registrable. If they were not registered, they could not be acted upon under section 49 of the Registration Act, 1908 nor could a decree be passed in terms of such unregistered awards. Unregistered awards which are compulsorily registrable under section 17(1)(b) could neither be admitted in evidence nor can decrees be passed in terms of the same.

40. In *Ratan Lal Sharma vs. Purshottam Harit* AIR 1974

SC 1066, this court held :

> "So in express words it purports to create rights in immovable property worth above Rs.100/- in favour of the appellant. It would accordingly require registration under S.17, Registration Act. As it is unregistered, the Court could not look into it. If the court could not, as we hold, look into it, the Court not pronounce judgment in accordance with it. Sec. 17, Arbitration Act presupposes an award which can be validly looked into by the Court. The appellant cannot successfully invoke Section 17…….. we are of opinion that the award requires registration and, not being registered is inadmissible in evidence for the purpose of pronouncing judgment in accordance with it."

In *Lachhman Dass vs. Ram Lal* - 1989 (3) SCC 99, this Court held :

> "In the present case the award declared that half share of ownership of the appellant to the lands in question "shall now be owned" by the respondent in addition to his half share in the lands. On a proper construction of the award, it is thus clear that the award did create, declare or assign a right, title and interest in the immovable property. It is not merely a declaration of the pre-existing right but creation of new right of the parties. Since the award affected the immovable property over Rs.100 it was required to be registered. ……..
>
> An award affecting immovable property of the value of more than Rs.100 cannot be looked into by the court for pronouncement upon the award on the application under Section 14 of the Arbitration Act unless the award is registered. ……..
>
> As the court could not look into the award, there is no question of the court passing a decree in accordance with the award and that point can also be taken when the award

is sought to be enforced as the rule of the court.

The courts below have not considered or decided this aspect at all.

Re: Question (iv)

41. If an award was not genuine, but was collusive and sham, the court will not and in fact can not make it a rule of the court. As noticed above, there should be a dispute, there should be an agreement to refer the dispute to arbitration, there should be reference to arbitration, there should be an adjudication or decision by the arbitrator after hearing parties, for a valid arbitration. If the parties had already settled their disputes and the arbitration award was only a ruse to avoid payment of stamp duty and registration with respect to a sale deed and declare a title in persons who did not have title earlier, then the entire proceedings is sham and bogus. In fact, C.B. Sharma was not really an arbitrator, nor the proceedings before him were arbitration proceedings and the awards were not really arbitration awards. If all these facts which have a bearing on the making of the award and the validity of the award are suppressed before the court and the court was misled into making decrees in terms of the awards, necessarily the proceedings are fraudulent and amounted to committing fraud on the court. In these circumstances the decree in CS Nos.366 and 367 of 1992 on the file of the Sr. Sub-Judge, Kurukshetra were invalid.

Conclusion

42. We, therefore allow these appeals, set aside the judgments of the first appellate court and High Court and restore the decrees of the trial court decreeing the suits filed by the appellants.

R.P. Appeals allowed.

M/S. PRAKASH JHA PRODUCTION AND ANR.
v.
UNION OF INDIA AND ORS.
(Writ Petition (Civil) No. 345 of 2011)

AUGUST 19, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Uttar Pradesh Cinemas (Regulation) Act, 1955: s.6(1) – Suspension of exhibition of the film – Certificate issued by Central Board of Film Certification for screening the Film 'Aarakshan' – Order of suspension of exhibition of the film by the State of U.P. u/s.6(1) on the ground that the exhibition of the film if allowed would cause an adverse effect on the law and order situation in the State – Held: The power vested in s.6 could be exercised by the State when a film which is being publicly exhibited could cause a breach of peace – Such an extra-ordinary power cannot be exercised with regard to a film which is yet to be exhibited openly and publicly in a particular State – The word 'suspension' envisages something functional or something which is being shown or is running - Therefore, the power as vested u/s.6 could not have been exercised by the State of U.P. in view of the fact that the said film was not being exhibited publicly in the theatre halls in U.P. – Consequently, at the stage, when the film was not screened or exhibited in the theatre halls publicly and for public viewing, neither an opinion could be formed nor any decision could be taken that there was a likelihood of breach of peace by exercising power purported u/s.6 of the Act –The contention that the film already is being exhibited in the State of U.P. as a High Level committee has seen the film cannot be accepted as the expression specifically uses the word 'publicly exhibited' meaning thereby that it is being exhibited all over and for public viewing in the State – Besides the contention

of the State of U.P. that some of the scenes of the film could create a breach of peace or could have an adverse effect on the law and order situation cannot be accepted as this film was screened in all other States of India peacefully and smoothly and in fact some of the States, where this film was screened, were also similarly sensitive States as that of the State of U.P. – Aarakshan/ Reservation is also one of the social issues and in a vibrant democracy like Indian democracy, public discussions and debate on social issues are required and are necessary for smooth functioning of a healthy democracy – Once the Board has cleared the film for public viewing, screening of the same cannot be prohibited in the manner as sought to be done by the State in the instant case – The decision of the State Government suspending the screening of the film 'Aarakshan' in the State of U.P. is set aside.

Union of India v. K.M. Shankarappa **(2001) 1 SCC 582: 2000 (5) Suppl. SCR 117 - relied on.**

S. Rangaranjan v. P. Jagjivan Ram & Ors. **(1989) 2 SCC 574: 1989 (2) SCR 204 - referred to.**

Case Law reference:

1989 (2) SCR 204	**referred to**	**Para 19**
2000 (5) Suppl. SCR 117	**relied on**	**Para 21**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 345 of 2011.

Under Article 32 of the Constitution of India.

Harish N. Salve, Amit Naik, Madhu Chaudhary, Mahesh Agarwal, Rishi Agarwal, E.C. Agrawala, Neeha Nagpal, Harshvardhan Jha for the Petitioners.

A.S. Chandiok, ASG, U.U. Lalit, Satish Chandra Mishra, Shail Kr. Dwivedi, AAG, R.K. Rathore, Ruchir Mishra, Sanjeev

Kumar Saxena, S.S. Rawat, D.S. Mahra, G.N. Reddy, C. Kannan, Kavita Wadia, Gunnam Venkateswara Rao, Manoj Kr. Dwivedi, Ashutosh Sharma, Abhinav Shrivastava for the Respondents.

The following order of the Court was delivered

O R D E R

1. This writ petition is filed by the petitioners praying for the reliefs specifically set out in the prayer portion of the writ petition. One of the reliefs that is sought for in this writ petition is to strike down the provision of Section 6 (1) of the U.P. Cinemas (Regulation) Act (hereinafter referred to as "the Act") being allegedly ultra vires to the Constitution of India. The other relief that is sought for is to quash and set aside the decisions taken by the respondents, namely State of Punjab, State of Andhra Pradesh and State of Uttar Pradesh suspending the screening of the film 'Aarakshan' in their respective States for a specified period.

2. Notice was issued on this writ petition making the same returnable today so as to enable the three State Governments to submit their reply/counter affidavit. However, at the stage of issuing notice itself, we were informed by the counsel appearing for the State of Punjab and Andhra Pradesh that so far as their States are concerned, they had withdrawn the order of suspension of screening of the film 'Aarakshan'.

3. The counsel appearing for the State of Punjab and the State of Andhra Pradesh are present in the Court. Today also they stand by the same statement which they had made on the last date, meaning thereby, that they had lifted the orders of suspension of screening of the film in their respective States. Therefore, to our understanding, the aforesaid film is being screened in the aforesaid two States also as on this date. This petition, therefore, has been rendered infructuous so far as the States of Andhra Pradesh and Punjab are concerned.

4. The State of Uttar Pradesh has filed the counter affidavit

opposing the prayer in the writ petition which is on record. We have heard the learned counsel appearing for the parties extensively today.

5. Mr. Harish Salve, learned senior counsel appearing for the petitioners has not pressed the prayer so far as constitutional validity of Section 6 of the Act is concerned. However, on his submission, we are keeping the said issue open to be agitated in an appropriate case in future, if necessary. He, however, has challenged the legality of the decision of the Uttar Pradesh Government suspending the screening of the film 'Aarakshan' in the entire State of Uttar Pradesh. According to him, the aforesaid exercise of power of suspension of the screening of the film amounts to exercising the power of pre-censorship which is being exercised by the Government, although no such power vested on it. According to him, the said power of censorship is vested in the Central Board of Film Certification, (hereinafter referred to as "the Board") and in the Central Government as provided for in the provisions made in The Cinematograph Act, 1952. He has also submitted that the power that is sought to be exercised in the present case under Section 6(1) of the Act is also without jurisdiction as such power could be exercised only when a film is being screened and shown in the public hall and also when a contingency of the nature as mentioned in the said Section arises. He submits that on satisfying the preconditions and only in such a situation a power is vested in the State Government to suspend the screening of the film for a specified period. He also submits that the aforesaid decision of the State Government is in violation of the provisions of Article 19(1) of the Constitution of India and, therefore, the same is required to be struck down and quashed.

6. We have also heard Mr. Chandiok, learned Additional Solicitor General, who submits that after a certificate has been issued to a particular film by the Censor Board, the said film could be screened in the entire country and the order which is passed by the State Government is not envisaged as it

practically prohibits screening of the film in the entire State of Uttar Pradesh.

7. Mr. U.U. Lalit, learned senior counsel appearing for the State of Uttar Pradesh has, however, taken us through the contents of the counter-affidavit in support of his contention that the prayer in writ petition cannot be granted by this Court. He has submitted that a very high-level Committee has seen the film and thereafter has given an opinion, according to which if and when the concerned film is shown there is likelihood of breach of peace and also breach of law and order situation and, therefore, the aforesaid decision of suspending the screening of the film "Aarakshan" in Uttar Pradesh, which has been taken in order to preserve and upkeep the law and order situation in the State should be upheld.

8. In order to appreciate the aforesaid contentions of the counsel appearing for the parties, we have gone through the pleadings of the parties alongwith the documents relied upon as also the decisions which are referred to and relied upon.

9. We have also perused the provisions of Section 6 of the Act which is practically the foundation and basis of the present case. Section 6(1) of the Uttar Pradesh Cinemas (Regulation) Act, 1955 reads as follows:

> "6. Power to the State Government or District Magistrate to suspend exhibition of films in certain cases - (1) The State Government, in respect of the whole of the State of Uttar Pradesh or any part thereof, and the District Magistrate in respect of the district within his jurisdiction may, if it or he, as the case may be, is of opinion that any film which is being publicly exhibited, is likely to cause a breach of the peace, by order, suspend the exhibition of the films and thereupon the films shall not during such suspension be exhibited in the State, part or the district concerned, notwithstanding the certificate granted under the Cintmatograph Act, 1952."

10. Upon going through the records, we find that the film

'Aarakashan' was submitted to the Central Board of Film Certification on 12.07.2011 for certification. Upon such submission of the film, the Chairperson of the Board, in terms of the provisions of the Act and the Rules, invited the legal expert and another expert who is related to dalit movement to watch the film at the time when the Examining Committee was previewing the film.

11. The Chairperson also saw to it that all the four members of the Examining Committee are members belonging to scheduled casts/scheduled tribes and OBC category. The said members of the Examining Committee along with the legal expert as also the expert related to dalit movement were present during the preview of the film. The experts as also the Examining Committee gave their approval for grant of censorship certificate and screening of the film. The Examining Committee decided to give U/A certificate to the film under the theme category "social". However, while taking the aforesaid decision, a view was expressed by the members of the Examining Committee for deletion of the word 'dalit' from the trailor in reel no. 1, which was deleted by the producer of the film, and the same was treated as voluntary cut. Thereafter, the certification was granted and a certificate was issued for screening of the film. The said certificate is annexed with the petition.

12. Pursuant to grant of the aforesaid certificate, the film is being screened all over India except for the State of Uttar Pradesh where it is not being exhibited because of the aforesaid decision of the State Government. The State of Uttar Pradesh has given certain reasons in their counter affidavit for the action taken leading to the issuance of the order suspending the screening of the film. They have also stated in their counter affidavit that the exhibition of the film 'Aarakshan' if allowed would definitely cause an adverse effect on the law and order situation in the State.

13. Our attention is also drawn by the counsel appearing for the State of U.P. to paragraph 3 of the said affidavit wherein

the relevant portion of the report given by the High Level committee constituted by the State Government is extracted. A bare perusal of the same would indicate that in the report the High Level Committee has suggested deletion of some portion from the film without which, according to them, the film cannot be screened as that may cause an adverse effect on the law and order situation in the State.

14. Before dealing with the said contentions, we would like to deal with the provision of the Act on the basis of which the aforesaid decision is taken. There is no dispute that the impugned decision is taken in the purported exercise of power under Section 6 of the Act. A bare perusal of the aforesaid provision in Section 6 of the Act would make it crystal-clear that the power vested therein could be exercised by the State under the said provision when a film which is being publicly exhibited could likely cause a breach of peace. Only in such circumstance and event, an order could be passed suspending the exhibition of the film.

15. The expression '*being publicly exhibited*' and the word '*suspension*' are relevant for our purpose and, therefore, we are giving emphasis on the aforesaid expression and the word. When it is said that a film is being publicly exhibited, it definitely pre-supposes a meaning that the film is being exhibited for public and in doing so if it is found to likely to cause breach of peace then in that event such a power could be exercised by the State Government. Such an extra-ordinary power cannot be exercised with regard to a film which is yet to be exhibited openly and publicly in a particular State. This view that we have taken is also fortified from the use of the word '*suspension*' in the said section. The word '*suspension*' envisages something functional or something which is being shown or is running. Suspension is always a temporary phase, which gets obliterated as and when the previous position is restored. Therefore, the power as vested under Section 6 of the Act could not have been exercised by the State of Uttar Pradesh in view of the fact that the said film was not being exhibited publicly in

the theatre halls in U.P. Consequently, at this stage, when the film is not screened or exhibited in the theatre halls publicly and for public viewing, neither an opinion could be formed nor any decision could be taken that there is a likelihood of breach of peace by exercising power purported under Section 6 of the Act.

