BALCHANDRA L. JARKIHOLI & ORS.
v .
B.S. YEDDYURAPPA & ORS.
(Civil Appeal Nos.4444-4476 of 2011)

MAY 13, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Constitution of India, 1950 – Tenth Schedule, Paragraph 2(1)(a) – Disqualification application against MLA on ground of defection – Manner of disposal by the Speaker – Challenge to – Tests of natural justice and fair play – Respondent no.1 was the Legislature Party Leader of BJP in the Karnataka Legislative Assembly, and also the Chief Minister of the State of Karnataka – 13 BJP MLAs including the appellants and two others-'MPR' and 'NN' wrote to the Governor of the State that they were withdrawing support to the Government led by Respondent no.1 – Governor asked Respondent no.1 to seek vote of confidence on the floor of the House, and also intimated the Speaker accordingly – Respondent no.1, as leader of the BJP Legislature Party in the Legislative Assembly, filed Disqualification application before the Speaker against all the said 13 MLAs – Speaker issued Show-Cause notices to all the said MLAs – Meanwhile 'MPR' and 'NN' retracted their stand, stating that they continued to support the Government led by Respondent no.1 – Also, 'KSE', State President of the BJP filed affidavit along with supporting documents, adverse to the interests of the appellants – Speaker disqualified the appellants reasoning that they had voluntarily given up their membership of the BJP by their acts and conduct, but did not disqualify 'MPR' and 'NN' taking note of the retraction made by them – Justification – Held: Except for the affidavit filed by 'KSE', State President of the B.J.P., and the statements of 'MPR' and 'NN', there was nothing on record in support of the allegations made in the

Disqualification application – No presumption could be drawn from the action of the appellants that they had voluntarily given up their membership of the BJP – All along the appellants emphasized their position that they not only continued to be members of the BJP, but were also willing to support any Government formed by the BJP headed by any leader, other than Respondent no.1, as the Chief Minister of the State – The Speaker acted in hot haste in disposing of the Disqualification application filed by Respondent no.1 – No convincing explanation was given as to why notices to show cause had been issued to the appellants under Rule 7 of the Disqualification Rules, giving the Appellants only three days' time to respond to the same, despite the stipulated time of seven days or more – The proceedings conducted by the Speaker did not meet the twin tests of natural justice and fair play – Procedure adopted by the Speaker seems to indicate that he was trying to ensure that the appellants stood disqualified prior to the date on which the Floor Test was to be held, so that they could not participate and, in their absence Respondent no.1 was able to prove his majority in the House – Also, although the same allegations, as were made against the Appellants by Respondent no.1, were also made against 'MPR' and 'NN', their retraction was accepted by the Speaker and they were, accordingly, permitted to participate in the Confidence Vote – The Speaker proceeded in the matter as if he was required to meet the deadline set by the Governor, irrespective of whether, in the process, he was ignoring the constitutional norms set out in the Tenth Schedule to the Constitution and the Disqualification Rules, and in contravention of the basic principles that go hand-in-hand with the concept of a fair hearing – Even if the Disqualification Rules were only directory in nature, sufficient opportunity should have been given to the Appellants to meet the allegations levelled against them – Affidavits, affirmed by 'KSE', 'MPR' and 'NN', were served on the Advocates appearing for the Appellants only on the date of hearing before

the Speaker and that too just before the hearing was to commence – Extraneous considerations writ large on the face of the order of the Speaker and therefore the same has to be set aside – Disqualification application filed by Respondent no.1 accordingly dismissed – Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986 – Rules 6 and 7.

Constitution of India, 1950 – Tenth Schedule, Paragraphs 2(1)(a) and 6 – Power of the superior Courts to judicially review order passed by Speaker under paragraph 2(1)(a) of the Tenth Schedule – Held: Under paragraph 2(1)(a) of the Tenth Schedule, the Speaker functions in a quasi-judicial capacity, which makes an order passed by him in such capacity, subject to judicial review – Judicial Review.

Constitution of India, 1950 – Tenth Schedule, Paragraph 5 – Object of – Held: The object behind the paragraph 5 is to ensure that the Speaker, while holding office, acts absolutely impartially, without any leaning towards any party, including the party from which he was elected to the House.

Respondent no.1 was the Legislature Party Leader of the Bharatiya Janata Party (BJP) in the Karnataka Legislative Assembly, and also the Chief Minister of the State of Karnataka.

On 6th October, 2010, 13 BJP MLAs of the Karnataka Legislative Assembly including the appellants and two others- MPR' and 'NN', wrote identical letters to the Governor of the State stating that they were withdrawing their support to the Government led by Respondent no.1. Five independent MLAs also withdrew support to the said Government. The same day, the Governor addressed letter to Respondent no.1 informing him of the developments regarding the withdrawal of support by 13 BJP MLAs and 5 independent MLAs and requesting

Respondent no.1 to seek vote of confidence on the floor of the House on or before 12th October, 2010 by 5 p.m. The Speaker was also requested accordingly.

On the very same day, Respondent no.1, as the leader of the BJP Legislature Party in the Karnataka Legislative Assembly, filed an application before the Speaker under Rule 6 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, praying to declare that all the said 13 MLAs elected on BJP tickets had incurred disqualification from the Legislative Assembly in view of the Tenth Schedule to the Constitution.

The Speaker issued Show-Cause notices to all the aforesaid 13 MLAs on 7th October, 2010, informing them of the Disqualification Application filed by Respondent no.1, but the appellants were not served with the notices directly. Instead the notices were pasted on the outer doors of their quarters in the MLA complex. Time was given to them till 5 p.m. on 10th October, 2010 (i.e. within 3 days), to submit their objections, if any, to the application.

The appellants made objections stating that the notice was in clear violation of the Disqualification Rules, 1986, especially Rules 6 and 7 thereof; that copies of the disqualification petition and annexures thereto were not forwarded with the Show-cause notice as required under the Rules; that the appellants ought to have been given a minimum notice period of 7 days' to reply and the Speaker could only extend the period of 7 days, but could not curtail the time from 7 days to 3 days. In addition, the appellants also sought to explain that they had chosen to withdraw their support only to the Government headed by Respondent no.1 as Chief Minister, as he was corrupt and encouraged corruption, and not to the BJP itself, which could form another Government which could be

led by any other person, other than Respondent no.1, to whom the Appellants would extend support. Accordingly, the appellants prayed for withdrawal of the Show-Cause notices and for dismissal of the petition dated 6th October, 2010 moved by Respondent no.1, alleging that the same was made with *mala fide* intention and the oblique motive of seeking their disqualification and thereby preventing them from voting on the confidence motion.

Meanwhile both 'MPR' and 'NN' retracted their stand, stating that they continued to support the Government led by Respondent no.1 and had no intention of withdrawing such support and accordingly prayed for withdrawal of any action proposed against them. Also, 'KSE', State President of the BJP filed affidavit along with supporting documents, which were adverse to the Appellants' interests.

The Speaker rejected the objections filed on behalf of Appellants and thereafter went on to disqualify the appellants under Paragraph 2(1)(a) of the Tenth Schedule with immediate effect stating that from the conduct of the Appellants in writing to the Governor that they had withdrawn support, joining hands with the leader of another party and issuing statements to the media, it was evident that the appellants had voluntarily given up the membership of the party from which they were elected. The Speaker then took note of the retraction by 'MPR' and 'NN', and arrived at the decision that the said two MLAs were not disqualified under the Tenth Schedule of the Constitution.