16. The counsel appearing for the State has also submitted that in fact the film already is being exhibited in the State of Uttar Pradesh as a High Level committee has seen the film. We cannot accept the aforesaid position as the expression specifically uses the word 'publicly exhibited' meaning thereby that it is being exhibited all over and publicly for public viewing in the State.

17. Besides, the contention of the State of U.P. that some of the scenes of the film could create a breach of peace or could have an adverse effect on the law and order situation cannot be accepted as this film is being screened in all other States of India peacefully and smoothly and in fact some of the States, where this film is being screened, are also similarly sensitive States as that of the State of U.P. In such States the film is being screened without any obstruction or difficulty and without any disturbance of law and order situation.

18. So far the contention of the counsel appearing for the State of Uttar Pradesh that the issue of reservation is a delicate issue and is to be handled carefully is concerned, we are of the considered opinion that reservation is also one of the social issues and in a vibrant democracy like ours, public discussions and debate on social issues are required and are necessary for smooth functioning of a healthy democracy. Such discussions on social issues bring in awareness which is required for effective working of the democracy. In fact, when there is public discussion and there is some dissent on these issues, an informed and better decision could be taken which becomes a positive view and helps the society to grow.

19. We may, at this stage, appropriately refer to the

decisions of this Court in the case of *S. Rangaranjan Vs. P. Jagjivan Ram & Ors.* reported in (1989) 2 SCC 574. In paragraph 36 of the said judgment, this Court has stated thus:-

> "36. The democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. What Walter Lippman said in another context is relevant here:
>
> When men act on the principle of intelligence, they go out to find the facts.... When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge".

20. In paragraph 35, this Court has also stated that in a democracy it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted.

21. Reference could also be made to the decision of this Court in *Union of India Vs. K.M. Shankarappa* reported in (2001) 1 SCC 582. In the said case constitutional validity of Sections 3, 4 and other Sections of the Cinematograph Act, 1958 were challenged. In paragraph 8 of the said judgment, this Court has stated that once an expert body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law and order situation and that it is for the State Government concerned to see that the law and order situation is maintained and that in any democratic society there are bound to be divergent views.

22. In the present case, the Examining Committee of the

Board had seen the film along with the experts and only after all the members of the Committee as also the two experts gave positive views on the screening of the film, thereafter only the certificate was granted. Therefore, since the expert body has already found that the aforesaid film could be screened all over the country, we find the opinion of the High Level committee for deletion of some of the scenes/words from the film amounted to exercising power of pre-censorship, which power is not available either to any high-level expert committee of the State or to the State Government. It appears that the State Government through the High Level Committee sought to sit over and override the decision of the Board by proposing deletion of some portion of the film, which power is not vested at all with the State.

23. It is for the State to maintain law and order situation in the State and, therefore, the State shall maintain it effectively and potentially. Once the Board has cleared the film for public viewing, screening of the same cannot be prohibited in the manner as sought to be done by the State in the present case. As held in *K.M Sankarapaa* (Supra) it is the responsibility of the State Government to maintain law and order.

24. Considering the entire facts and circumstances of the case, we are of the considered opinion that the present writ petition is required to be partly allowed in terms of the observations made herein.

25. We, therefore, set aside and quash the decision of the State Government suspending the screening of the film 'Aarakshan' in the State of Uttar Pradesh in the light of the observations made and we partly allow the petition to the aforesaid extent.

D.G. Writ petition partly allowed.

RAM KUMAR

v.

STATE OF U.P. & ORS.

(Civil Appeal No. 7106 of 2011)

AUGUST 19, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Service Law:

Appointment/selection – To the post of police constable – Cancellation of the order of selection of the appellant – On the ground of his failure to disclose in the affidavit submitted to the recruiting authority, in the proforma of verification roll about his involvement in a criminal case – Challenged by the appellant – Writ petition as also appeal dismissed by the High Court – On appeal held: Though a criminal case u/ss. 324/ 323/504 IPC was registered against the appellant but in absence of any other witness against the appellant, he was acquitted of the charges in the case, four years prior to the furnishing of the affidavit – On these facts, it was not possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable – Appointing Authority instead of considering whether the appellant was suitable for appointment to the post of constable, mechanically held that his selection was irregular and illegal because the appellant furnished an affidavit stating the facts incorrectly at the time of recruitment – Thus, the order of the High Court is set aside and the order of the Appointing Authority is quashed.

Kendriya Vidyalaya Sangathan and Ors. v Ram Ratan Yadav **(2003) 3 SCC 437: 2003 (2) SCR 361– distinguished.**

Commissioner of Police and Ors. v Sandeep Kumar **2011 (3) SCALE 606 – referred to.**

Case Law Reference:

2011 (3) SCALE 606	**Referred to**	**Para 4**
2003 (2) SCR 361	**Distinguished**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7106 of 2011.

From the Judgment & Order dated 31.08.2009 of the High Court of Judicature at Allahabad in Special Appeal No. 924 of 2009.

V.K. Shukla, K.K. Mohan for the Appellant.

Aarohi Bhalla, Ajay Singh, Gunnam Venkateswara Rao for the Respondents.

The Order of the Court was delivered by

A. K. PATNAIK, J. 1. Leave granted.

2. This is an appeal against the order dated 31.08.2009 of the Division Bench of the Allahabad High Court in Special Appeal No.924 of 2009 dismissing the appeal of the appellant against the order of the learned Single Judge in Writ Petition (C) No.40674 of 2007.

3. The facts very briefly are that pursuant to an advertisement issued by the State Government of U.P. on 19.11.2006, the appellant applied for the post of constable and he submitted an affidavit dated 12.06.2006 to the recruiting authority in the proforma of verification roll. In the affidavit dated 12.06.2006, he made various statements required for the purpose of recruitment and in para 4 of the affidavit he stated that no criminal case was registered against him. He was selected and appointed as a male constable and deputed for training. Thereafter, the Jaswant Nagar Police Station, District Etawah, submitted a report dated 15.01.2007 stating that Criminal Case No.275/2001 under Sections 324/323/504 IPC

was registered against the appellant and thereafter the criminal case was disposed of by the Additional Chief Judicial Magistrate, Etawah, on 18.07.2002 and the appellant was acquitted by the Court. Along with this report, a copy of the order dated 18.07.2002 of the Additional Chief Judicial Magistrate was also enclosed. The report dated 15.01.2007 of the Jaswant Nagar Police Station, District Etawah, was sent to the Senior Superintendent of Police, Ghaziabad. By order dated 08.08.2007, the Senior Superintendent of Police, Ghaziabad, cancelled the order of selection of the appellant on the ground that he had submitted an affidavit stating wrong facts and concealing correct facts and his selection was irregular and illegal.

4. Aggrieved, the appellant filed Writ Petition No.40674 of 2007 under Article 226 of the Constitution before the Allahabad High Court but the learned Single Judge dismissed the writ petition by his order dated 30.08.2007. The learned Single Judge held that since the appellant had furnished false information in his affidavit in the proforma verification roll, his case is squarely covered by the judgment rendered by this Court in *Kendriya Vidyalaya Sangathan and Others v. Ram Ratan Yadav* [(2003) 3 SCC 437] and that he was rightly terminated from service without any inquiry. The appellant challenged the order of the learned Single Judge in Special Appeal No.924 of 2009 but the Division Bench of the High Court did not find any merit in the appeal and dismissed the same by the impugned order dated 31.08.2009.

5. Learned counsel for the appellant submitted that the appellant had been acquitted by the order dated 18.07.2002 of the Additional Chief Judicial Magistrate in Criminal Case No.275 of 2001 and for this reason when the appellant furnished the affidavit dated 12.06.2006 in the prescribed verification roll, four years after the order of the acquittal, he did not think it necessary to state in the affidavit about this criminal case. He submitted that in any case, a copy of the order of the Additional Chief Judicial Magistrate in Criminal Case No.275 of 2001

would show that the crime related to a minor incident which took place on 02.12.2000 and as there was no evidence against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 324/34/504 IPC. He submitted that therefore this is not a fit case in which the selection of the appellant should have been cancelled. He cited *Commissioner of Police and Others v. Sandeep Kumar* [2011(3) SCALE 606] in which this Court has taken a view that cancellation of candidature to the post of temporary Head Constable for the suppression and failure to disclose in the verification roll/application about his involvement in an incident resulting in a criminal case under Sections 325/34 of the IPC when the candidate was a young man, was not justified.

6. Learned counsel for the respondents, on the other hand, supported the judgment of the learned Single Judge as well as the impugned order of the Division Bench of the High Court. Besides relying on the judgment of this Court in *Kendriya Vidyalaya Sangathan and Others v. Ram Ratan Yadav* (supra), he also relied on the counter affidavit filed on behalf of the respondent Nos. 2 to 4 and in particular the Government Order dated 28.04.1958 under which a verification had to be carried out with regard to the character of the candidate who was being considered for appointment. He submitted that in accordance with the Government instructions in the Government Order dated 28.04.1958, candidates desiring appointment to various posts in Government service were required to submit a detailed affidavit furnishing details of their character and antecedents.

7. We have carefully read the Government Order dated 28.04.1958 on the subject '*Verification of the character and antecedents of government servants before their first appointment*' and it is stated in the Government order that the Governor has been pleased to lay down the following instructions in supercession of all the previous orders:

"The rule regarding character of candidate for appointment

under the State Government shall continue to be as follows:

> The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be duty of the appointing authority to satisfy itself on this point."

It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.

8. In the facts of the present case, we find that though Criminal Case No.275 of 2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18.07.2002 by the Additional Chief Judicial Magistrate, Etawah. On a reading of the order dated 18.07.2002 of the Additional Chief Judicial Magistrate would show that the sole witness examined before the Court, PW-1 Mr. Akhilesh Kumar, had deposed before the Court that on 02.12.2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC. On these facts, it was not at all possible for the appointing authority

to take a view that the appellant was not suitable for appointment to the post of a police constable.

9. The order dated 18.07.2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15.01.2007 of the Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the appellant was illegal and irregular because he did not furnish in his affidavit in the proforma of verification roll that a criminal case has been registered against him. As has been stated in the instructions in the Government Order dated 28.04.1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment.

10. In *Kendriya Vidyalaya Sangathan and Others v. Ram Ratan Yadav* (supra) relied on by the respondents, a criminal case had been registered under Sections 323, 341, 294, 506-B read with Section 34 IPC and was pending against the respondent in that case and the respondent had suppressed this material in the attestation form. The respondent, however, contended that the criminal case was subsequently withdrawn and the offences in which the respondent was alleged to have been involved were also not of serious nature. On these facts, this Court held that the respondent was to serve as a Physical

Education Teacher in Kendriya Vidyalaya and he could not be suitable for appointment as the character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age and if the authorities had dismissed him from service for suppressing material information in the attestation form, the decision of the authorities could not be interfered with by the High Court. The facts of the case in *Kendriya Vidyalaya Sangathan and Others v. Ram Ratan Yadav* (supra) are therefore materially different from the facts of the present case and the decision does not squarely cover the case of the appellant as has been held by the High Court.

11. For the aforesaid reasons, we allow the appeal, set aside the order of the learned Single Judge and the impugned order of the Division Bench and allow the writ petition of the appellant and quash the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad. The appellant will be taken back in service within a period of two months from today but he will not be entitled to any back wages for the period he has remained out of service. There shall be no order as to costs.

N.J. Appeal allowed.

RAJEEV HITENDRA PATHAK & OTHERS
v.
ACHYUT KASHINATH KAREKAR & ANOTHER
(Civil Appeal No.4307 of 2007)

AUGUST 19, 2011

[DALVEER BHANDARI, DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

CONSUMER PROTECTION ACT, 1986:

Sections 12, 13 and 14 – Power of review and to set aside ex parte orders – Held: District Consumer Forums and State Commissions have not been given any power to set aside ex parte orders and power of review and the powers which have not been expressly given by the statute cannot be exercised.

Section 22 (as amended in 2002) read with ss. 12, 13 and 14 and s. 22-A (as introduced in 2002) — Power and procedure applicable to National Commission and power to set aside ex parte orders – Held: After amendment in s. 22 and introduction of s. 22-A, the power of review or recall has vested with the National Commission only – The findings of the National Commission holding that the State Commission can review its own orders are set aside – However, the findings of the National Commission holding that the complaint be restored to its original number for hearing in accordance with law is upheld.

The wife of respondent no. 1 (in CA No. 4307 of 2007) died during surgery on 8.10.1997. A complaint was filed alleging deficiency in service and claiming compensation of Rs. 15,00,000/-. On 9.9.2004, the State Commission dismissed the complaint for want of prosecution. However, on an application by the complainants, the State Commission recalled the order dated 9.9.2004 and

restored the complaint. The appellants filed a revision petition before the National Commission contending that (i) the State Commission did not have power to restore the complaint and (ii) the State Commission erred in restoring the complaint without issuing notice to the appellants. The National Commission dismissed the revision petition. The said order gave rise to C.A. No. 4307 of 2007. C.A. No. 8155 of 2001 was filed against the order passed by the National Commission dismissing the complainant's application for setting aside the ex parte order passed by it.

The two-Judge Bench before which the appeals were listed for hearing, noticed the divergent views of the Court on the question of power of the State Commission to review or recall its *ex parte* order and, consequently, the appeals were listed before the three-Judge Bench.

The main question for consideration before the Court was: "whether the District Consumer Forums and the State Commissions have the power to set aside their own *ex parte* orders or in other words have the power to call or review their own orders?"

Disposing of the appeals, the Court

HELD: 1.1 On a careful analysis of the provisions of the Consumer Protection Act, 1986 it is abundantly clear that the Tribunals are creatures of the statute and derive their power from the express provisions of the statute. The District Forums and the State Commissions have not been given any power to set aside *ex parte* orders and power of review and the powers which have not been expressly given by the statute cannot be exercised. [para 36] [529-D-E]

1.2 The legislature chose to give the National Commission the power to review its *ex parte* orders.

Before amendment, against dismissal of any case by the Commission, the consumer had to rush to this Court. The amendment in s.22 and introduction of s. 22-A were done for the convenience of the consumers. [para 37] [529-F]

Jyotsana Arvind Kumar Shah & Others v. Bombay Hospital Trust **(1999) 4 SCC 325 – upheld**

New India Assurance Co. Ltd. v. R. Srinivasan **2000 (1) SCR 1228 = (2000) 3 SCC 242 - overruled**

1.3 In view of the legal position, in Civil Appeal No.4307 of 2007, the findings of the National Commission are set aside as far as it has held that the State Commission can review its own orders. After the amendment in s. 22 and introduction of s. 22A in the Act in the year 2002, the power of review or recall has vested with the National Commission only. However, this Court affirms the findings of the National Commission holding that the Complaint No.473 of 1999 be restored to its original number for hearing in accordance with law. There has been considerable delay in disposal of the complaint. Therefore, the State Commission is directed to dispose of Complaint No.473 of 1999 as expeditiously as possible. [paras 39-40] [530-A-C]

1.4 Similarly, in Civil Appeal No.8155 of 2001, the impugned order is set aside and the National Commission is directed to dispose of the Original Petition No.110 of 2003 *de novo* as expeditiously as possible. [para 41] [530-D-E]

Morgan Stanley Mutual Fund v. Kartick Das **1994 (1) Suppl. SCR 136 = (1994) 4 SCC 225;** *Gulzari Lal Agarwal v. Accounts Officer* **1996 (6) Suppl. SCR 708 = (1996) 10 SCC 590;** *M/s Eureka Estates (P) Ltd. v. A.P. State Consumer Disputes Redressal Commission and Others* **AIR 2005 AP 118 – Cited.**

Case Law Reference:

(1999) 4 SCC 325	**upheld**	**para 8**
2000 (1) SCR 1228	**overruled**	**para 9**
1994 (1) Suppl. SCR 136	**Cited**	**para 14**
1996 (6) Suppl. SCR 708	**Cited**	**para 15**
AIR 2005 AP 118	**Cited**	**para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4307 of 2007.

From the Judgment & Order dated 16.11.2005 of the National Consumer Disputes Commission, at New Delhi in Revision Petition No. 551 of 2005.

WITH

C.A. No.8155 of 2001.

Siddharth Bhatnagar, M.S. Ganesh, Pawan Kumar Bansal (for V.D. Khanna, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, L.A.J. Selvan, Jay Kishore Singh, (for Ravindra Keshvrao Adsure, Anil Kumar Jha for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. These appeals emanate from the order dated 16.11.2005 in Revision Petition No.551 of 2005 and order dated 12.7.2001 in Miscellaneous Petition No.1 of 2001 in Original Petition No.110 of 1993 passed by the National Consumer Disputes Redressal Commission, New Delhi.

2. The main question which arises for consideration is whether the District Consumer Forums and the State Commissions have the power to set aside their own ex parte

orders or in other words have the power to recall or review their own orders?

3. The questions of law involved in both the appeals are identical, therefore, we deem it appropriate to dispose of both these appeals by a common judgment.

4. Brief facts necessary to dispose of these appeals are recapitulated as under:

CIVIL APPEAL NO.4307 OF 2007

5. Smita Achyut Karekar was admitted to Ashirwad Nursing Home as she was suffering from the ailment of slip disc. The operation was performed on 8.10.1997. It was noticed, at about 3.45 pm on that day, that her blood vessels had ruptured accidentally during the surgery. She was declared dead at 5.35 pm.

6. The complainants issued a legal notice on 24.7.1999. Reply to the legal notice was sent on 7.8.1999. The complainants filed complaint alleging deficiency in service and claimed compensation of Rs.15,00,000/-. The complainants did not take necessary steps to remove objection and to complete procedure under the Consumer Protection Act, 1986. The State Commission, Maharashtra issued notice to the opposite parties/appellants herein on 10.02.2004. On 9.9.2004, the State Commission dismissed the complaint for want of prosecution. On 04.11.2004, the complainants filed an application for recalling 9.9.2004 order and consequently the State Commission recalled the order dated 9.9.2004 and restored the complaint.

7. The appellants aggrieved by the said order preferred a Revision Petition No.551 of 2005 before the National Consumer Disputes Redressal Commission, New Delhi. The appellants in the revision petition made two main arguments before the Commission : firstly, that the State Commission did

not have the power to restore the complaint and, secondly, that the State Commission restored the complaint without issuing notice to the appellants. The National Commission dismissed the revision petition which has been challenged by the appellants before this Court.

8. The appellants relied on the judgment in the case of *Jyotsana Arvind Kumar Shah & Others v. Bombay Hospital Trust* (1999) 4 SCC 325. In this case, the Court held that the State Commission did not have the power to review or recall its ex parte order.

9. In *New India Assurance Co. Ltd. v. R. Srinivasan* (2000) 3 SCC 242, this Court took the contrary view and held that the State Commission could review or recall its ex parte order.

10. In the instant case, a two-Judge Bench of this Court vide judgment and order dated 17.9.2007 reported in 2007 (11) SCALE 166 noted the controversy and observed as under:

"5. In Jyotsana's case it was observed at para 7 as follows:

> "We heard the learned counsel on both sides for quite some time. When we asked the learned counsel appearing for the respondent to point out the provision in the Act which enables the State Commission to set aside the reasoned order passed, though ex parte, he could not lay his hands on any of the provisions in the Act. As a matter of fact, before the State Commission the appellants brought to its notice the two orders, one passed by the Bihar State Commission in *Court Master, UCO Bank v. Ram Govind Agarwal* 1996 (1) CPR 351 and the other passed by the National Commission in *Director, Forest Research Institute v. Sunshine Enterprises* 1997 (1) CPR 42 holding that the redressal agencies have no power to recall or review their ex parte order. The State Commission

had distinguished the abovesaid orders on the ground that in those two cases the opponents had not only not appeared but also failed to put in their written statements. In other words, in the case on hand, according to the State Commission, the opponent (respondent) having filed the written statements, the failure to consider the same by the State Commission before passing the order would be a valid ground for setting aside the ex parte order. The State Commission, however, fell into an error in not bearing in mind that the Act under which it is functioning has not provided it with any jurisdiction to set aside the ex parte reasoned order. It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the appellate authority or make an appropriate application before the State Commission for setting aside the ex parte order, if *permissible under the law*. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent, if permissible under the law. If the law does not permit the respondent to move the application for setting aside the ex parte order, which appears to be the position, the order of the State Commission setting aside the ex parte order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an ex parte order."

6. Subsequently, in New India Assurance case this Court appears to have taken a different view as it is evident from what has been stated in para 18, the same reads as follows:

"We only intend to invoke the spirit of the principle behind the above dictum in support of our view that every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the function of the court or, for that matter of a judicial or quasi-judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the nonappearance of the complainant."

7. In the latter case i.e. *New India Assurance case* reference was not made to the earlier decision in *Jyotsana case*. Further the effect of the amendment to the Act in 2003 whereby Section 22A was introduced has the effect of conferment of power of restoration on the National Commission, but not to the State Commission. In view of the divergence of views expressed by coordinate Benches, we refer the matter to a larger Bench to consider the question whether the State Commission has the power to recall the ex parte order. Records be placed before the Hon'ble Chief Justice of India for appropriate orders."

11. We have been called upon to decide whether the State Commission has the power to recall an ex parte order.

12. Shri Siddharth Bhatnagar, learned senior counsel appearing for the appellants in Civil Appeal No.4307 of 2007 submitted that the Consumer Tribunals set up under the

Consumer Protection Act, 1986 are creatures of that Statute and derive their powers only from the express provisions of the Statute. He has drawn our attention to various provisions of the Consumer Protection Act, 1986 to strengthen his submission. He referred to Section 13(4) of the Consumer Protection Act, 1986 which reads as under:

> "13 (4) For the purposes of this Section, the District Forum shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:-
>
> (i) the summoning and enforcing the attendanceof any defendant or witness and examining the witness on oath;
>
> (ii) the discovery and production of any document or other material object produced as evidence;
>
> (iii) the reception of evidence on affidavits;
>
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
>
> (v) issuing of any commission for the examination of any witness; and
>
> (vi) any other matter which may be prescribed."

13. Mr. Bhatnagar has also drawn our attention to Regulation 26(1) of the Consumer Protection Regulations, 2005, framed in exercise of powers conferred by Section 30-A of the Consumer Protection Act, 1986. Regulation 26(1) reads as follows:

> "26. Miscellaneous— (1) In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):

> Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made thereunder."

14. Mr. Bhatnagar submitted that only very few provisions of the Code of Civil Procedure have been made applicable to the proceedings before the District Forums and the State Commissions under Section 18 of the Consumer Protection Act, which applies Sections 13 and 14 to the State Commission and the National Commission (under Section 22(1) are those under Section 13(4)). He relied on the judgment of this Court in *Morgan Stanley Mutual Fund v. Kartick Das* (1994) 4 SCC 225 to strengthen his argument that the consumer tribunals can derive powers only from the express provisions in the Statute. In the said case, the Court observed as under:

> "44. A careful reading of the above discloses that there is no power under the Act to grant any interim relief of (sic or) even an ad interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience."

15. Mr. Bhatnagar also placed reliance on another judgment of this Court in *Gulzari Lal Agarwal v. Accounts Officer* (1996) 10 SCC 590. In this case, the Court relied on earlier judgment of this Court in the case of Morgan Stanley Mutual Fund and observed that the Consumer Forum has no jurisdiction or power to pass any interim order pending disposal of the original complaint filed before it.

16. Mr. Bhatnagar relied on Section 17 of the Act which deals with the jurisdiction of the State Commission. Sections 17-A and 17-B were added by the 2002 Amendment of the Act dealing with the "Transfer of Cases" and "Circuit Benches"

respectively. The objects and reasons for introducing the said provisions by way of the said amendment were as follows:

> **"Objects and Reasons—** Clause 15 (old) seeks to insert a new Section 17-A to empower the State Commission to transfer a case from one District Forum to another District Forum within the State if required for the ends of justice. It also seeks to insert another new Section 17-B to enable the State Commissions to hold Circuit Benches."

17. Mr. Bhatnagar also relied on Section 22 of the Act, which deals with the power and procedure of the National Commission. Before the 2002 Amendment, the said provision was as follows:

"22. Power of and procedure applicable to the National Commission— The National Commission shall, in the disposal of any complaints or any proceedings before it, have—

(a) the powers of a Civil Courts as specified in Sub-Sections (4), (5) and (6) of Section 13;

(b) the power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of Sub-Section (1) of Section 14, and follow such procedure as may be prescribed by the Central Government."

18. After the 2002 Amendment, Section 22 of the Act now reads as follows:

> **"22. Power and procedure applicable to the National Commission** — (1) The provisions of Sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

> (2) Without prejudice to the provisions contained in Sub-Section (1), the National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record."

19. The 2002 Amendment also introduced Section 22A which reads as follows:

> **"22A. Power to set aside ex parte orders.**-Where an order is passed by the National Commission ex parte against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice."

20. Mr. Bhatnagar contended that Section 22(2) was introduced in 2002 to give the National Commission the power to review its own order. This power could not have been used by the Commission before the amendment. After amendment, now the Commission has specific power to set aside an ex parte order. This power has only been given to the National Commission and not extended to the District Forums or the State Commissions. If the legislature intended to give this power to the State Commissions and District Forums then it would have extended the same to those forums also.

21. Mr. Bhatnagar has also drawn our attention to the objects and reasons for carrying out the amendment which reads as follows:

> **"Objects and Reasons**— Clause 21 (old) seeks to substitute Section 22 so that the provisions of Sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum, shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission. It also seeks to empower the National Commission to review any order made by it when there is an error apparent on the face of record. These

provisions will make the powers and procedures in respect of the National Commission more explicit. It also seeks to insert new Sections 22-A, 22-B and 22-C and 22-D. New Section 22-A empowers the National Commission to set aside ex parte orders against the opposite party or complainant in the interest of justice……."

22. Mr. Bhatnagar submitted that the limited applicability of the provisions of the Civil Procedure Code to the Tribunals under the Act is under Section 13(4) of the Act. There is no power of review or recall under the said provision. Even under Section 13(4)(vi), no Rule has been framed in terms of Section 30(1) by the Central Government which provides power to review or recall of orders.

23. Learned senior counsel for the appellants also relied on *M/s Eureka Estates (P) Ltd. v. A.P. State Consumer Disputes Redressal Commission and Others* AIR 2005 AP 118 in which the Court observed that the District Forums and the State Commissions are entitled to exercise only such powers which are specifically vested in them under the Act and the Rules.

24. Mr. Bhatnagar submitted that it is evident from the Statement of Objects and Reasons of the Act that the purpose of the Act is to provide speedy and simple redressal to consumer disputes. It is for this reason that all the provisions of the Civil Procedure Code have not been extended to the Consumer Forums.

25. Mr. Bhatnagar further submitted that the salutary object of speedy and simple redressal under the Act is to be found *inter alia* in Sections 13(2) and (3) of the Act which provide for the procedure to be adopted by the forum in deciding the complaints admitted by it. The said provisions read as follows:

13. (2) The District Forum shall, if the complaints admitted by it under Section 12 relates to goods in respect of which the

procedure specified in Sub- Section (1) cannot be followed, or if the complaint relates to any services,—

(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

(b) where the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute,—

(i) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or

(ii) *ex parte* on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum.

(c) where the complainant fails to appear on the date of hearing before the District Forum, the District Forum may either dismiss the complaint for default or decide it on merits.

(3) No proceedings complying with the procedure laid down in Sub-Sections (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with."

26. Mr. Bhatnagar also relied on Section 12(3) of the Act which reads as follows:

> "12(3) On receipt of a complaint made under Sub-Section (1), the District Forum may, by order, allow the complaint to be proceeded with or rejected:
>
> Provided that a complaint shall not be rejected under this Sub-Section unless an opportunity of being heard has been given to the complainant:
>
> Provided further that the admissibility of the complaint shall ordinarily be decided within twentyone days from the date on which the complaint was received."

27. Mr. Bhatnagar tried to explain the legislative intent behind introducing Section 22-A. According to him, only the National Commission has been given power to set aside ex parte orders and the same power has not been extended to the District Forums or the State Commissions because against the orders of the District Forums and the State Commissions, appeal or revision can be filed before the State Commission and the National Commission respectively. But in the case of the orders of the National Commission, prior to the amendment, the parties were compelled to approach this Court even against the orders by which the cases were dismissed in default. It became extremely expensive and time consuming. In this view of the matter, it became imperative to give this power to the National Commission.