The Appellants filed writ petitions challenging the decision of the Speaker, which were listed before the Hon'ble Chief Justice of High Court and his companion Judge (Hon'ble Mr. Justice N. Kumar). On account of

difference of opinion between the Hon'ble Chief Justice and his companion Judge, the matter was referred to a third Judge who concurred with the decision rendered by the Chief Justice and as a result, per majority, the order passed by the Speaker was upheld by the High Court.

In the instant appeals, the questions which arose for consideration were:(a) Did the Appellants voluntarily give up their membership of the BJP; (b) Since only three days' time was given to the Appellants to reply to the Show-Cause notices, as against the period of 7 days or more, prescribed in Rule 7(3) of the Disqualification Rules, were the said notices vitiated; (c) Did the Speaker act in hot haste in disposing of the Disqualification Application filed by Respondent no.1 introducing a whiff of bias as to the procedure adopted and (d) What is the scope of judicial review of an order passed by the Speaker under Paragraph 2(1)(a) of the Tenth Schedule to the Constitution, having regard to the provisions of Article 212 thereof.

Allowing the appeals, the Court

HELD: 1.1. In the instant case, the Appellants had in writing informed the Governor on 6th October, 2010, that having become disillusioned with the functioning of the Government headed by Respondent no.1, they had chosen to withdraw support to the Government headed by Respondent no.1 and had requested the Speaker to intervene and institute the constitutional process as constitutional head of the State. The said stand was re-emphasized in their replies to the Show-Cause notices submitted by the Appellants on 9th October, 2010, wherein they had, *inter alia*, denied that their conduct had attracted the vice of "defection" within the scope of Paragraph 2(1)(a) of the Tenth Schedule. In their said

replies they had categorically indicated that nowhere in the letter of 6th October, 2010, had they indicated that they would not continue as Members of the Legislature Party of the BJP. On the other hand, they had reiterated that they would continue to support the BJP and any Government formed by the BJP headed by any leader, other than Respondent no.1, as Chief Minister of the State. They also reiterated that they would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka according to the Constitution of India and that it was only to save the party and Government and to ensure that the State was rid of a corrupt Chief Minister, that the letter had been submitted to the Governor on 6th October, 2010. The letter dated 6th October, 2010, written by the Appellants to the Governor clearly indicates that the authors thereof who had been elected as a MLA on a BJP ticket, having become disillusioned with the functioning of the Government headed by Respondent no.1 on account of widespread corruption, nepotism, favouritism, abuse of power and misuse of Government machinery, were convinced that a situation had arisen in which the governance of the State could not be carried on in accordance with the provisions of the Constitution and that Respondent no.1 had forfeited the confidence of the people. The letter further indicates that it was in the interest of the State and the people of Karnataka that the authors were expressing their lack of confidence in the Government headed by Respondent no.1 and that they were, accordingly, withdrawing their support to the Government headed by Respondent no.1 with a request to the Governor to intervene and institute the constitutional process as constitutional head of the State. [Paras 74, 75] [934-D-H; 935-A-E]

1.2. Although, the language used in the letter dated

6th October, 2010 was similar to the language used in Article 356 of the Constitution, but the same could not be said to be an explicit invitation to the Governor to take action in accordance with the said Article. The "constitutional process", as hinted at in the said letter did not necessarily mean the constitutional process of proclamation of President's rule, but could also mean the process of removal of the Chief Minister through constitutional means. On account thereof, the BJP was not necessarily deprived of a further opportunity of forming a Government after a change in the leadership of the legislature party. In fact, the same is evident from the reply given by the Appellants on 9th October, 2010, in reply to the Show-Cause notices issued to them, in which they had re-emphasized their position that they not only continued to be members of the BJP, but would also support any Government formed by the BJP headed by any leader, other than Respondent no.1, as the Chief Minister of the State. The conclusion arrived at by the Speaker does not find support from the contents of the said letter of 6th October, 2010, so as to empower the Speaker to take such a drastic step as to remove the Appellants from the membership of the House. [Para 76] [935-E-H; 936-A-B]

1.3. The Speaker concluded that by leaving Karnataka and going to Goa or to any other part of the country or by allegedly making statements regarding the withdrawal of support to the Government led by Respondent no.1 and the formation of a new Government, the Appellants had voluntarily given up their membership of the B.J.P. and were contemplating the formation of a Government excluding the BJP. The Speaker proceeded on the basis that the allegations must be deemed to have been proved, even in the absence of any corroborative evidence, simply because the same had not been denied by the Appellants. The Speaker apparently did not take

into consideration the rule of evidence that a person making an allegation has to prove the same with supporting evidence and the mere fact that the allegation was not denied, did not amount to the same having been proved on account of the silence of the person against whom such allegations are made. Except for the affidavit filed by 'KSE', State President of the B.J.P., and the statements of two of the thirteen MLAs, who had been joined in the Disqualification Application, there is nothing on record in support of the allegations which had been made therein. Significantly, the said affidavits had not been served on the Appellants. Since 'KSE' was not a party to the proceedings, the Speaker should have caused service of copies of the same on the Appellants to enable them to meet the allegations made therein. Not only did the Speaker's action amount to denial of the principles of natural justice to the Appellants, but it also reveals a partisan trait in the Speaker's approach in disposing of the Disqualification Application filed by Respondent no.1. If the Speaker wished to rely on the statements of a third party which were adverse to the Appellants' interests, it was obligatory on his part to have given the Appellants an opportunity of questioning the deponent as to the veracity of the statements made in the affidavit. This conduct on the part of the Speaker is also indicative of the "hot haste" with which the Speaker disposed of the Disqualification Petition as complained of by the Appellants. The question does, therefore, arise as to why the Speaker did not send copies of the affidavit affirmed and filed by 'KSE' as also the affidavits of the two MLAs, who had originally withdrawn support to the Government led by Respondent no.1, but were later allowed to retract their statements, to the Appellants. Given an opportunity to deal with the said affidavits, the Appellants could have raised the question as to why the said two MLAs, 'MPR' and 'NN' , were treated differently

on account of their having withdrawn the letters which they had addressed to the Governor, while, on the other hand, disqualifying the Appellants who had written identical letters to the Governor, upon holding that they had ceased to be members of the BJP, notwithstanding the Show-Cause notices issued to them. The explanation given as to why notices to show cause had been issued to the Appellants under Rule 7 of the Disqualification Rules, giving the Appellants only three days' time to respond to the same, despite the stipulated time of seven days or more indicated in Rule 7(3) itself, is not very convincing. There was no compulsion on the Speaker to decide the Disqualification Application filed by Respondent no.1 in such a great hurry within the time specified by the Governor to the Speaker to conduct a Vote of Confidence in the Government headed by Respondent no.1. Apparently, such a course of action was adopted by the Speaker on 10th October, 2010, since the Vote of Confidence on the Floor of the House was slated for 12th October, 2010. The element of hot haste is also evident in the action of the Speaker in this regard as well. [Para 77] [936-C-H; 937-A-H; 938-A]