28. According to the counsel for the appellants, in *New India Assurance Co. Ltd.*, this Court did not notice the earlier decision in *Jyotsana's* case. He submitted that the Tribunals constituted under the Consumer Protection Act, 1986 exercise only such powers as are expressly conferred by the provisions of the said Act and Rules framed thereunder. Since no power of review and recall was conferred on the District Forums and the State Commissions, they can exercise no such power.

29. The counter affidavit was filed by the respondents statingthat the Commission was justified in setting aside the ex parte order and restoring the respondents' complaint. The counter affidavit also states that the respondents cannot be deprived of their right without contest on the basis of trivial technicalities.

30. The respondents relied upon the judgment of this Court in *New India Assurance Co. Ltd.* in which this Court held that the Consumer Courts have inherent powers to restore the complaints dismissed for default. It is also stated in the counter affidavit that due to old age, respondent no.1 lost track of the case and therefore, the State Commission was justified in setting aside the ex parte order in order to ensure that justice is done to the parties.

CIVIL APPEAL NO.8155 OF 2001

31. In Civil Appeal No.8155 of 2001, the National Commission passed an ex parte order and in the appeal against the order, this Court gave liberty to the appellants to approach the Commission for setting aside the ex parte order. Thereafter, an application was filed by the complainants for review of the order. The Commission vide order dated 12.7.2001 (relied on the judgment of *Jyotsana's case*) dismissed the application. Aggrieved by the said order, the appellant has filed this appeal.

32. Mr. M.S. Ganesh, learned senior counsel appearing on behalf of the appellants in Civil Appeal No.8155 of 2001 submitted that the National Commission has implied and inherent power to recall the order dated 30.5.1996 passed in Original Petition No.110 of 1993.

33. Mr. Ganesh also submitted that the notice of hearing sent by the National Commission was never served on the counsel for the appellants yet the National Commission

proceeded to an ex parte decision on the appellants' complaint and dismissed it on the ground of limitation.

34. According to Mr. Ganesh, the decision in *Jyotsana's* case is manifestly *per incuriam*. It does not even refer to the doctrine of implied powers and was not aware of its applicability. The later decision in *New India Assurance Co. Ltd.* is expressly mindful of the doctrine. He submitted that an external aid to the interpretation of the Consumer Protection Act, 1986 also reinforces the above construction of the Act.

35. We have carefully scrutinized the provisions of the Consumer Protection Act, 1986. We have also carefully analyzed the submissions and the cases cited by the learned counsel for the parties.

36. On careful analysis of the provisions of the Act, it is abundantly clear that the Tribunals are creatures of the Statute and derive their power from the express provisions of the Statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and power of review and the powers which have not been expressly given by the Statute cannot be exercised.

37. The legislature chose to give the National Commission power to review its ex parte orders. Before amendment, against dismissal of any case by the Commission, the consumer had to rush to this Court. The amendment in Section 22 and introduction of Section 22-A were done for the convenience of the consumers. We have carefully ascertained the legislative intention and interpreted the law accordingly.

38. In our considered opinion, the decision in Jyotsana's case laid down the correct law and the view taken in the later decision of this Court in New India Assurance Co. Ltd. is untenable and cannot be sustained.

39. In view of the legal position, in Civil Appeal No.4307 of 2007, the findings of the National Commission are set aside

as far as it has held that the State Commission can review its own orders. After the amendment in Section 22 and introduction of Section 22A in the Act in the year 2002 by which the power of review or recall has vested with the National Commission only. However, we agree with the findings of the National Commission holding that the Complaint No.473 of 1999 be restored to its original number for hearing in accordance with law.

40. There has been considerable delay in disposal of the complaint. Therefore, we direct the State Commission to dispose of the Complaint No.473 of 1999 [in Civil Appeal No.4307 of 2007] as expeditiously as possible and in any event within three months from the date of the communication of this order.

41. Similarly, in Civil Appeal No.8155 of 2001, we set aside the impugned order and direct the National Commission to dispose of the Original Petition No.110 of 2003 de novo as expeditiously as possible and in any event within three months from the date of the communication of this order.

42. Both the appeals are disposed of accordingly. The parties are directed to bear their own costs.

R.P. Appeals disposed of.

STATE OF U.P. & ORS.
v.
LUXMI KANT SHUKLA
(Civil Appeal No. 7105 of 2011)

AUGUST 19, 2011.

[R. V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

U. P. FUNDAMENTAL RULES, 1942:

F. R. 56 (c) and (d), proviso (i)(ii) proviso – Effect of notice for voluntary retirement given by employee to employer pending disciplinary proceedings – Held: Such notice would be effective only if it is accepted by the appointing authority – In the instant case, the officer gave notice for voluntary retirement during pendency of disciplinary proceedings against him – Since no order of acceptance was passed by the appointing authority, the officer continued in service even after the period of notice of three months expired in August 2009 and his services were terminated only with the order of dismissal passed on 07.09.2009 – Service Law.

The respondent, a member of the Provincial Civil Services of the State of U.P., was placed under suspension on 12.2.2008. On 19.2.2008, a charge-sheet containing 16 charges was served on him and an Inquiry Officer was appointed. On 28.5.2009, the respondent filed his reply to the charge-sheet to the Inquiry Officer and endorsed a copy thereof to the Principal Secretary (Appointment Section – II), Government of U.P. requesting him to exonerate him from the charges and instead grant him voluntary retirement from service under FR 56 of the U.P. Fundamental Rules, 1942. On 30.11.2009, the Inquiry Officer submitted his inquiry report to the State Government holding that the charges against the respondent were proved. By order dated 16.12.2009,

the respondent was intimated that his representation dated 5.10.2009 for voluntary retirement was not accepted by the Government. The respondent filed Civil Misc. W.P. No. 5 (SB) before the High Court for quashing the order dated 16.12.2009 and for directing the State Government to pay all his retirement benefits admissible under FR 56. By order dated 7.9.2010 the respondent was dismissed from service. The respondent challenged the said order in another CMWP No. 1386 (SB) of 2010. On 16.9.2010 the Division Bench of the High Court quashed the order dated 16.12.2009 by which the State Government had rejected the request of the respondent to accept his voluntary retirement and directed the Government to consider the respondent's request afresh. (The High Court did not interfere with the subsequent dismissal order dated 7.9.2010 pending consideration in CMWP No. 1386 (SB) of 2010.) Aggrieved, the State Government filed the appeal.

The question for consideration before the Court was: Whether the respondent stood voluntarily retired from service before the order of dismissal was passed by the State Government.

Allowing the appeal, the Court

HELD: 1.1 A reading of clause (c) of FR 56 would show that a government servant on attaining the age of 45 years, may by notice to the appointing authority, choose to voluntarily retire from service. Clause (d) of FR 56 further provides that the period of such notice shall be three months. However, the proviso after proviso (i) and (ii) to Clause (d), states that the notice given by the government servant against whom a disciplinary proceeding is pending or contemplated, shall be "effective only if it is accepted by the appointing authority." In this proviso, however, it is clarified that in the case of a "contemplated disciplinary proceeding" the

government servant shall be informed before the expiry of his notice period that it has not been accepted. [para 13] [542-E-H; 543-A]

1.2 In the instant case, the disciplinary proceeding was initiated against the respondent on 19.02.2008, when the charge sheet containing 16 charges was issued against him and the Enquiry Officer was appointed to enquire into the charges. It is only after the initiation of the disciplinary proceeding that the respondent made a request in the copy of his reply dated 28.05.2009 to the appointing authority to accept his retirement under Clause (c) of FR 56. Thus, even if the request of the respondent made on 28.05.2009 is treated as the notice of voluntary retirement, on 28.05.2009 a disciplinary proceeding was pending against him and as per the language of the proviso, such notice of voluntary retirement would be "effective only if it is accepted by the appointing authority". Therefore, until the appointing authority accepted the request of the respondent for voluntary retirement, the very notice dated 28.05.2009 for voluntary retirement would not be effective. Since, no such order of acceptance was passed by the appointing authority, the respondent continued in service even after the period of notice of three months expired in August 2009; and his services were terminated only with the order of dismissal passed on 07.09.2009. This is not a case of "a contemplated disciplinary proceeding", but a case of disciplinary proceeding which was already pending when the respondent made the request for voluntary retirement on 28.05.2009 and the finding of the High Court that the respondent was required to be informed before the expiry of his notice of voluntary retirement that it had not been accepted is erroneous. [paras 14, 15 and 17] [543-B-E-H; 544-A-B]

State of Haryana v. S.K.Singhal **1999 (2) SCR 714 = (1999) 4 SCC 293 – referred to.**

Union of India and Others v. Sayed Muzaffar Mir **1994 (3) Suppl. SCR 729 = 1995 Supp (1) SCC 76 – held inapplicable.**

1.3 The impugned judgment is set aside and the writ petition (C.M.W.P. No.05 (S/B) of 2010) challenging the rejection of respondent's request for voluntary retirement is dismissed. [para 18] [545-F]

Bishan Lal v. State of Haryana **(AIR 1977 P&H 7);** *Samsher Singh v. State of Punjab and Another* **1975 (1) SCR 814 = (1974) 2 SCC 831;** *Municipal Corporation, Ludhiana v. Inderjit Singh and Another* **2008 (14) SCR 95 = (2008) 13 SCC 506 – Cited.**

Case Law Reference:

(AIR 1977 P&H 7)	**Cited**	**para 9**
1994 (3) Suppl. SCR 729	**held inapplicable**	**para 10**
1975 (1) SCR 814	**Cited**	**para 11**
2008 (14) SCR 95	**Cited**	**para 11**
1999 (2) SCR 714	**Referred to**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7105 of 2011.

From the Judgment & Order dated 16.09.2010 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Civil Misc. Writ Petition No. 05 (S/B) of 2010.

P.P. Rao, Shail Kumar Dwivedi, AAG, Devender Upadhyaya, Gunnam Venkateswara Rao, Vandana Mishra, Manoj Kr. Dwivedi for the Appellants.

Caveator In Person.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Leave granted.

2. This is an appeal against the judgment and order dated 16.09.2010 of the Division Bench of the Allahabad High Court, Lucknow Bench, in Civil Miscellaneous Writ Petition No. 05 (S/B) of 2010 (hereinafter referred to as 'the impugned judgment').

3. The facts very briefly are that the respondent is a member of the Provincial Civil Services of the State of U.P. When he was posted as Special Secretary, Samaj Kalyan Department, Government of U.P. in 2006, he authored a book titled 'Jati Raj'. As the book contained some remarks against national leaders like late Dr. B.R. Ambedkar, the State Government issued a letter dated 11.09.2007 to the respondent when he was posted as Special Secretary, Dharmarth Karya Department, Government of U.P., requesting him to furnish to the Government a copy of the book. The respondent instead of furnishing a copy of the book proceeded on leave and on 12.02.2008 he was placed under suspension in contemplation of the disciplinary proceedings. On 19.02.2008, a charge-sheet containing 16 charges was served on him. The charges against the respondent were that certain passages in the book 'Jati Raj' written by him were defamatory and derogatory to national leaders and he had hurt the religious sentiments of the people and created hatred amongst various sections of the society. By order dated 19.02.2008, the State Government appointed Shri Vijay Shanker Pandey, the Commissioner, Lucknow Division, as the Enquiry Officer to enquire into the charges.

4. Aggrieved, the respondent filed Writ Petition No. 256 (SB) of 2008 before the Allahabad High Court, Lucknow Bench, and by an interim order dated 14.03.2008 the High Court stayed the operation of the order of suspension as well as the order appointing the Enquiry Officer. The State Government challenged the order dated 14.03.2008 of the High Court before this Court in Special Leave Petition (Civil) No. 12749 of 2008 and this Court, while issuing notice in Special Leave

Petition, stayed the operation of the order dated 14.03.2008 passed by the High Court. Thereafter, this Court by order dated 14.11.2008 disposed of the Special Leave Petition with a request to the High Court to dispose of the Writ Petition No. 256 (S/B) of 2008 expeditiously and with the direction that pending such disposal of the writ petition, the State Government was not to take any final decision imposing any penalty on the respondent. In the meanwhile, as the respondent did not submit his reply to the charge-sheet, the Enquiry Officer conducted the enquiry ex parte and submitted an enquiry report dated 15.07.2008 holding the respondent guilty of the charges. The disciplinary authority issued notice dated 05.08.2008 to the respondent to show cause why the enquiry report should not be accepted. On 01.05.2009, having found that the ex-parte enquiry was violative of principles of natural justice, the disciplinary authority passed an order directing the Enquiry Officer, Shri Vijay Shanker Pandey, to hold the enquiry afresh after giving sufficient opportunity of hearing to the respondent in accordance with the rules. Writ Petition No. 256 (SB) of 2008 was disposed of by the High Court on 15.05.2009 directing the Enquiry Officer to commence the proceedings afresh from the stage of charge-sheet. The respondent filed a Review Petition No. 115 of 2009, but the High Court dismissed the Review Petition on 26.05.2009.

5. The respondent then filed his reply to the charge-sheet on 28.05.2009 to the Enquiry Officer, Shri Vijay Shanker Pandey and endorsed a copy of the reply to the Principal Secretary (Appointment Section–II), Government of U.P. requesting him to exonerate him from the charges against him and instead grant voluntary retirement from service under Rule 56 of the U.P. Fundamental Rules, 1942 (for short 'FR 56'). As Shri Vijay Shanker Pandey declined to conduct the enquiry afresh, the State Government by its order dated 01.06.2009 appointed Shri Alok Ranjan, Principal Secretary, Urban Development, as the Enquiry Officer to enquire into the charges against the respondent. The respondent submitted his reply

to the charge sheet to the new Enquiry Officer, Shri Alok Ranjan on 11.06.2009 and after considering the reply of the respondent and the material available on record, the Enquiry Officer submitted his enquiry report on 30.11.2009 to the State Government holding that the charges against the respondent were proved. While the enquiry report was pending consideration before the State Government, the State Government first considered the request of the respondent in his representation dated 05.10.2009 for voluntary retirement and by order dated 16.12.2009 intimated the respondent that his request for voluntary retirement has not been accepted by the State Government.