1.4. Even if Rules 6 and 7 of the Disqualification Rules are taken as directory and not mandatory, the Appellants were still required to be given a proper opportunity of meeting the allegations mentioned in the Show-Cause notices. The fact that the Appellants had not been served with notices directly, but that the same were pasted on the outer doors of their quarters in the MLA complex and that too without copies of the various documents relied upon by Respondent no.1, giving them three days' time to reply to the said notices justifies the Appellants' contention that they had not been given sufficient time to give an effective reply to the Show-Cause notices. Furthermore, the Appellants were not served with copies of the affidavit filed by 'KSE' , although, the Speaker relied

heavily on the contents thereof in arriving at the conclusion that the Appellants stood disqualified under paragraph 2(1)(a) of the Tenth Schedule to the Constitution. Likewise, the Appellants were also not supplied with the copies of the affidavits filed by 'MPR' and 'NN' , whereby they retracted the statements which they had made in their letters submitted to the Governor on 6th October, 2010. The Speaker not only relied upon the contents of the said affidavits, but also dismissed the Disqualification Application against them on the basis of such retraction, after having held in the case of the Appellants that the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution were attracted immediately upon their intention to withdraw their support to the Government led by Respondent no.1. The Speaker ignored the claim of the Appellants to be given reasonable time to respond to the Show-Cause notices and also to the documents which were handed over to the Advocates of the Appellants at the time of hearing of the Disqualification Application. Incidentally, a further incidence of partisan behaviour on the part of the Speaker will be evident from the fact that not only were the Appellants not given an adequate opportunity to deal with the contents of the affidavits affirmed by 'KSE', 'MPR' and 'NN' , but the time given to submit the Show-Cause on 10th October, 2010, was preponed from 5.00 p.m. to 3.00 p.m., making it even more difficult for the Appellants to respond to the Show-Cause notices in a meaningful manner. The explanation given by the Speaker that the Appellants had filed detailed replies to the Show-Cause notices does not stand up to the test of fairness when one takes into consideration the fact that various allegations had been made in the three affidavits filed by 'KSE', 'MPR' and 'NN' , which could only be answered by the Appellants themselves and not by their Advocates. [Paras 84, 85] [943-A-H; 944-A-C]

1.5. The procedure adopted by the Speaker seems to indicate that he was trying to meet the time schedule set by the Governor for the trial of strength in the Assembly and to ensure that the Appellants and the other independent MLAs stood disqualified prior to the date on which the Floor Test was to be held. Having concluded the hearing on 10th October, 2010, by 5.00 p.m., the Speaker passed a detailed order in which various judgments, both of Indian Courts and foreign Courts, and principles of law from various authorities were referred to, on the same day, holding that the Appellants had voluntarily given up their membership of the BJP by their acts and conduct which attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, whereunder they stood disqualified. The Vote of Confidence took place on 11th October, 2010, in which the disqualified members could not participate and, in their absence Respondent no.1was able to prove his majority in the House. [Para 86] [944-E-G]

1.6. Unless it was to ensure that the Trust Vote did not go against the Chief Minister, there was no conceivable reason for the Speaker to have taken up the Disqualification Application in such a great hurry. Although, in *Mahachandra Prasad Singh's* **case and in** *Ravi S. Naik's* **case, this Court had held that the Disqualification Rules were only directory and not mandatory and that violation thereof amounted to only procedural irregularities and not violation of a constitutional mandate, it was also observed in** *Ravi S. Naik's* **case that such an irregularity should not be such so as to prejudice any authority who is affected adversely by such breach. In the instant case, it was a matter of survival as far as the Appellants were concerned. In such circumstances, they deserved a better opportunity of meeting the allegations made against them, particularly when except for the newspaper cuttings said to have**

been filed by Respondent no.1 along with the Disqualification Application, there was no other evidence at all available against the Appellants. [Para 87] [944-H; 945-A-C]

1.7. In the present case, the Disqualification Application filed by Respondent no.1contained only bald allegations, which were not corroborated by any direct evidence. The application did not even mention the provision under which the same had been made. By allowing 'KSE', who was not even a party to the proceedings, and 'MPR' and 'NN' to file their respective affidavits, the short-comings in the Disqualification Application were allowed to be made up. The Speaker, however, relied on the same to ultimately declare that the Appellants stood disqualified from the membership of the House, without even serving copies of the same on the Appellants, but on their Advocates, just before the hearing was to be conducted. If one were to take a realistic view of the matter, it was next to impossible to deal with the allegations at such short notice. [Para 88] [945-D-H; 946-A-C]

1.8. Also, although the same allegations, as were made against the Appellants by Respondent no.1, were also made against 'MPR' and 'NN', their retraction was accepted by the Speaker, despite the view expressed by him that upon submitting the letter withdrawing support to the BJP Government led by Respondent no.1, all the MLAs stood immediately disqualified under paragraph 2(1)(a) of the Tenth Schedule to the Constitution, and they were, accordingly, permitted to participate in the Confidence Vote for reasons which are not required to be spelt out. [Para 89] [946-D-E]

Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council & Ors. **(2004) 8 SCC 747: 2004 (5) Suppl. SCR 692;** *Ravi S. Naik v. Union of India* **(1994) Suppl.2 SCC 641: 1994 (1) SCR 754 and** *Jagjit Singh v. State of Haryana* **(2006) 11 SCC 1: 2006 (10) Suppl. SCR 521 – distinguished.**

Rajendra Singh Rana & Ors. Vs. Swami Prasad Maurya & Ors. **(2007) 4 SCC 270: 2007 (2) SCR 591;** *Kihoto Hollohan Vs. Zachillhu & Ors.* **(1992) Supp.2 SCC 651: 1992 (1) SCR 686;** G. *Viswanathan Vs. Hon'ble Speaker Tamil Nadu Legislative Assembly, Madras & Anr.* **(1996) 2 SCC 353: 1996 (1) SCR 895;** *S. Partap Singh Vs. State of Punjab* **(1964) 4 SCR 733;** *State of M.P. Vs. Ram Singh* **(2000) 5 SCC 88: 2000 (1) SCR 579;** *B.R. Kapur Vs. State of T.N.* **(2001) 7 SCC 231: 2001 (3) Suppl. SCR 191;** *Nazir Ahmad Vs. King Emperor* **63 Indian Appeals 372;** *State of U.P. Vs. Singhara Singh* **(1964) 4 SCR 485;** *Union of India v. Tulsiram Patel* **(1985) 3 SCC 398: 1985 (2) Suppl. SCR 131;** *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad* **(2005) 11 SCC 314: 2005 (1) SCR 624;** *E.P. Royappa Vs. State of Tamil Nadu* **(1974) 4 SCC 3: 1974 (2) SCR 348 – referred to.**

2. On the question of justiceability of the Speaker's order on account of the expression of finality in paragraph 6 of the Tenth Schedule to the Constitution, it has now been well-settled that such finality did not include the powers of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker. Under paragraph 2(1)(a) of the Tenth Schedule, the Speaker functions in a quasi-judicial capacity, which makes an order passed by him in such capacity, subject to judicial review. The scope of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, therefore, enables the Speaker in a quasi-judicial capacity to declare that a Member of the House stands disqualified for the reasons mentioned in paragraph 2(1)(a) of the Tenth Schedule to the Constitution. [Para 90] [946-F-H; 947-A]

3. The proceedings conducted by the Speaker on the Disqualification Application filed by Respondent no.1do not meet the twin tests of natural justice and fair play. The Speaker proceeded in the matter as if he was required to meet the deadline set by the Governor, irrespective of whether, in the process, he was ignoring the constitutional norms set out in the Tenth Schedule to the Constitution and the Disqualification Rules, 1986, and in contravention of the basic principles that go hand-in-hand with the concept of a fair hearing. [Para 91] [947-B-D]

4. Even if the Disqualification Rules were only directory in nature, even then sufficient opportunity should have been given to the Appellants to meet the allegations levelled against them. The fact that the Show-Cause notices were issued within the time fixed by the Governor for holding the Trust Vote, may explain service of the Show-Cause notices by affixation at the official residence of the Appellants, though without the documents submitted by Respondent no.1 along with his application, but it is hard to explain as to how the affidavits, affirmed by 'KSE', 'MPR' and 'NN' , were served on the Advocates appearing for the Appellants only on the date of hearing and that too just before the hearing was to commence. Extraneous considerations are writ large on the face of the order of the Speaker and the same has to be set aside. [Para 92] [947-E-G]

5. In paragraph 5 of the Tenth Schedule, which was introduced into the Constitution by the Fifty-second Amendment Act, 1985, to deal with the immorality of defection and Floor crossing during the tenure of a legislator, it has been indicated that notwithstanding anything contained in the said Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy

Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of the State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under the Schedule if he by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election, and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party. The object behind the said paragraph is to ensure that the Speaker, while holding office, acts absolutely impartially, without any leaning towards any party, including the party from which he was elected to the House. [Para 93] [947-H; 948-A-D]

6. The order of the Speaker dated 10th October, 2010, disqualifying the Appellants from the membership of the House under paragraph 2(1)(a) of the Tenth Schedule to the Constitution is set aside along with the majority judgment delivered by the High Court in the Writ Petitions, and the portions of the judgment delivered by Hon'ble Justice N. Kumar concurring with the views expressed by the Hon'ble Chief Justice of the High Court, upholding the decision of the Speaker on the Disqualification Application filed by Respondent no.1. Consequently, the Disqualification Application filed by Respondent no.1 is dismissed. [Para 94] [948-E-F]

Case Law Reference:

1994 (1) SCR 754	**distinguished**	**Paras 13,19,20, 37,51,53, 54, 67,72,81,83,87**
2006 (10) Suppl. SCR 521	**distinguished**	**Paras 14,53, 59,88**
2007 (2) SCR 591	**referred to**	**Paras 15,24, 48,56,59**

2004 (5) Suppl. SCR 692	**distinguished**	**Paras 19,78, 79,80,84,87**
1992 (1) SCR 686	**referred to**	**Paras 24,30,38,47, 50,51,52, 54,61,72**
1996 (1) SCR 895	**referred to**	**Para 24**
2004 (5) Suppl. SCR 692	**referred to**	**Paras 24,37,47, 48,52, 54,67**
(1964) 4 SCR 733	**referred to**	**Para 24**
2000 (1) SCR 579	**referred to**	**Para 41**
2001 (3) Suppl. SCR 191	**referred to**	**Para 41**
63 Indian Appeals 372	**referred to**	**Para 41**
(1964) 4 SCR 485	**referred to**	**Para 41**
1985 (2) Suppl. SCR 131	**referred to**	**Para 43**
2005 (1) SCR 624	**referred to**	**Para 55**
1974 (2) SCR 348	**referred to**	**Para 55**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4444-4476 of 2011.

From the Judgment & Order dated 15.11.2010 of the Division Bench of High Court of Karnataka at Bangalore in Writ Petition Nos. 32660-32670 of 2010.

WITH

C.A. Nos. 4522-4544 of 2011

C.A. Nos. 4477-4509 of 2011

Soli J. Sorabje and P.P. Rao, Jayashree Wad, Ashish Wad, Tamali Wad, Sameer Abhyankar, Dipti Shikhar Srivastava

(for J.S. Wad & Co.) Prashant Kumar, Mahalaxmi Pavani, Triveni Poteker, Bimala Devi, Purushottam Sharma Tripathi, Apeksha Sharan, A.S. Ponnanna, A.P. Ranganatha (for Ajay Sharma), Temple Law Firm, Bhupender Yadav, S.S. Shamshery, Vikramjit Banejet, Pruhsh Kapur and S.N. Bhat for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. All the above-mentioned appeals arise out of the order dated 10th October, 2010, passed by the Speaker of the Karnataka State Legislative Assembly on Disqualification Application No.1 of 2010, filed by Shri B.S. Yeddyurappa, the Legislature Party Leader of the Bharatiya Janata Party in Karnataka Legislative Assembly, who is also the Chief Minister of the State of Karnataka, on 6th October, 2010, under Rule 6 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, against Shri M.P. Renukacharya and 12 others, claiming that the said respondents, who were all Members of the Karnataka Legislative Assembly, would have to be disqualified from the membership of the House under the Tenth Schedule of the Constitution of India. In order to understand the circumstances in which the Disqualification Application came to be filed by Shri Yeddyurappa for disqualification of the 13 named persons from the membership of the Karnakata Legislature, it is necessary to briefly set out in sequence the events preceding the said application.

3. On 6th October, 2010, all the above-mentioned 13 members of the Karnataka Legislative Assembly, belonging to the Bharatiya Janata Party, hereinafter referred to as the "MLAs", wrote identical letters to the Governor of the State indicating that they had been elected as MLAs on Bharatiya Janata Party tickets, but had become disillusioned with the functioning of the Government headed by Shri B.S.

Yeddyurappa and were convinced that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution and that Shri Yeddyurappa had forfeited the confidence of the people as the Chief Minister of the State. Accordingly, in the interest of the State and the people of Karnataka, the legislators expressed their lack of confidence in the Government headed by Shri B.S. Yeddyurappa and withdrew their support to the said Government. The contents of one of the aforesaid letters dated 6th October, 2010, are reproduced hereinbelow :

"His Excellency,

I was elected as an MLA on BJP ticket. I being an MLA of the BJP got disillusioned with the functioning of the Government headed by Shri B.S. Yeddyurappa. There have been widespread corruption, nepotism, favouritism, abuse of power, misusing of government machinery in the functioning of the government headed by Chief Minister Shri B.S. Yeddyurappa and a situation has arisen that the governance of the State cannot be carried on in accordance with the provisions of the Constitution and Shri Yeddyurappa as Chief Minister has forfeited the confidence of the people. In the interest of the State and the people of Karnataka I hereby express my lack of confidence in the government headed by Shri B.S. Yeddyurappa and as such I withdraw my support to the Government headed by Shri B.S. Yeddyurappa the Chief Minister. I request you to intervene and institute the constitutional process as constitutional head of the State.

With regards,

I remain
Yours faithfully,

Shri H.R. Bharadwaj,
His Excellency Governor of Karnataka,
Raj Bhavan, Bangalore."

Five independent MLAs also expressed lack of confidence and withdrew support to the Government led by Shri B.S. Yeddyurappa.

4. On the basis of the aforesaid letters addressed to him, the Governor addressed a letter to the Chief Minister, Shri B.S. Yeddyurappa, on the same day (6.10.2010) informing him that letters had been received from 13 BJP MLAs and 5 independent MLAs, withdrawing their support to the Government. A doubt having arisen about the majority support enjoyed by the Government in the Legislative Assembly, the Governor requested Shri Yeddyurappa to prove that he still continued to command the support of the majority of the Members of the House by introducing and getting passed a suitable motion expressing confidence in his Government in the Legislative Assembly on or before 12th October, 2010 by 5 p.m. In his letter he indicated that the Speaker had also been requested accordingly. On the very same day, Shri B.S. Yeddyurappa, as the leader of the BJP Legislature Party in the Karnataka Legislative Assembly, filed an application before the Speaker under Rule 6 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, being Disqualification Application No.1 of 2010, praying to declare that all the said thirteen MLAs elected on BJP tickets had incurred disqualification in view of the Tenth Schedule to the Constitution.

5. As will appear from the materials on record, Show-Cause notices were thereafter issued to all the 13 MLAs on 7th October, 2010, informing them of the Disqualification Application filed by Shri Yeddyurappa stating that having been elected to the Assembly as Members of the BJP, they had unilaterally submitted a letter on 6th October, 2010 to the Governor against his Government withdrawing the support given to the Government under his leadership. The Appellants were informed that their act was in violation of paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India and it disqualified

them from continuing as Members of the Legislature. Time was given to the Appellants till 5 p.m. on 10th October, 2010, to submit their objections, if any, to the application. They were also directed to appear in person and submit their objections orally or in writing to the Speaker, failing which it would be presumed that they had no explanation to offer and further action would thereafter be taken ex-parte, in accordance with law.