6. Aggrieved, the respondent filed Civil Miscellaneous Writ Petition No. 5 (SB) of 2010 in the Allahabad High Court, Lucknow Bench for quashing the order dated 16.12.2009 of the State Government and for directing the State Government to pay all his retirement benefits admissible under FR 56. During the pendency of the Civil Miscellaneous Writ Petition No. 5 (SB) of 2010, the State Government issued a notice dated 05.02.2010 to the respondent to show cause why the enquiry report dated 30.11.2009 should not be accepted. The respondent submitted his reply dated 02.03.2010 to the show cause notice and also made a request for being given an opportunity of personal hearing. Personal hearing was granted to the respondent on 04.06.2010 and the respondent was dismissed from service by the disciplinary authority by order dated 07.09.2010. Aggrieved, the respondent filed Civil Miscellaneous Writ Petition No. 1386 (SB) of 2010 on 14.09.2010 before the Allahabad High Court, Lucknow Bench, against the order of dismissal and this Writ Petition is pending consideration before the High Court.

7. On 16.09.2010, the Division Bench of the High Court, by the impugned judgment, quashed the order dated 16.12.2009 of the State Government and rejected his request to accept voluntary retirement under FR 56 and directed the State Government to reconsider the respondent's request

afresh keeping in view the observations made in the impugned judgment. By the impugned judgment, however, the High Court did not in any way interfere with the subsequent order dated 07.09.2010 of the disciplinary authority dismissing the respondent from service as the order of dismissal was subject matter of challenge in a separate writ petition, Civil Miscellaneous Writ Petition No. 1386 (SB) of 2010, before the Allahabad High Court, Lucknow Bench.

8. Mr. P.P. Rao, learned counsel appearing for the appellants, submitted that under Clause (c) of FR 56, a government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of 45 years. He submitted that the respondent had not served any such notice to the State Government and had only sent to the State Government a copy of his reply dated 28.05.2009 to the Enquiry Officer, Shri Vijay Shanker Pandey, and made an endorsement at the foot of the reply to the Principal Secretary (Appointment Section-II), Government of U.P. that he may be retired from service under FR 56 and he may be granted all service and consequential benefits. He vehemently submitted that such endorsement on a copy of the reply with a request to the appointing authority to grant him voluntary retirement from service was not a notice of voluntary retirement in terms of FR 56. He next submitted that the proviso to Clauses (c) and (d) of FR 56 clearly provides that the notice given by the Government servant against whom a disciplinary proceeding is pending shall be effective only if it is accepted by the appointing authority and that the proviso does not require that where a disciplinary proceeding is pending against a Government servant, he should be informed of the decision on his request for voluntary retirement before expiry of the notice period. He argued that a close reading of the proviso would show that only where a disciplinary proceeding is contemplated against a Government servant, the Government servant has to be informed before the expiry of the notice period about the decision that his request for voluntary retirement has not been

accepted. He submitted that the High Court has, on the contrary, held in the impugned judgment that the respondent was required to be informed before the expiry of the period of notice about the decision that his request for voluntary retirement has not been accepted.

9. Mr. Rao next submitted that in any case the State Government as the appointing authority has considered the request of the respondent for voluntary retirement and rejected the same as would be evident from the relevant file and in particular the note dated 26.11.2009 put up by the Under Secretary, Appointment Department and dealt with by the Special Secretary of the Government on 27.11.2009 and by the Principal Secretary of the Department and the Chief Secretary, Government of U.P., on 02.12.2009 and orally approved by the Chief Minister on 08.12.2009 as recorded by the Special Secretary on 08.12.2009. He submitted that the High Court has, however, taken a view in the impugned judgment that as the Chief Minister has not put her signature in the order dated 08.12.2009 rejecting the request of the respondent for voluntary retirement, the order was not dully authenticated in terms of the Rules of Business. He cited the decision of the *Punjab and Haryana High Court in Bishan Lal v. State of Haryana* (AIR 1977 P&H 7) that an order cannot be called in question merely because the Chief Minister has not put his signature on the official file. He finally submitted that since the State Government has not accepted the request for voluntary retirement made by the respondent, the respondent continued in service till he was dismissed by the order dated 07.09.2010.

10. The respondent, who appeared in-person, on the other hand, submitted that in the copy of his reply dated 28.05.2009 to the Enquiry Officer, which was sent to the Principal Secretary, Appointment Section-II, Government of U.P., he had served a notice to the appointing authority that he may be retired under Clause (c) of FR 56, and all service and consequential benefits may be granted to him under Clause (e) of FR 56. He submitted that this was therefore a notice in terms of Clause

(c) of FR 56. He submitted that the High Court has rightly held in the impugned judgment that once the State Government as the appointing authority took a decision and treated the reminder of the respondent as a request for accepting his voluntary retirement, the State Government cannot now be permitted to take a stand that the request made by the respondent in the endorsement dated 28.05.2009 was not a notice of voluntary retirement. He further submitted that Clause (d) of FR 56 clearly provides that the period of notice would be three months. He argued that on the expiry of the three months period from 28.05.2009, the respondent stood compulsory retired from service. He submitted that the State Government should have informed him about its decision not to accept his voluntary retirement before the expiry of the period of three months notice served by the respondent. But the State Government did not communicate the decision to the respondent within the notice period of three months and therefore the respondent stood compulsory retired from service on expiry of the notice period and he was entitled to the pension and other retirement benefits in accordance with Clause (e) of FR 56. In support of his submissions, he cited the decision of this Court in *Union of India and Others v. Sayed Muzaffar Mir* [1995 Supp (1) SCC 76].

11. The respondent next submitted that admittedly the Chief Minister has not put her signature on the proposal not to accept his notice of voluntary retirement and therefore there is no decision of the State Government not to accept his notice of voluntary retirement. He vehemently argued that Article 166(3) of the Constitution of India provides that the Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of such business, and it does not contemplate delegation of the powers of the Ministers in favour of any officer of the State. He cited the decision of this Court in *Samsher Singh v. State of Punjab and Another* [(1974) 2 SCC 831] in support of this proposition. He also relied on *Municipal*

Corporation, Ludhiana v. Inderjit Singh and Another [(2008) 13 SCC 506] in which it has been held that a statutory authority cannot pass a statutory order on an oral prayer made by the owner of a property regarding compounding fee. He submitted that the contention of the appellants that the Chief Minister had orally approved the rejection of the notice of the voluntary retirement of the respondent should not therefore be accepted by the Court.

12. In our considered opinion, the answer to the question whether the respondent stood voluntary retired from service before the order of dismissal was passed by the State Government will depend mainly on the precise language of Clauses (c) and (d) of FR 56 and the provisos thereto, which are quoted hereinbelow:

> "(c) Notwithstanding anything contained in Clause (a) or Clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years.
>
> (d) The period of such notice shall be three months:
>
> Provided that-
>
> (i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement;

> (ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:
>
> *Provided further that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted*:
>
> Provided also that the notice once given by a Government servant under Clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority".
>
> (emphasis supplied)

13. A reading of clause (c) of FR 56 quoted above would show that when a government servant attains the age of 45 years, the appointing authority as well as the government servant have the option to initiate voluntary retirement and when the government servant chooses to initiate his voluntary retirement, he has to serve a notice to the appointing authority. Clause (d) of FR 56 further provides that the period of such notice shall be three months. There are, however, two provisos to Clause (d): proviso (i) and proviso (ii). These are not relevant for deciding this case. What is relevant is the proviso after proviso (i) and (ii) to Clause (d), which states that notice given by the government servant against whom a disciplinary proceeding is pending or contemplated, shall be "effective only if it is accepted by the appointing authority." In this proviso, however, it is clarified that in the case of a "contemplated disciplinary proceeding" the government servant shall be

informed before the expiry of his notice period that it has not been accepted.

14. In the facts of the present case, the disciplinary proceeding was initiated against the respondent on 19.02.2008, when the charge sheet containing 16 charges was issued against the respondent and when Shri Vijay Shanker Pandey, the Commissioner, Lucknow Division was appointed as the Enquiry Officer to enquire into the charges. It is only after the initiation of a disciplinary proceeding that the respondent made a request in the copy of his reply dated 28.05.2009 to the appointing authority to accept his retirement under Clause (c) of FR 56. Thus, even if we treat the request of the respondent made on 28.05.2009 as the notice of voluntary retirement, we find that on 28.05.2009 a disciplinary proceeding was pending against the respondent and as per the language of the proviso, such notice of voluntary retirement would be "effective only if it is accepted by the appointing authority". Therefore, until the appointing authority accepted the request of the respondent for voluntary retirement, the very notice dated 28.05.2009 for voluntary retirement would not be effective.

15. The High Court, however, has taken the view in the impugned judgment that it was incumbent upon the appointing authority to inform the respondent before the expiry of the notice period of three months that his request for voluntary retirement has not been accepted and the High Court has therefore directed that a fresh decision be taken by the State Government on the request of the respondent for voluntary retirement after it found that the Chief Minister had not put her signature in the order rejecting the request of the respondent for voluntary retirement. This view taken by the High Court, in our considered opinion, is contrary to the plain language of the proviso which states that in the case of "a contemplated disciplinary proceeding" the government servant shall be informed before the expiry of his notice that it has not been accepted. As we have already found, this is not a case of "a contemplated disciplinary proceeding", but a case of

disciplinary proceeding which was already pending when the respondent made the request for voluntary retirement on 28.05.2009 and the finding of the High Court that the respondent was required to be informed before the expiry of his notice of voluntary retirement that it had not been accepted is erroneous. In view of our finding that in a case where a disciplinary proceeding was pending, the relevant proviso to FR 56(c) and (d) does not require the decision of the appointing authority to be communicated to the Government servant before the expiry of the period of notice of voluntary retirement, it is not necessary for us to examine further whether the order dated 16.12.2009 rejecting the request of the respondent for voluntary retirement without the signature of the Chief Minister was valid or not.

16. The decision of this Court in *Union of India v. Sayed Muzaffar Mir* (supra) cited by the respondent does not apply to the facts of the present case. In that case, Rule 1802 (b) of the Indian Railway Establishment Code provided that the railway servant could retire voluntarily from service by serving three months notice and a railway servant by his letter dated 22.07.1985 gave a three months notice to the Railways to retire from service. After the three months period expired on 21.10.1985, the order of removal of the railway servant was passed on 04.11.1985. On these facts the Central Administrative Tribunal, New Mumbai Bench, held that since the period of notice of voluntary retirement had expired on 21.10.1985, the order of removal was nonest in the eye of law and this Court did not find any infirmity in the order of the Tribunal. In the present case, the relevant proviso to Clauses (c) and (d) of FR 56 was explicit that in case of a disciplinary proceeding which is pending, the notice of voluntary retirement cannot be "effective" until the appointing authority accepted the notice for voluntary retirement. We have already found that when the request for voluntary retirement was made by the respondent on 28.05.2009, the disciplinary proceeding was pending against him. Therefore, the notice of voluntary retirement was not effective until a positive order of acceptance

of the notice of voluntary retirement was passed by the State Government.

17. As has been held by this Court in *State of Haryana v. S.K.Singhal* [(1999) 4 SCC 293] cited by Mr. Rao, that if the right to voluntary retirement is conferred on the employee in absolute terms by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies, then voluntary retirement will come into effect automatically on the expiry of the period specified in the notice, but if such right to voluntary retirement of an employee, who is under suspension or who is facing disciplinary proceedings, is not conferred in absolute terms but is contingent upon the permission by the appointing authority, the notice of voluntary retirement does not take effect until a positive order is passed by the appointing authority. In this case, we have found that under the relevant proviso to Clauses (c) and (d) of FR 56, the right of a Government servant against whom a disciplinary proceeding is pending to voluntary retire from service is contingent upon the order of acceptance being passed by the appointing authority. Since, no such order of acceptance was passed by the appointing authority in the present case, the respondent continued in service even after the period of notice of three months expired in August 2009 and his services were terminated only with the order of dismissal passed on 07.09.2009.

18. In the result, the appeal is allowed and the impugned judgment is set aside and the writ petition (C.M.W.P. No.05 (S/B) of 2010) challenging the rejection of respondent's request for voluntary retirement is dismissed. There shall be no order as to costs.

R.P. Appeal allowed.

NATIONAL INSURANCE COMPANY LTD.
v.
KUSUMA AND ANR.
(Civil Appeal No. 7212 of 2011)

AUGUST 23, 2011

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

Motor Vehicles Act, 1988 – ss.166 and 168 – Assessment of quantum of compensation – Meaning of the word "just" as appearing in s.168 – Loss of foetus on account of injury sustained by the claimant-mother in an accident – Claim petition – Tribunal held that loss of foetus was akin to death of a child of tender age and awarded compensation of Rs.50,000/- towards loss of unborn child and a further sum of Rs.10,000/- towards pain and sufferings to the claimant – High Court enhanced compensation to a consolidated amount of Rs.1,80,000/- – On appeal, held: s.168 casts an obligation on the Claims Tribunal to determine the amount of compensation "which appears to it to be just" – Word "just" connotes something which is equitable, fair and reasonable, conforming to rectitude and justice and not arbitrary – Determination of "just" amount of compensation is beset with difficulties, more so when the deceased happens to be an infant/child – Though assessment of compensation in a case where the deceased is an infant involves a good deal of guesswork but it cannot be a wild guesswork – Some material has to be adduced by the claimants to prove that they entertained a reasonable expectation of pecuniary advantage from the deceased – In the instant case, neither the Tribunal nor the High Court applied any principle for determination of the amount of compensation on account of the death of a still born child – Besides, in the judgment of the High Court, there was no discussion on the question of non-pecuniary compensation awarded by the Tribunal to the claimant-mother

on account of pain and suffering as a result of death of the child – In the normal course, the matter would have been remanded back to the Tribunal for fresh consideration – However, on facts, it would be too harsh to direct the claimants to undergo the entire gamut of a fresh exercise under s.168 – Therefore, in the facts and circumstances of the case, judgment of High Court not interfered with.