6. It also appears that replies were submitted by the Appellants to the Speaker on 9th October, 2010 indicating that having come to learn from the media that a Show-Cause notice had been issued as per the orders of the Speaker and had been pasted on the doors of the MLA quarters in the MLA hostels at Bangalore, which were locked and used by the legislators only when the House was in session, they had the contents of the notices read out to them on the basis whereof interim replies to the Show-Cause notices were being submitted. In the interim replies filed by the Appellants on 9th October, 2010, it was categorically indicated that the interim reply was being submitted, without prejudice and by way of abundant caution, as none of the documents seeking disqualification had either been pasted on the doors of the MLA quarters or forwarded to the Appellants along with the Show-Cause notice. Similarly, a copy of the Governor's letter, which was made an enclosure to the Show-Cause notice, was also not pasted on the doors of the residential quarters of the Appellants or otherwise served on them personally. A categorical request was made to the Speaker to supply the said documents and the Appellants reserved their right to give exhaustive replies after going through the aforesaid enclosures to the Show-Cause notice as and when supplied.

7. Having said this, the Appellants submitted that the notice was in clear violation of the Disqualification Rules, 1986, and especially Rules 6 and 7 thereof. It was mentioned that Rule 7(3) requires copies of the petition and annexures thereto to be forwarded with the Show-Cause notice. The notice dated 7th October, 2010 called upon the Appellants to appear and

reply by 5 p.m. on 10th October, 2010, which was in flagrant violation of Rule 7 of the aforesaid Rules which laid down a mandatory procedure for dealing with a petition seeking disqualification filed under the Rules.

8. It was pointed out that Rule 7 requires that the Appellants had to be given 7 days' time to reply or such further period as the Speaker may for sufficient cause allow. Under the said Rule the Speaker could only extend the period of 7 days, but could not curtail the time from 7 days to 3 days. It was the categorical case of the Appellants that the minimum notice period of 7 days was a requirement of the basic principles of natural justice in order to enable a MLA to effectively reply to the Show-Cause notice issued to him seeking his disqualification from the Legislative Assembly. It was mentioned in the reply to the Show-Cause notice that issuance of such Show-Cause notice within a truncated period was an abuse and misuse of the Constitutional provisions for the purpose of achieving the unconstitutional object of disqualifying sufficient number of Members of the Assembly from the membership of the House in order to prevent them from participating in the Vote of Trust scheduled to be taken by Shri B.S. Yeddyurappa on the Floor of the House at 11 a.m. on 11th October, 2010. It was contended that the Show-Cause notices was ex-facie unconstitutional and illegal, besides being motivated and mala fide and devoid of jurisdiction.

9. In addition to the above, it was also sought to be explained that it was not the intention of the Appellants to withdraw support to the BJP, but only to the Government headed by Shri Yeddyurappa as the leader of the BJP in the House. It was contended that withdrawing of support from the Government headed by Shri B.S. Yeddyurappa as the Chief Minister of Karnataka did not fall within the scope and purview of the Tenth Schedule to the Constitution of India. It was urged that the conduct of the Appellants did not fall within the meaning of "defection" or within the scope of paragraph 2(1)(a) of the Tenth Schedule or the scheme and object of the Constitution

of India. It was further emphasized that even prima facie, "defection" means leaving the party and joining another, which is not the case as far as the Appellants were concerned who had not left the BJP at all. It was repeatedly emphasized in the reply to the Show-Cause notice that the Appellants had chosen to withdraw their support only to the Government headed by Shri B.S. Yeddyurappa as Chief Minister, as he was corrupt and encouraged corruption, and not to the BJP itself, which could form another Government which could be led by any other person, other than Shri Yeddyurappa, to whom the Appellants would extend support. In the reply to the Show-Cause notice it was, inter alia, stated as follows :-

> "My letter submitted to H.E. Governor of Karnataka of withdrawing the support from the Government headed by Shri B.S. Yeddyurappa as Chief Minister of the State is an act of an honest worker of the BJP party and a member of the Legislative Assembly to salvage the image and reputation of the BJP or the BJP as such. In fact my letter is aimed at cleansing the image of the party by getting rid of Shri B.S. Yeddyurappa as Chief Minister of the State who has been acting as a corrupt despot in violation of the Constitution of India and contrary to the interests of the people of the State."

10. It was also categorically stated that as disciplined soldiers of the BJP the Appellants would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka. The Appellants appealed to the Speaker not to become the tool in the hands of a corrupt Chief Minister and not to do anything which could invite strictures from the judiciary. A request was, therefore, made to withdraw the Show-Cause notices and to dismiss the petition dated 6th October, 2010 moved by Shri B.S. Yeddyurappa, in the capacity of the leader of the Legislature Party of the Bharatiya Janata Party and also as the Chief Minister, with mala fide intention and the oblique motive

of seeking disqualification of the answering MLAs and preventing them from voting on the confidence motion on 11th October, 2010.

11. The Speaker took up the Disqualification Application No.1 of 2010 filed by Shri B.S. Yeddyurappa, the Respondent No.1 herein, along with the replies to the Show-Cause notices issued to the thirteen MLAs, who had submitted individual letters to the Governor indicating their withdrawal of support to the Government led by Shri Yeddyurappa. Except for Shri M.P. Renukacharya and Shri Narasimha Nayak, all the other MLAs were represented by their learned advocates before the Speaker. It was noticed during the hearing that Shri Renukacharya had subsequently filed a petition stating that he continued to support the Government and also prayed for withdrawal of any action proposed against him. He reiterated his confidence in the Government headed by Shri Yeddyurappa and alleged that a fraud had been perpetrated at the time when the individual letters were submitted to the Governor and that he had no intention of withdrawing support to the Government in which he had full confidence. A similar stand was taken on behalf of Shri Narasimha Nayak also. In addition to the above, an affidavit along with supporting documents, affirmed by one Shri K.S. Eswarappa, State President of the Bharatiya Janata Party (B.J.P.) was filed and it was taken into consideration by the Speaker. On the basis of the above, the following two issues were framed by the Speaker :

> "(a) Whether the respondents are disqualified under paragraph 2(1)(a) of Tenth Schedule of the Constitution of India, as alleged by the Applicant?
>
> (b) Is there a requirement to give seven days' time to the respondents as stated in their objection statement?"

12. Answering the aforesaid issues, the Speaker arrived at the finding that after having been elected from a political party and having consented and supported the formation of a

Government by the leader of the said party, the respondents, who are the Appellants herein, other than Shri M.P. Renukacharya and Shri Narasimha Nayak, had voluntarily given up their membership of the party by withdrawing support to the said Government. In arriving at such a conclusion, the Speaker took into consideration the allegations made by Shri Yeddyurappa that after submitting their respective letters to the Governor withdrawing support to the Government, the said respondents had gone from Karnataka to Goa and other places and had declared that they were a separate group and that they were together and that they had withdrawn their support to the Government. The Speaker also took personal notice of statements alleged to have been made by the Appellants and observed that they had not denied the allegations made by Shri Yeddyurappa that they had negotiated with the State Janata Dal, its members and leader, Shri H.D. Kumaraswamy, regarding formation of another Government. In support of the same, the Speaker relied on media reports and the affidavit filed by Shri Eswarappa. The Speaker recorded that the same had not been denied by the Appellants herein.

13. Referring to the Tenth Schedule and certain decisions of this Court as to how statutory provisions are to be interpreted in order to avoid mischief and to advance remedy in the light of Heyden's Rule, the Speaker extracted a portion of a passage from Lord Denning's judgment in Seaford Court Estates Ltd. Vs. Asher, wherein Lord Denning had stated that a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases. The Speaker was of the view that in the event of a difference of opinion regarding leadership in a political party, the matter had to be discussed in the platform of the party and not by writing a letter to the Governor withdrawing support to the Government. The Speaker also observed that the Governor never elects the leader of the legislature party. Accordingly, from the conduct of the Appellants in writing to the Governor that they had withdrawn support, joining hands with the leader of another party and issuing

statements to the media, it was evident that by their conduct the Appellants had become liable to be disqualified under the Tenth Schedule. In coming to the said conclusion, the Speaker placed reliance on several decisions of this Court and in particular, the decision in *Ravi S. Naik Vs. Union of India* [(1994) Suppl.2 SCC 641], wherein the question of a member voluntarily giving up his membership of a political party was considered in detail. Special emphasis was laid on the observation made in the said decision to the effect that a person can voluntarily give up his membership of a political party even though he may not have tendered his resignation from the membership of the party. In the said decision it was further observed that even in the absence of a formal resignation from membership, an inference could be drawn from the conduct of a member that he had voluntarily given up his membership of the political party to which he belonged.

14. The Speaker also referred to and relied on the decision of this Court in *Jagjit Singh Vs. State of Haryana* [(2006) 11 SCC 1], wherein, it was expressed that to determine whether an independent member had joined a political party, the test to be considered was whether he had fulfilled the formalities for joining a political party. The test was whether he had given up his independent character on which he was elected by the electorate.

15. Yet another decision relied upon by the Speaker was the decision in *Rajendra Singh Rana & Ors. Vs. Swami Prasad Maurya & Ors.* [(2007) 4 SCC 270], wherein the question of voluntarily giving up membership of a political party was also under consideration. The Speaker relied on paragraphs 48 and 49 of the said judgment, wherein it was indicated that the act of giving a letter requesting the Governor to call upon the leader of the other side to form a Government would itself amount to an act of voluntarily giving up the membership of the party on whose ticket the member was elected.

16. The Speaker observed that the Appellants herein had not denied their conduct anywhere and had justified the same even during their arguments. The Speaker was of the view that by their conduct the Appellants had voluntarily given up the membership of the party from which they were elected, which attracted disqualification under the Tenth Schedule. The Speaker further held that the act of withdrawing support and acting against the leader of the party from which they had been elected, amounted to violation of the object of the Tenth Schedule and that any law should be interpreted by keeping in mind the purpose for which it was enacted.

17. The Speaker then took note of the retraction by Shri M.P. Renukacharya and Shri Narasimha Nayak, indicating that they had no intention of withdrawing support to the Government led by Shri Yeddyurappa and that they extended support to the party and the Government and their elected leader. The Speaker also relied on the affidavit filed by Shri K.S. Eswarappa and on considering the same, arrived at the decision that the said two MLAs were not disqualified under the Tenth Schedule of the Constitution. As far as the Appellants are concerned, the Speaker held that in view of the reasons stated and the factual background, he was convinced that they were disqualified from their respective posts of MLAs under paragraph 2(1)(a) of the Tenth Schedule of the Constitution.

18. The Speaker then took up the objection taken on behalf of the Appellants herein that the Show-Cause notice to the Appellants had been issued in violation of the provisions of Rules 6 and 7 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, hereinafter referred to as "the Disqualification Rules,1986", inasmuch as, they were not given seven days' time to reply to the Show-Cause notice, as contemplated by Rule 7(3) of the aforesaid Rules. The Speaker, without answering the objection raised, skirted the issue by stating that it was sufficient for attracting the provisions of paragraph

2(1)(a) of the Tenth Schedule to the Constitution of India that the Appellants herein had admitted that they had withdrawn support to the Government. The Speaker further recorded that the Appellants had been represented by counsel who had justified the withdrawal of support and "recognizing themselves with the leader and MLAs of another party". Without giving details, the Speaker observed that this Court had stated that the Disqualification Rules were directory and not mandatory as they were to be followed for the sake of convenience. The stand taken by the Speaker was that since the Appellants had appeared and filed objection and submitted detailed arguments, the objection taken with regard to insufficient time being given in violation of the Rules to reply to the Show-Cause notice, was only a technical objection and was not relevant to a decision in the matter. On the basis of his aforesaid reasoning, the Speaker rejected the objection filed on behalf of Appellants and went on to disqualify the Appellants herein under paragraph 2(1)(a) of the Tenth Schedule to the Constitution with immediate effect. The application seeking disqualification of Shri M.P. Renukacharya and Shri Narasimha Nayak was dismissed.

19. The Appellants herein challenged the decision of the Speaker in Writ Petition Nos.32660-32670 of 2010, which were listed for hearing before the Chief Justice of Karnataka and the Hon'ble Mr. Justice N. Kumar. In his judgment, the Hon'ble Chief Justice took up the objections taken on behalf of the Appellants herein, beginning with the objection that the application for disqualification filed by Shri Yeddyurappa was not in conformity with Rules 6 and 7 of the Defection Rules. Referring to Sub-rules (5) and (6) of Rule 6, the Chief Justice held that there had been substantive compliance with the said Rules which had been held to be directory in nature and that it would not be possible merely on account of the violation of the procedure contemplated under the Rules to set aside the order of the Speaker, unless the violation of the procedure was shown to have resulted in prejudice to the Appellants. Repeating the

reasons given by the Speaker to reject the objection of the Appellants on the aforesaid score and relying on the judgments rendered by this Court in *Ravi S. Naik's* case (supra) and in the case of *Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council & Ors.* [(2004) 8 SCC 747] the Chief Justice held that it was not possible to accept the contentions of the learned counsel for the Appellants and rejected the same.

20. On the second contention relating to violation of the rules of natural justice and the proceedings conducted by the Speaker in extreme haste, thereby depriving the Appellants of a reasonable opportunity of defending themselves, the Chief Justice, placing reliance on the decision in *Ravi S. Naik's* case (supra), negated the submissions made on behalf of the Appellants upon holding that since no prejudice had been caused to the Appellants, it was difficult to accept the contention advanced on their behalf that the entire proceedings of the Speaker deserved to be set aside.

21. Regarding the other objection taken on behalf of the Appellants on the question of reliance having been placed on the affidavit filed by the State President of the Bharatiya Janata Party, the Chief Justice held that none of the Appellants had disputed the factual position expressed in the newspaper cuttings which formed part of the affidavit and that the submission made on behalf of the Appellants that had they been afforded proper time to deal with the said affidavit, they would have been able to show that the facts recorded in the newspaper article were incorrect, was, therefore, without any basis.

22. On the main question as to whether the action of the Appellants had attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, the Chief Justice came to a categorical finding that the Appellants had defected from the Bharatiya Janata Party and had voluntarily given up their membership thereof. Furthermore, while doing so, the Appellants had indicated that the constitutional machinery had

broken down leading to a situation where the governance of the State could not be carried on in accordance with the Constitution and requested the Governor to intervene and institute the constitutional process as the constitutional head of the State. Referring to the wordings of Article 356 of the Constitution which provides for proclaiming President's Rule in a State where it was no longer possible to carry on the governance of the State in accordance with the provisions of the Constitution of India, the Chief Justice agreed with the view expressed by the Speaker that by withdrawing support from the Government led by Shri Yeddyurappa, the Appellants had voluntarily chosen to disassociate themselves from the Bharatiya Janata Party with the intention of bringing down the Government.