The car in which respondent No.1 was travelling collided with a Bus owned by respondent No.2. Respondent no.1, who was 30 weeks pregnant, suffered a fatal blow on the stomach as a result of which, The following day she delivered a still born baby. Respondent no.1 filed claim petition under Section 166 of the Motor Vehicles Act, 1988 (for Short 'the Act') before the Motor Accident Claims Tribunal. The Tribunal held that loss of foetus on account of injury sustained by the claimant in the accident was akin to the death of a child of tender age and awarded compensation of Rs.50,000/- towards the loss of unborn child and a further sum of Rs.10,000/- towards pain and sufferings to the claimant, along with an interest @ 6% p.a. from the date of institution of the claim petition till the date of deposit/ payment. The appellant-Insurance Company was directed to pay the said compensation to the claimant-respondent no.1, in order to indemnify the owner of the car. Dissatisfied with the quantum of compensation awarded by the Tribunal, respondent no.1 filed an appeal before the High Court, seeking enhancement of the aforesaid compensation. The High Court enhanced the compensation to a consolidated amount of Rs.1,80,000/- with interest @ 6% per annum from the date of the petition till the date of payment.

In the instant appeal filed by the insurance company, the question which arose for consideration was whether the quantum of compensation determined by the High Court warranted interference by this Court.

Dismissing the appeal, the Court

HELD: 1.1. On receipt of an application for compensation made under Section 166 of the Motor Vehicles Act, 1988, Section 168 of the Act casts an obligation on the Motor Accident Claims Tribunal to determine the amount of compensation "which appears to it to be just". The expression "which appears to it to be just" gives a wide discretion to the Tribunal to determine the compensation which in the opinion of the Tribunal is "just". [Para 10] [553-D-E]

1.2. The word "just" connotes something which is equitable, fair and reasonable, conforming to rectitude and justice and not arbitrary. It may be true that Section 168 of the Act confers a wide discretion on the Tribunal to determine the amount of compensation but this discretion is also coupled with a duty to see that this exercise is carried out rationally and judiciously by accepted legal standards and not whimsically and arbitrarily, a concept unknown to public law. The amount of compensation awarded is not expected to be a windfall or bonanza for the victim or his dependent, as the case may be, but at the same time it should not be niggardly or a pittance. Thus, determination of "just" amount of compensation is beset with difficulties, more so when the deceased happens to be an infant/ child because the future of a child is full of glorious uncertainties. In the case of death of an infant many imponderables, like life expectancy of the deceased, his prospects to earn, save, spend and distribute have to be taken into account. It is quite possible that there may be no actual pecuniary benefit which may be derived by his parents during the life time of the child. But at the same time that cannot be a ground to reject the claim of the parents, albeit if they establish that they had reasonable expectation of pecuniary benefit if the child had lived. The question whether there exists a reasonable expectation of

pecuniary benefit is always a mixed question of fact and law but a mere speculative possibility of benefit is not sufficient. [Para 11] [556-A-F]

Helen C. Rebello & Ors. v. Maharashtra State Road Transport Corporation & Anr. **(1999) 1 SCC 90: 1998 (1) Suppl. SCR 684 – relied on.**

2. It is quite true that the question of assessment of compensation in a case where the deceased is an infant involves a good deal of guesswork but it cannot be a wild guesswork. Some material has to be adduced by the claimants to prove that they entertained a reasonable expectation of pecuniary advantage from the deceased. [Para 13] [555-F]

New India Assurance Company Ltd. v. Satender & Ors. **(2006) 13 SCC 60: 2006 (8) Suppl. SCR 745;** *Lata Wadhwa & Ors. v. State of Bihar & Ors.* **(2001) 8 SCC 197: 2001 (1) Suppl. SCR 578 and** *M.S. Grewal & Anr. v. Deep Chand Sood & Ors.* **(2001) 8 SCC 151: 2001 (2) Suppl. SCR 156 – referred to.**

3. In the instant case, neither the Tribunal nor the High Court applied any principle for determination of the amount of compensation on account of the death of a still born child. No reasons were indicated by the Tribunal while awarding a lump sum amount of Rs.50,000/- towards the loss of unborn child and Rs.10,000/- towards pain and suffering to the mother and by the High Court while enhancing the said amounts to a consolidated amount of Rs.1,80,000/-. Besides, in the impugned judgment of the High Court, there was no discussion on the question of non-pecuniary compensation awarded by the Tribunal to the claimant-mother on account of pain and suffering as a result of death of the child. In the normal course, this Court would have remanded the matter back to the Tribunal for fresh consideration.

However, bearing in mind the quantum of compensation awarded by the courts below and the fact that the accident took place in the year 1995, it is clear that at this juncture it would be too harsh to direct the claimants to undergo the entire gamut of a fresh exercise under Section 168 of the Act. Therefore, in the facts and circumstances of the case, this Court refrains from interfering with the impugned judgment. [Para 14] [556-B-F]

Case Law Reference:

2006 (8) Suppl. SCR 745 referred to	**Paras 6, 11**
1998 (1) Suppl. SCR 684 relied on	**Para 10**
2001 (1) Suppl.SCR 578 referred to	**Para 13**
2001 (2) Suppl.SCR 156 referred to	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7212 of 2011.

From the Judgment & Order dated 17.01.2008 of the High Court of Karnataka at Bangalore in MFA No. 2227 of 2006.

Gaurav Aggarwal (for Law Associates & Co.) for the Appellant.

U.U. Lalit, K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by

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

2. Challenge in this appeal, by special leave, is to the legality and validity of the judgment and order dated 17th January, 2008, delivered by the High Court of Karnataka at Bangalore, whereby the High Court has allowed the appeal preferred by respondent No.1 herein, enhancing the compensation awarded to her by the Motor Accident Claims

Tribunal (for short "the Tribunal") constituted under the Motor Vehicles Act, 1988 (for short "the Act") to Rs.1,80,000/- along with interest @ 6% per annum.

3. To appreciate the controversy, the factual matrix in a nutshell is as under :

On 28th June 1995, the car in which Mrs. Kusuma, respondent No.1 in this appeal (hereinafter referred to as "the claimant"), aged about 36 years, was travelling from Sullia to Puttur collided with a Bus owned by Karnataka State Road Transport Corporation, respondent No.2 herein. Due to the impact of the accident, the claimant and others sustained injuries. The claimant, who was 30 weeks pregnant, suffered a fatal blow on the stomach. She was admitted in the hospital, where an X-ray and scanning of the foetus showed that the baby had died inside the uterus. On an induced delivery, the following day she delivered a still born baby. The claimant filed a claim petition under Section 166 of the Act before the Tribunal, Mangalore, making a claim of Rs. 2,00,000/- with cost and interest at 12%, towards the expenses incurred on medical treatment, mental shock, pain and loss of child.

4. The Tribunal vide award dated 5th October 2004, inter alia, held that loss of foetus on account of injury sustained by the claimant in the accident was akin to the death of a child of a tender age. Relying on a decision of the Karnataka High Court, wherein the Court had awarded a compensation of Rs.25,000/- towards the loss of affection and Rs. 25,000/- towards the loss of estate on the death of a child of less than 1 year of age in an accident, the Tribunal allowed the claim in part and awarded a compensation of an amount of Rs.50,000/- towards the loss of unborn child and a further sum of Rs.10,000/- towards pain and sufferings to the claimant, along with an interest @ 6% per annum from 18th November 1995 i.e. the date of institution of the claim petition till the date of deposit/ payment. The Insurance Company, the appellant in this appeal, was directed to pay the said compensation to the claimant, in

order to indemnify the owner of the car. Claim petition against the owner of the Bus was rejected.

5. Dissatisfied with the quantum of compensation awarded by the Tribunal, the claimant filed an appeal before the High Court, seeking enhancement of the aforesaid compensation. Pertinently, the Insurance Company did not question the award.

6. Applying the principle indicated by this Court in *New India Assurance Company Ltd. Vs. Satender & Ors.*[1], in relation to assessment of quantum of compensation on the death of a child in an accident, the High Court, by a short judgment allowed the appeal in part and enhanced the compensation to a consolidated amount of `1,80,000/- with interest @ 6% per annum from the date of the petition till the date of payment.

7. Being aggrieved, the Insurance Company is before us in this appeal.

8. At the time of issuing notice to the respondents, at the first blush, it was felt that the appeal involved a very important question of law, namely, whether an unborn child (foetus) while still in mother's womb can be considered to be a child for the purpose of claiming compensation under Section 166 of the Act and, therefore, Mr. Uday U. Lalit, Senior Advocate, was requested to assist the Court as Amicus Curiae. Accordingly, we heard Mr. Gaurav Aggarwal, learned counsel appearing for the appellant and the learned Amicus Curiae on the said issue. However, having closely examined the fact-situation as emerging from the record, we are convinced that the appellant cannot be permitted to raise the aforesaid issue. In the present case, having chosen not to question the correctness of the award made by the Tribunal, determining the amount of compensation "towards the loss of unborn child", the appellant-Insurance Company is now estopped from contending that an unborn child cannot be considered to be a child for the purpose

1. (2006) 13 SCC 60.

of claiming compensation under Section 166 of the Act. It is manifest from the impugned judgment that the question for consideration before the High Court in claimant's appeal was with regard to the quantum of compensation and not the entitlement of claim for grievous injury to a 30 weeks old child in *utero* resulting in the birth of a still born child.

9. Thus, under the given circumstances, the question that survives for our consideration is whether the quantum of compensation determined by the High Court, at a lump sum amount of Rs. 1,80,000/-, for the loss of still born child, treating it as a child, and towards pain and sufferings to the respondent-claimant awarded by the Tribunal at Rs. 50,000/- and Rs.10,000/- respectively, warrants interference by this Court.

10. On receipt of an application for compensation made under Section 166 of the Act, Section 168 of the Act casts an obligation on the Tribunal to determine the amount of compensation "which appears to it to be just". The expression "which appears to it to be just" gives a wide discretion to the Tribunal to determine the compensation which in the opinion of the Tribunal is "just". Explaining the meaning of the word "just" as appearing in Section 110B of the Motor Vehicles Act, 1939, which was in pari materia with Section 168 of the Act, this Court in *Helen C. Rebello & Ors. Vs. Maharashtra State Road Transport Corporation & Anr.*[2] observed thus :

> "The word "just", as its nomenclature, denotes equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. Thus, this field of wider discretion of the Tribunal has to be within the said limitations and the limitations under any provision of this Act or any other provision having the force of law."

2. (1999) 1 SCC 90.

11. Thus, the word "just" connotes something which is equitable, fair and reasonable, conforming to rectitude and justice and not arbitrary. It may be true that Section 168 of the Act confers a wide discretion on the Tribunal to determine the amount of compensation but this discretion is also coupled with a duty to see that this exercise is carried out rationally and judiciously by accepted legal standards and not whimsically and arbitrarily, a concept unknown to public law. The amount of compensation awarded is not expected to be a windfall or bonanza for the victim or his dependent, as the case may be, but at the same time it should not be niggardly or a pittance. Thus, determination of "just" amount of compensation is beset with difficulties, more so when the deceased happens to be an infant/ child because the future of a child is full of glorious uncertainties. In the case of death of an infant many imponderables, like life expectancy of the deceased, his prospects to earn, save, spend and distribute have to be taken into account. It is quite possible that there may be no actual pecuniary benefit which may be derived by his parents during the life time of the child. But at the same time that cannot be a ground to reject the claim of the parents, albeit they establish that they had reasonable expectation of pecuniary benefit if the child had lived. The question whether there exists a reasonable expectation of pecuniary benefit is always a mixed question of fact and law but a mere speculative possibility of benefit is not sufficient. In *Satender & Ors.* (supra), relied upon by the High Court, while dealing with a claim for compensation under the Act in relation to the death of a nine year old child in a truck accident, this Court had observed as follows :

> "9. There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendor of the stars, beyond the reach of monetary tape-measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person.

The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents."

12. It was further observed that:

"In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

13. It is quite true, as observed in *Satender & Ors.* (supra), that the question of assessment of compensation in a case where the deceased is an infant involves a good deal of guesswork but in our view it cannot be a wild guesswork. As aforesaid, some material has to be adduced by the claimants to prove that they entertained a reasonable expectation of pecuniary advantage from the deceased. There are quite a few precedents providing guidelines for determination of compensation in such cases but because of nature of the order we propose to pass on facts in hand, we deem it unnecessary to burden the judgment by making a reference to all these cases, except to note that in *Lata Wadhwa & Ors. Vs. State of Bihar & Ors.*[3] as also in *M.S. Grewal & Anr. Vs. Deep Chand*

3. (2001) 8 SCC 197.

Sood & Ors.[4], wherein a large number of young school going children had lost their lives, respectively in fire and by drowning, multiplier method was adopted and applied for assigning value of future dependency to determine the quantum of compensation.

14. Having examined the instant case on the touchstone of the aforestated broad principles, we are of the opinion that neither the Tribunal nor the High Court applied any principle for determination of the amount of compensation on account of the death of a still born child. It is clear from a bare reading of the orders of the Tribunal and the High Court that no reasons have been indicated by the Tribunal while awarding a lump sum amount of `50,000/- towards the loss of unborn child and `10,000/- towards pain and suffering to the mother and by the High Court enhancing the said amounts to a consolidated amount of `1,80,000/-. Besides, in the impugned judgment, we do not find any discussion on the question of non-pecuniary compensation awarded by the Tribunal to the claimant-mother on account of pain and suffering as a result of death of the child. In the normal course, we would have remanded the matter back to the Tribunal for fresh consideration. However, bearing in mind the quantum of compensation awarded by the courts below and the fact that the accident took place in the year 1995, we are of the opinion that at this juncture it would be too harsh to direct the claimants to undergo the entire gamut of a fresh exercise under Section 168 of the Act. Therefore, in the facts and circumstances of the case, we refrain from interfering with the impugned judgment and dismiss the appeal accordingly, with no order as to costs.

15. Before concluding, we place on record our appreciation for the valuable assistance rendered by Mr. Uday U. Lalit, the learned Amicus Curiae.

B.B.B. Appeal dismissed.

4. (2001) 8 SCC 151.

INDERJIT SINGH GREWAL
v.
STATE OF PUNJAB & ANR.
(Criminal Appeal No. 1635 of 2011)

AUGUST 23, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Code of Criminal Procedure, 1973 – s. 482 – Parties obtained decree of divorce by mutual consent – Complaint filed by wife before the police under the Protection of Women from Domestic Violence Act, 2005 that the divorce decree was sham – Subsequently, criminal complaint also filed under the 2005 Act before another district – Meanwhile husband filed an application u/s. 482 Cr.P.C. for quashing the complaint – Subsequently, wife filed a civil suit for declaration that decree for divorce was null and void as it was obtained by fraud – During pendency, application by wife for grant of custody of minor child as also FIR lodged u/ss. 406, 376 and 120-B IPC – Application filed u/s. 482 for quashing the complaint dismissed by the High Court – On appeal, held: Wife herself had been a party to the alleged fraud committed by the husband upon the civil court for getting the decree of divorce and asked the criminal court to sit in appeal against the judgment and decree of the competent civil court – Complaint was filed before the Magistrate, Jalandhar while the decree of divorce had been granted by the District Judge, Ludhiana i.e. of another district – It cannot be understood as under what circumstances a subordinate criminal court can sit in appeal against the judgment and order of the superior civil court, having a different territorial jurisdiction – Decree of civil court for divorce still subsists – Suit to declare the said judgment and decree as a nullity is still pending consideration before the competent court – Permitting the Magistrate to proceed further with the complaint under the 2005 Act is not compatible and in consonance with the decree of divorce

which still subsists – It amounts to abuse of the process of the court – Impugned judgment and order is set aside – Complaint pending before the Magistrate, Jalandhar and all orders passed therein are quashed – Protection of Women from Domestic Violence Act, 2005.

Judgment/Order – Order obtained by making misrepresentation or playing fraud upon the competent authority – Sustainability of – Held: Such order cannot be sustained in the eyes of the law as fraud unravels everything – Fraud and justice never dwell together.

Judgment/Order – Setting aside of an order/decree, even if void or void ab initio – Held: Declaration has to be obtained from the competent court – It cannot be obtained in collateral proceedings.

Word and Phrases – Fraud – Meaning of.

Maxims – Allegans suam turpetudinem non est audiendus – Held: Person alleging his own infamy cannot be heard at any forum.

The marriage of appellant-husband and respondent No. 2-wife was dissolved by mutual consent. Thereafter, respondent No. 2 filed a complaint before the police against the appellant under the Protection of Women from Domestic Violence Act, 2005 alleging that the decree of divorce obtained by them was a sham transaction since even after divorce, both of them had been living together as husband and wife. In the enquiry conducted and the legal opinion sought it was opined that no case was made out against the appellant. Subsequently, respondent No. 2 filed a complaint under the 2005 Act and the Magistrate summoned the minor child of the parties for counselling. Aggrieved, the appellant filed an application u/s. 482 Cr.P.C. for quashing the said complaint. Meanwhile, respondent No. 2 filed a civil suit seeking declaration that the decree for divorce was null and void as it had been obtained by fraud. During

pendency of the suit, respondent No. 2 filed an application for grant of custody and guardianship of the minor child which is pending consideration; and also lodged an FIR u/ss. 406, 376 and 120-B IPC against the appellant and his mother and sister. Thereafter, the High Court dismissed the application filed by the appellant u/s. 482 Cr.P.C. for quashing the complaint. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Where a person gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eyes of the law as fraud unravels everything. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law". "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant). Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. Fraud and deception are synonymous. "Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine". An act of fraud on court is always viewed seriously. [Para 11] [570-G-H; 571-A-B]

Meghmala and Ors. v. G. Narasimha Reddy and Ors. **(2010) 8 SCC 383: 2010 (10) SCR 47 – relied on.**

1.2 For setting aside such an order, even if void, the party has to approach the appropriate forum. It is evident that even if a decree is void ab initio, declaration to that effect has to be obtained by the person aggrieved from the competent court. More so, such a declaration cannot be obtained in collateral proceedings. [Paras 12 and 14] [571-C-D; 572-C]

State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) and Ors. **AIR 1996 SC 906: 1995 (6) Suppl. SCR 139;** *Tayabbhai M. Bagasarwalla and Anr.*

v. Hind Rubber Industries Pvt. Ltd. **AIR 1997 SC 1240: 1997 (2) SCR 152 – relied on.**

Sultan Sadik v. Sanjay Raj Subba and Ors. **AIR 2004 SC 1377: 2004 (1) SCR 82;** *M. Meenakshi and Ors. v. Metadin Agarwal (dead) by Lrs. and Ors.* **(2006) 7 SCC 470: 2006 (5) Suppl. SCR 505;** *Sneh Gupta v. Devi Sarup and Ors.* **(2009) 6 SCC 194: 2009 (2) SCR 553 – referred to.**

1.3 A person alleging his own infamy cannot be heard at any forum as explained by the legal maxim "*allegans suam turpetudinem non est audiendus*". No one should have an advantage from his own wrong (*commondum ex injuria sua memo habere debet*). No action arises from an immoral cause (*ex turpi cause non oritur action*). Damage suffered by consent is not a cause of action (*volenti non fit injuria*). [Para 15] [572-E-F]

1.4 The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit offence. If more than one person combining both in intent and act, commit an offence jointly, each is guilty, as if he has done the whole act alone. Offence has been defined under Section 40 IPC and Section 43 IPC defines illegality. Making false statement on oath before the court is an offence under Section 191 IPC and punishable under Section 193 IPC. [Para 16] [572-G-H; 573-A]

Faguna Kanta Nath v. The State of Assam **AIR 1959 SC 673: 1959 Suppl. SCR 1;** *Jamuna Singh v. State of Bihar* **AIR 1967 SC 553: 1967 SCR 469 – relied on.**

2.1 In the instant case, respondent no.2 herself had been a party to the fraud committed by the appellant upon the civil court for getting the decree of divorce as alleged by her in the impugned complaint. Thus, according to her own admission she herself is an abettor to the crime and she made herself disentitled for any equitable relief. [Para 15] [572-D-F]

2.2 While granting the decree of divorce, the statement of respondent no.2 had been recorded in the first as well as in the second motion. Period of more than 6 months was given to her to think over the issue. However, she made a similar statement in the second motion as well. As per the statutory requirement, the purpose of second motion after a period of six months is that parties may make further efforts for reconciliation in order to save their marriage. There is also obligation on the part of the court under Section 23(2) of the Act 1955 to make every endeavour to bring about a reconciliation between the parties. [Paras 17 and 18] [573-B-C]

Jagraj Singh v. Birpal Kaur **AIR 2007 SC 2083:2007 (2) SCR 496;** *Smt. Sureshta Devi v. Om Prakash* **AIR 1992 SC 1304;** *Hitesh Bhatnagar v. Deepa Bhatnagar* **AIR 2011 SC 1637– referred to.**

2.3 Respondent no.2, who did not change her stand in the second motion and obtained a sham decree of divorce as alleged by her and asked the criminal court to sit in appeal against the judgment and decree of the competent civil court. The complaint was filed before the Magistrate, Jalandhar while the decree of divorce had been granted by the District Judge, Ludhiana i.e. of another district. Therefore, it is beyond imagination as under what circumstances a subordinate criminal court can sit in appeal against the judgment and order of the superior civil court, having a different territorial jurisdiction. [Para 21] [574-G-H; 575-A]

2.4 In the facts and circumstances of the case, the submission made on behalf of respondent No.2 that the judgment and decree of a civil court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by the respondent No.2 to declare the said judgment

and decree dated 20.3.2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the civil court subsists. On the similar footing, the submission even after the decree of divorce, they continued to live together as husband and wife and therefore, the complaint under the Act 2005 is maintainable, is not worth acceptance at this stage. [Para 22] [575-B-E]

D. Velusamy v. D. Patchaiammal **(2010) 10 SCC 469: 2010 (13) SCR 706;** *Savitaben Somabhai Bhatiya v. State of Gujarat and Ors.* **(2005) 3 SCC 636: 2005 (2) SCR 638– Distinguished**

Japani Sahoo v. Chandra Sekhar Mohanty **AIR 2007 SC 2762: 2007 (8) SCR 582;** *Noida Entrepreneurs Association v. Noida and Ors.* **(2011) 6 SCC 508 – referred to.**

2.5 In the instant case, the parties got married and the decree of civil court for divorce still subsists. More so, a suit to declare the said judgment and decree as a nullity is still pending consideration before the competent court. Permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of the instant case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same. [Para 25] [576-D-E]

2.6 The impugned judgment and order is set aside. Petition filed by the appellant under Section 482 Cr.P.C is allowed. The complaint pending before the Magistrate, Jalandhar and all orders passed therein are quashed. [Para 26] [576-F]

Case Law Reference:

2010 (10) SCR 47	**Relied on**	**Para 11**
1995 (6) Suppl. SCR 139	**Relied on**	**Para 12**
1997 (2) SCR 152	**Relied on**	**Para 12**
2004 (1) SCR 82	**Referred to**	**Para 13**
2006 (5) Suppl. SCR 505	**Referred to**	**Para 14**
2009 (2) SCR 553	**Referred to**	**Para 14**
1959 Suppl. SCR 1	**Relied on**	**Para 16**
1967 SCR 469	**Relied on**	**Para 16**
2007 (2) SCR 496	**Referred to**	**Para 18**
AIR 1992 SC 1304	**Referred to**	**Para 19**
AIR 2011 SC 1637	**Referred to**	**Para 20**
2010 (13) SCR 706	**Distinguished**	**Para 23**
2005 (2) SCR 638	**Distinguished**	**Para 23**
2007 (8) SCR 582	**Referred to**	**Para 24**
(2011) 6 SCC 508	**Referred to**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1635 of 2011.

From the Judgment & Order dated 09.08.2010 of the High Court of Punjab & Haryana at Chandigarh, in Criminal Misc. No. M-29339 of 2009 (O&M).

Ranjit Kumar, Gautam Godara, Ravindra Keshavrao Adsure for the Appellant.

Anil Grover, AAG, Manoj Swarup, Ankit Swarup, Preshit Surshe, Rohit Kumar Singh, Kavita Wadia, Noopur Singhal for the Respondents.

The Judgment of t he Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. The instant appeal reveals a very sorry state of affair where the wife files a criminal complaint before the competent court to initiate criminal proceedings against her husband alleging that they had obtained decree of divorce by playing fraud upon the court without realising that in such a fact-situation she herself would be an accomplice in the crime and equally responsible for the offence. More so, the appeal raises a substantial question of law as to whether the judgment and decree of a competent Civil Court can be declared null and void in collateral proceedings, that too, criminal proceedings.

3. This criminal appeal arises from the judgment and final order dated 9.8.2010 in Criminal Misc. No. M-29339 of 2009 (O&M) passed by the High Court of Punjab & Haryana at Chandigarh, by which the High Court has dismissed the application filed by the appellant under Section 482 of Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') for quashing the complaint No. 87/02/09 dated 12.6.2009 filed by respondent no. 2 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter called the 'Act 2005').

4. Facts and circumstances giving rise to present case are as under:

A. That the appellant and respondent no. 2 got married on 23.9.1998 at Jalandhar as per Sikh rites and from the said wedlock a son, namely, Gurarjit Singh was born on 5.10.1999. The parties to the marriage could not pull on well together because of temperamental differences and decided to get divorce and, therefore, filed HMA Case No. 168 of 19.9.2007 before the District Judge, Ludhiana under Section 13-B of Hindu Marriage Act, 1955 (hereinafter called the 'Act 1955') for dissolution of marriage by mutual consent. In the said case,

statements of appellant and respondent no. 2 were recorded on 19.9.2007 and proceedings were adjourned for a period of more than six months to enable them to ponder over the issue.

B. The parties again appeared before the court on 20.3.2008 on second motion and their statements were recorded and both of them affirmed that it was not possible for them to live together and, therefore, the learned District Judge, Ludhiana vide judgment and order dated 20.3.2008 allowed the said petition and dissolved their marriage.

C. Respondent no. 2 filed a complaint before Senior Superintendent of Police, Ludhiana against the appellant on 4.5.2009 under the provisions of the Act 2005 alleging that the decree of divorce obtained by them was a sham transaction. Even after getting divorce, both of them had been living together as husband and wife. She was forced to leave the matrimonial home. Thus, she prayed for justice. The said complaint was sent to SP, City-I, Ludhiana for conducting inquiry. The said SP, City-I conducted the full-fledged inquiry and submitted the report on 4.5.2009 to the effect that the parties had been living separately after divorce and, no case was made out against the present appellant. However, he suggested to seek legal opinion in the matter.

D. Accordingly, legal opinion dated 2.6.2009 was sought, wherein it was opined that the parties had obtained the divorce decree by mutual consent and the allegations made by respondent no. 2 against the appellant were false and baseless and the purpose of filing the complaint was only to harass the appellant.

E. Respondent no. 2 subsequently filed a complaint under the Act 2005 on 12.6.2009. The learned Magistrate issued the summons to the appellant on the same date. The Magistrate vide order dated 3.10.2009 summoned the minor child for counseling. The appellant, being aggrieved of the order of Ld. Magistrate dated 12.6.2009, filed application dated 13.10.2009 under Section 482 Cr.P.C. for quashing the complaint dated

12.6.2009.

F. In the meanwhile, respondent no. 2 filed Civil Suit on 17.7.2009 in the court of Civil Judge (Senior Division), Ludhiana, seeking declaration that the judgment and decree dated 20.3.2008, i.e. decree of divorce, was null and void as it had been obtained by fraud. The said suit is still pending.

G. Respondent no. 2 also filed application dated 17.12.2009 under Guardians and Wards Act, 1890 for grant of custody and guardianship of the minor child Gurarjit Singh and the same is pending for consideration before the Additional Civil Judge (Senior Division), Ludhiana.

H. Respondent no. 2 on 11.2.2010 also lodged an FIR under Sections 406, 498-A, 376, 120-B of the Indian Penal Code, 1860 (hereinafter called 'IPC') against the appellant and his mother and sister.