23. The Chief Justice also rejected the allegations of mala fide on account of the speed with which the Speaker had conducted the disqualification proceedings within five days i.e. one day ahead of the Trust Vote which was to be taken by Shri Yeddyurappa on the Floor of the Assembly. The Chief Justice, accordingly, found no merit in any of the contentions raised on behalf of the Appellants and holding that the order of the Speaker did not suffer from any infirmity, dismissed the Writ Petitions filed by the Appellants.

24. Mr. Justice N. Kumar, who, along with the Chief Justice, heard the writ petition filed by the Appellants herein, in his separate judgment, differed with the views expressed by the Chief Justice in regard to the interpretation of paragraph 2(1)(a) of the Tenth Schedule of the Constitution. Observing that in a parliamentary democracy the mandate to rule the State is given not to any individual but to a political party, the learned Judge further observed that the Council of Ministers headed by the Chief Minister can continue in the office as long as they enjoyed the confidence of the majority of the Members of the House. If the House expressed no confidence in the Chief Minister, it was not only the Chief Minister, but his entire Council of Ministers

who cease to be in office. Regarding interpretation of the provisions of paragraph 2(1)(a) of the Tenth Schedule of the Constitution, Kumar,J., referred to the decisions rendered by this Court in - (1*) Kihoto Hollohan Vs. Zachillhu & Ors.* [(1992) Supp.2 SCC 651]; (2) *G. Viswanathan Vs. Hon'ble Speaker Tamil Nadu Legislative Assembly,* Madras & Anr. [(1996) 2 SCC 353]; (3) *Dr. Mahachandra Prasad Singh Vs. Chairman, Bihar Legislative Council & Ors.* [(2004) 8 SCC 747]; and (4) *Rajendra Singh Rana & Ors Vs. Swami Prasad Maurya & Ors.* [(2007) 4 SCC 270], and held that from the scheme of the Tenth Schedule it was clear that the same applied only to a Member of the House. Such Member could be elected on the ticket of any political party or as an Independent, but a member of a political party who is elected as a Member of the House, would automatically become a member of the Legislature Party in the said House. The learned Judge held that paragraph 2 of the Tenth Schedule deals with disqualification of Members of the House. The learned Judge also held that paragraph 2(1) deals with disqualification of a Member of a House who belongs to a political party, while paragraph 2(2) deals with disqualification of a Member of a House elected as an Independent. In the case of a Member of a House elected as an Independent candidate, the question of his voluntarily giving up his membership of a political party would not arise. Similarly, when he did not belong to any political party, the question of voting or abstaining from voting in such House contrary to the directions issued by the political party would not arise. The learned Judge observed that once a person gets elected as an Independent candidate, the mandate of the voters is that he should remain independent throughout his tenure in the House and under no circumstances could he join any political party. However, in the case of a Member of the House belonging to a political party, the disqualification occurs when he voluntarily gives up the membership of that political party. It is because of the mandate of the people that he should continue to be the member of that political party which set him up as a candidate for the election. He was, however, free to give up his

membership of the party, but for the said purpose he had to resign from the membership of the House as well as the membership of the political party and then contest the election in the vacancy caused because of his resignation and then only he would have an independent course of choice.

25. After analyzing the intent behind the inclusion of the Tenth Schedule to the Constitution, the learned Judge also observed that the anti-defection law was enacted to prevent floor crossing and destabilizing the Government which is duly elected for a term. If, however, a Member of the House voluntarily gave up his membership of a political party, the object of the anti-defection law was to prevent him from extending support to the opposition party to form the Government by his vote or to ensure that if he has resigned from the membership of a party, his support was not available for forming an alternative Government by the opposition party. The learned Judge observed that if a Member violates the above conditions, the Parliament has taken care to see by enacting the Tenth Schedule that such Member would be instantly disqualified from being a Member of the House. Once the act of disqualification occurred, the question of condoning such act or taking him back to the party on his tendering an apology or expressing his intention to come back to the party, would not arise. Therefore, if the act falls within the ambit of paragraph 2(1)(a) of the Tenth Schedule, his membership becomes void. However, if such disqualification was incurred under paragraph 2(1)(b), such disqualification did not render his membership void but it was voidable at the option of the political party.

26. The learned Judge went on to further hold that when a Member of a House expressed his no-confidence in the leader of a Legislature Party and if he happened to be the Chief Minister who is heading the Council of Ministers and had written to the Governor in that regard, such act by itself would not amount to an act of floor crossing. Similarly, if the Governor, after taking note of the expression of no-confidence, was

satisfied that the Chief Minister had lost majority support in the House, he could call upon the Chief Minister to prove his majority on the Floor of the House. It was further observed that if the Chief Minister, on such request, failed to establish that he enjoyed the support of the majority of the Members, his Ministry would fall, but such act of the Member of the House would not constitute 'defection' under the Tenth Schedule. By such act, the political party which had formed the Government, would not lose its right to form a Government again. It is not as if the Governor can recommend the imposition of President's Rule under Article 356 of the Constitution or call upon the leader of the opposition to form an alternative Government after the fall of the earlier Government. Before embarking upon either of the two options, the Governor was expected to explore the possibility of formation of an alternative Government. The Speaker could call upon the leader who enjoyed the majority support of the Members of the House to form an alternative Government. In such case it was open to the political party, whose Government had fallen on the Floor of the House, to once again stake a claim before the Governor, either with the same leader or another leader elected by the party, by showing the majority support of the Members of the House. In that a situation, the stability of the Government of the political party is not disturbed. On the other hand, what is disturbed by such an act is the Government of the political party with a particular leader in whom the Members of the House belonging to the same political party have no confidence. But this would not mean that the member of the political party to which the Chief Minister belonged had given up his membership of the political party. Other provisions have been made in the Constitution for dealing with such dissenting members. In such a case, by issuing a whip, those who had expressed their no-confidence in the leader of the House, can be directed to vote in his favour at the time of voting on the floor of the House. Once such direction is given, the member concerned can neither abstain from voting nor vote contrary to the direction. If he does so, he incurs disqualification under paragraph 2(1)(b) of the Tenth

Schedule to the Constitution. The learned Judge observed further that, in fact, the said provision also provides for such an act being condoned so that by persuasion or by entering into an understanding, their support could still be relied upon by the party to save the Government before voting or in forming a fresh Government after such voting, if in the voting the Government fails. The said dissent amounts to the dissent within the party itself.

27. The learned Judge observed that the two grounds set out in paragraph 2 of the Tenth Schedule to the Constitution are mutually exclusive and operate in two different fields. While paragraph 2(1)(a) deals with the Member who voluntarily walks out of the party, paragraph 2(1)(b) deals with the Member who remains in the party but acts in a manner which is contrary to the directions of the party. The learned Judge, however, went on to observe that if a Member voluntarily gives up his membership from the party, then paragraph 2(1)(b) is no longer attracted. In either event, it is the political party which is aggrieved by such conduct. However, it was left to the party to condone the conduct contemplated in paragraph 2(1)(b), but such conduct would have to be condoned within 15 days from the date of such voting or abstention.

28. Having dealt with the various decisions referred to hereinabove, the learned Judge came to the conclusion that it was clear that an act of no confidence in the leader of the legislative party does not amount to his voluntarily giving up the membership of the political party. Similarly, his act of expressing no confidence in the Government formed by the party, with a particular leader as Chief Minister, would not also amount to a voluntary act of giving up the membership of the political party. The learned Judge further observed that deserting the leader and deserting the Government is not synonymous with deserting the party. If a Minister resigned from the Ministry, it would not amount to defection. What constitutes defection under paragraph 2(1)(a) of the Tenth Schedule is

deserting the party. The learned Judge observed that dissent is not defection and the Tenth Schedule while recognising dissent prohibits defection.