I. The High Court vide impugned judgment and order dated 9.8.2010 dismissed the application filed by the appellant.

Hence, this appeal.

5. Shri Ranjit Kumar, learned senior counsel appearing for the appellant has submitted that the High Court erred in rejecting the application of the appellant under Section 482 Cr.P.C., as none of the reliefs claimed by the respondent no.2 could be entertained by the criminal court while dealing with the complaint; the complaint itself is time barred, thus, the Magistrate Court could not take cognizance thereof. The complaint has been filed because of malice in order to extract money from the appellant. More so, the plea of fraud alleged by the respondent no.2 in the complaint for obtaining the decree of divorce before the Civil Court as per her own version, succinctly reveals that she herself had been a party to this fraud. The High Court failed to appreciate as to what extent her version could be accepted as she herself being the accomplice in the said offence of fraud committed upon the court. Even if the allegations made therein are true, she is equally liable for

punishment under Section 107 IPC. More so, the reliefs claimed by the respondent no. 2 in the civil suit for declaring the decree of divorce as null and void and in another suit for getting the custody of the child referred to hereinabove, would meet her requirements. Thus, the appeal deserves to be allowed.

6. On the contrary, Shri Manoj Swarup, learned counsel appearing for the respondent no.2 has vehemently opposed the appeal contending that decree of divorce is a nullity as it has been obtained by fraud. The relationship of husband and wife between the appellant and respondent no.2 still subsists and thus, complaint is maintainable. The court has to take the complaint on its face value and the allegations made in the complaint require adjudication on facts. The issue of limitation etc. can be examined by the Magistrate Court itself. The appeal lacks merit and is liable to be dismissed.

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

8. Before we proceed to determine the case on merit, it is desirable to highlight the *admitted facts of the case*:

I. Appellant and respondent no.2 are highly qualified persons. Both of them are employed and economically independent. Appellant is an Assistant Professor and respondent no. 2 is a Lecturer. The appellant is Ph.D and respondent no.2 has registered herself for Ph.D. They are competent to understand the complications of law and other facts prevailing in the case.

II. Both of them got married in year 1998 and had been blessed with a son in year 1999. There was no complaint by respondent no.2 against the appellant of any cruelty, demand of dowry etc. before getting the decree of divorce dated 20.3.2008 by mutual consent.

III. The decree of divorce has been obtained under Section 13-B of the Act 1955. Respondent no.2 was examined by the court on first motion on 19.9.2007 wherein she stated, *inter-*

alia, as under:

> *"We are living separately from each other since 23.9.2005. Now there is no chance of our living together as husband and wife."*

IV. Respondent no.2 was examined in the second motion by the learned District Judge, Ludhiana on 20.3.2008, wherein she stated as under:

> "My statement was recorded on 19.9.2007 alongwith the statement of my husband Inderjit Singh Grewal. Six months time was given to us to ponder over the matter but we could not reconcile. One child was born from our wedlock namely Gurarjit Singh Grewal whose custody has been handed over by me to my husband Inderjit Singh Grewal and he shall look after the welfare of the said child. We have settled all our disputes regarding dowry articles and past and future permanent alimony. Now there is nothing left out against each other. A draft of Rs.3,00,000/- ….has been received by me towards permanent alimony and maintenance and in lieu of dowry articles left by me in the matrimonial home. We are living separately since 23.9.2005. After that there is no co-habitation between us. There is no scope of our living together as husband and wife. I will remain bound by the terms and conditions as enshrined in the petition. I have left with no claim against petitioner No.1. Our marriage may be dissolved by passing a decree of divorce by mutual consent."

V. The learned District Judge, Ludhiana granted the decree of divorce dated 20.3.2008 observing as under:

> "They have settled all their disputes regarding dowry articles, past and future alimony….They are living separately from each other since 23.9.2005…The petitioners have not been able to reconcile….The petitioners have settled all their disputes regarding dowry, stridhan and past and future permanent alimony….The custody of the son of the petitioners is handed over to

Inderjit Singh Grewal by Amandeep Kaur. The petition is allowed. The marriage between the petitioners is henceforth declared dissolved…."

VI. The complaint dated 4.5.2009 filed by respondent no. 2 before the Senior Superintendent of Police, Ludhiana was investigated by the Superintendent of Police, City-I, Ludhiana. He recorded statements of several neighbours and maid servant working in appellant's house and submitted the report to the effect that as the husband and wife could not live together, they obtained the decree of divorce by mutual consent. However, the complainant Amandeep Kaur had alleged that she was induced by her husband to get divorce for settling in the United States and it was his intention to kick her out from the house. However, the husband stated that she had been paid Rs.3,00,000/- in the court by draft and Rs.27,00,000/- in cash for which the husband Inderjit Singh Grewal had entered into an agreement to sell his ancestral property. The complainant had not been living with the appellant after the decree of divorce and they were not having physical relationship with each other. It was further suggested in the report that legal opinion may also be taken.

VII. Legal opinion dated 2.6.2009 had been to the effect that the parties had taken divorce by mutual consent due to their differences. The allegation to the extent that they had been living together even after divorce were false and baseless and had been labelled only to harass the appellant.

9. The instant case is required to be considered in the aforesaid factual backdrop.

So far as the complaint dated 12.6.2009 is concerned, there had been allegation of mis-behaviour against the appellant during the period of year 2005. Respondent no. 2 alleged that during that period she had not been treated well by the appellant, thus, she had to take shelter in the house of her parents; all her belongings including the dowry articles were kept by the appellant and his parents. She has further given

details how both of them have obtained decree of divorce by mutual consent as they wanted to settle in United States and therefore, they had decided to get divorce on paper so that the appellant may go to U.S.A. and get American citizenship by negotiating a marriage of convenience with some U.S. citizen and divorce her and again re-marry the complainant. She further alleged that even after decree of divorce she had been living with the appellant till 7.2.2009 and continued co-habitation with him. They had visited several places together during this period. The child had been forcibly snatched from her by the appellant. Therefore, she was entitled to the custody of the minor child along with other reliefs.

10. The question does arise as to whether reliefs sought in the complaint can be granted by the criminal court so long as the judgment and decree of the Civil Court dated 20.3.2008 subsists. Respondent no.2 has prayed as under:

"*It is therefore prayed that the respondent no.1 be directed to hand over the custody of the minor child Gurarjit Singh Grewal forthwith. It is also prayed that the respondent no.1 be directed to pay to her a sum of Rs.15,000/- per month by way of rent of the premises to be hired by her at Ludhiana for her residence. It is also prayed that all the respondents be directed to restore to her all the dowry articles as detailed in Annexure A to C or in the alternative they be directed to pay to her a sum of Rs.22,95,000/- as the price of the dowry articles. Affidavit attached.*"

Thus, the reliefs sought have been threefolds:

(a) Custody of the minor son; (b) right of residence; and (c) restoration of dowry articles.

11. It is a settled legal proposition that where a person gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eyes of the law as fraud unravels everything. "Equity is always known to defend the law from crafty evasions

and new subtleties invented to evade law". It is a trite that "Fraud and justice never dwell together" *(fraus et jus nunquam cohabitant)*. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. Fraud and deception are synonymous. "Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine". An act of fraud on court is always viewed seriously. (Vide: *Meghmala & Ors. v. G. Narasimha Reddy & Ors.,* (2010) 8 SCC 383)

12. However, the question does arise as to whether it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent court.

The issue is no more *res integra* and stands settled by a catena of decisions of this Court. For setting aside such an order, even if void, the party has to approach the appropriate forum. (Vide: *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors.,* AIR 1996 SC 906; and *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd.,* AIR 1997 SC 1240).

13. In *Sultan Sadik v. Sanjay Raj Subba & Ors.,* AIR 2004 SC 1377, this Court held that there cannot be any doubt that even if an order is void or voidable, the same requires to be set aside by the competent court.

14. In *M. Meenakshi & Ors. v. Metadin Agarwal (dead) by Lrs. & Ors.,* (2006) 7 SCC 470, this Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is non-est/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The Court observed as under:–

"It is well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one

person but may be valid in respect of another. A void order is necessarily not non-est. *An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof."* **(**Emphasis added)

Similar view has been reiterated by this Court in *Sneh Gupta v. Devi Sarup & Ors.,* (2009) 6 SCC 194.

From the above, it is evident that even if a decree is *void ab initio,* declaration to that effect has to be obtained by the person aggrieved from the competent court. More so, such a declaration cannot be obtained in collateral proceedings.

15. Respondent no.2 herself had been a party to the fraud committed by the appellant upon the civil court for getting the decree of divorce as alleged by her in the impugned complaint. Thus, according to her own admission she herself is an abettor to the crime.

A person alleging his own infamy cannot be heard at any forum as explained by the legal maxim "*allegans suam turpetudinem non est audiendus".* No one should have an advantage from his own wrong (*commondum ex injuria sua memo habere debet).* No action arises from an immoral cause (*ex turpi cause non oritur action).* Damage suffered by consent is not a cause of action *(volenti non fit injuria).* The statements/allegations made by the respondent no.2 patently and latently involve her in the alleged fraud committed upon the court. Thus, she made herself disentitled for any equitable relief.

16. The offence of abetment is complete when the alleged abettor has instigated another or **engaged with another** in a conspiracy to commit offence. (Vide: *Faguna Kanta Nath v. The State of Assam,* AIR 1959 SC 673; and *Jamuna Singh v. State of Bihar* AIR 1967 SC 553). If more than one person combining both in intent and act, commit an offence jointly, each is guilty, as if he has done the whole act alone. Offence has been defined under Section 40 IPC and Section 43 IPC

defines illegality. Making false statement on oath before the court is an offence under Section 191 IPC and punishable under Section 193 IPC.

17. While granting the decree of divorce, the statement of respondent no.2 had been recorded in the first as well as in the second motion as mentioned hereinabove. Period of more than 6 months was given to her to think over the issue. However, she made a similar statement in the second motion as well.

18. As per the statutory requirement, the purpose of second motion after a period of six months is that parties may make further efforts for reconciliation in order to save their marriage. There is also obligation on the part of the court under Section 23(2) of the Act 1955 to make every endeavour to bring about a reconciliation between the parties.

In *Jagraj Singh v. Birpal Kaur,* AIR 2007 SC 2083, this Court held that conjugal rights are not merely creature of statute but inherent in the very institution of marriage. Hence, the approach of a court of law in matrimonial matters should be "much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire". The court should not give up the effort of reconciliation merely on the ground that there is no chance for reconciliation or one party or the other says that there is no possibility of living together. Therefore, it is merely a misgiving that the courts are not concerned and obligated to save the sanctity of the institution of marriage.

19. In *Smt. Sureshta Devi v. Om Prakash,* AIR 1992 SC 1304, this Court held that mere filing the petition for divorce by mutual consent does not authorise the court to make a decree for divorce. The interregnum waiting period from 6 to 18 months is obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The court must be satisfied about the *bona fides and the consent of the parties* for the reason that court gets

jurisdiction to make a decree for divorce only on mutual consent at the time of enquiry. The consent must continue to decree nisi and must be *valid* subsisting consent when the case is heard. Thus, *withdrawal of consent can be unilateral prior to second motion.* The Court further observed:

> *"The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living.* ***The parties may live under the same roof by force of circumstances****, and yet they may not be living as husband and wife. The. parties may be living in different houses and yet they could live as husband and wife. What seems to be necesssary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that* ***they have mutually agreed*** *that the marriage should be dissolved."* (Emphasis added)

20. For grant of divorce in such a case, the Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. (Vide: *Hitesh Bhatnagar v. Deepa Bhatnagar,* AIR 2011 SC 1637).

21. Respondent no.2, who did not change her stand in the second motion and obtained a sham decree of divorce as alleged by her asked the criminal court to sit in appeal against the judgment and decree of the competent Civil Court. The complaint was filed before the Magistrate, Jalandhar while the decree of divorce had been granted by the District Judge,

Ludhiana i.e. of another district. Therefore, it is beyond our imagination as under what circumstances a subordinate criminal court can sit in appeal against the judgment and order of the superior Civil Court, having a different territorial jurisdiction.

22. In the facts and circumstances of the case, the submission made on behalf of respondent no.2 that the judgment and decree of a Civil Court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by the respondent no.2 to declare the said judgment and decree dated 20.3.2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the Civil Court subsists. On the similar footing, the contention advanced by her counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the Act 2005 is maintainable, is not worth acceptance at this stage.

23. In *D. Velusamy v. D. Patchaiammal,* (2010) 10 SCC 469, this Court considered the expression "domestic relationship" under Section 2(f) of the Act 2005 placing reliance on earlier judgment in *Savitaben Somabhai Bhatiya v. State of Gujarat & Ors.,* (2005) 3 SCC 636 and held that relationship "in the nature of marriage" is akin to a common law marriage. However, the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage.

The said judgments are distinguishable on facts as those cases relate to live-in relationship without marriage. In the instant case, the parties got married and the decree of Civil Court for divorce still subsists. More so, a suit to declare the said judgment and decree as a nullity is still pending consideration before the competent court.

24. Submissions made by Shri Ranjit Kumar on the issue of limitation, in view of the provisions of Section 468 Cr.P.C., that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the Act 2005 read with Rule 15(6) of The Protection of Women from Domestic Violence Rules, 2006 which make the provisions of Cr.P.C. applicable and stand fortified by the judgments of this court in *Japani Sahoo v. Chandra Sekhar Mohanty,* AIR 2007 SC 2762; and *Noida Entrepreneurs Association v. Noida & Ors.,* (2011) 6 SCC 508.

25. In view of the above, we are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same.

26. The appeal succeeds and is allowed. The impugned judgment and order dated 9.8.2010 is hereby set aside. Petition filed by the appellant under Section 482 Cr.P.C. is allowed. Complaint No. 87/02/09 pending before the Magistrate, Jalandhar and all orders passed therein are quashed.

Before parting with the case, we clarify that respondent no.2 shall be entitled to continue with her other cases and the court concerned may proceed in accordance with law without being influenced by the observations made herein. The said observations have been made only to decide the application under Section 482 Cr.P.C. filed by the appellant.

N.J. Appeal allowed.