29. The learned Judge also considered the case of Shri M.P. Renukacharya and Shri Narasimha Nayak, who were among the 13 members against whom the disqualification petition had been filed by the Chief Minister. The learned Judge pointed out that along with the Appellants herein, the aforesaid two members had also signed a representation which had been given to the Governor and if such an act would amount to voluntarily giving up the membership of a political party and the case fell within paragraph 2(1)(a), the disqualification becomes automatic and the membership of such persons becomes void. The question of those members retracting their steps and reaffirming their confidence in the Chief Minister and the Party President confirming the same on a subsequent date, is of no consequence. The learned Judge held that the same yardstick had not been applied for the Appellants and the two other members against whom the disqualification petition filed by the Chief Minister was dismissed.

30. Expressing his views with regard to the manner in which the Speaker had acted in the matter in hot haste, the learned Judge referred to paragraphs 180, 181 and 182 of the decision rendered by this Court in *Kihoto Hollohan's* case (supra), which was the minority view, but had suggested that the office of the Speaker which was attached with great dignity should not be made the target of bias since his tenure as Speaker is dependent on the will of the majority of the House. While holding that right to dissent is the essence of democracy, for the success of democracy and democratic institutions honest dissent is to be respected by persons in authority. On the basis of his aforesaid conclusions, the learned Judge held that the order of the Speaker impugned in the writ petition was in violation of the constitutional mandate and also suffered from perversity and could not, therefore, be sustained. The impugned

order of the Speaker was, therefore, set aside by the learned Judge.

31. On account of such difference of opinion between the Chief Justice and his companion Judge, the matter was referred to a third Judge to consider the following issue :-

> "Whether the impugned order dated 10.10.2010 passed by the Speaker of the Karnataka State Legislative Assembly is in consonance with the provisions of paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India."

32. On the basis of the said reference, the matter was referred to the Hon'ble Mr. Justice V.G. Sabhahit, who by his judgment and order dated 29th October, 2010, concurred with the decision rendered by the Chief Justice upholding the order passed by the Speaker. As a result, the majority view in the writ petitions was that the Hon'ble Speaker was justified in holding that the Appellants herein had voluntarily resigned from their membership of the Bharatiya Janata Party by their conduct, which attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution and were rightly disqualified from the membership of the House.

33. Mr. R.F. Nariman, learned Senior Advocate, appearing for the Appellants in SLP(C)Nos.33123-33155 of 2010, *Balchandra L. Jarkiholi & Ors. Vs. B.S. Yeddyurappa & Ors.* (now appeals), questioned the order of the Speaker dated 10th October, 2010, disqualifying the Appellants from membership of the House, on grounds of mala fide and violation of Rules 6(5)(b) and 7(3) of the Disqualification Rules, 1986, as also the principles of natural justice. Contending that the order passed by the Speaker on 10th October, 2010, was vitiated by mala fides, Mr. Nariman submitted that the same had been passed with the oblique motive of preventing the Appellants from participating in the Trust Vote which was to be taken by the

Chief Minister on 11th October, 2010. Learned counsel also submitted that the letters dated 6th March, 2010, addressed by the Appellants individually along with Shri M.P. Renukacharya and Shri Narasimha Nayak to the Governor did not even suggest that they had intended to leave the Bharatiya Janata Party or to join another political party but that they were disillusioned with the functioning of the Government under Shri B.S. Yeddyurappa and had, therefore, decided to withdraw support to the Government headed by him. Furthermore, apart from mentioning that the Appellants had written to the Governor withdrawing their support to the Government, the Disqualification Application does not also contain any averment that the Appellants had met any person from any other political party. Although certain press statements had been mentioned in the petition, the same had not been annexed to the application. Mr. Nariman submitted that, in fact, no documentary evidence was at all annexed to the said application.

34. In addition to the above, Mr. Nariman also pointed out that the Disqualification Application had not been properly verified in terms of Rules 6(6) of the Disqualification Rules, 1986, and that the said application was, therefore, liable to be rejected on such ground also. Instead of rejecting the application or even returning the same for proper verification, the Speaker chose to ignore the shortcomings and issued Show-Cause notices to the Appellants in undue haste with the oblique motive of disqualifying them from the membership of the House prior to the Trust Vote to be taken on 11th October, 2010. Applications sans annexures were not even served on the Appellants, but merely pasted on the doors of the official residence of the Appellants which were locked since the Assembly was not in session. Mr. Nariman submitted that the Appellants were granted time till 5.00 p.m. on 10th October, 2010, to respond to the Show-Cause notices although Rule 7(3) provided for seven days' time or more to respond to such an application. Instead, in complete violation of the said Rules, the Appellants were given only three days' time to respond to the

Show-Cause notices and even more serious objection was taken by Mr. Nariman that it was in the Show-Cause notices that for the first time, it was stated that the actions of the Appellants were in violation of paragraph 2(1)(a) of the Tenth Schedule of the Constitution, although no such specific averment had been made by the Respondent No.1 in his application. It was urged that on account of the short time given by the Speaker to the Appellants to respond to the Show-Cause notices, they could only submit an interim reply of a general nature and it had been categorically mentioned that on receipt of all the documents on which reliance had been placed, a detailed response would be given to the Show-Cause notices. Mr. Nariman contended that certain documents were made available to the learned Advocate of the Appellants just before the hearing was to be conducted before the Speaker on 10th October, 2010, which contained facts which could be answered only by the Appellants personally. However, since the Appellants were not available in Karnataka at the relevant point of time, it was not possible for the learned Advocate appearing on their behalf to respond to the issues raised in the additional documents. It was submitted that the Speaker acted against all principles of natural justice and the propriety in taking on record the affidavit affirmed by the State President of the Bharatiya Janata Party Shri K.S. Eswarappa, with the sole intention of supplying the inadequacies in the Disqualification Application filed by Shri Yeddyurappa. In addition, the Speaker also took into consideration the statements of retraction made by Shri M.P. Renukacharya and Shri Narasimha Nayak and allowed the same, whereafter they proceeded to make allegations against the Appellants that they had intended to remove the BJP Government and to support any Government led by Shri H.D. Kumaraswamy. Mr. Nariman submitted that the Speaker had applied two different yardsticks as far as the Appellants and Shri M.P. Renukacharya and Shri Narasimha Nayak are concerned, despite the fact that they too had written identical letters to the Governor withdrawing support to the

Government led by Shri Yeddyurappa. Mr. Nariman submitted that once Shri M.P. Renukacharya and Shri Narasimha Nayak had written to the Governor expressing their decision to withdraw support to the Government headed by Shri Yeddyurappa, the provisions of paragraph 2(1)(a) of the Tenth Schedule came into operation immediately and the Speaker was no longer competent to reverse the same.

35. Mr. Nariman submitted that the action taken by the Speaker on the Disqualification Application filed against Shri M.P. Renukacharya and Shri Narasimha Nayak made it obvious that such steps were taken by the Speaker to save the membership of the said two MLAs to enable them to participate in the Trust Vote. It was also submitted that to make matters worse, the Speaker took personal notice about the statements allegedly made by the Appellants to the effect that they wanted to topple the BJP Government and to form a new Government with the others. It was submitted that while performing an adjudicatory function under the Tenth Schedule, while holding a highly dignified office, all personal knowledge which the Speaker may have acquired, should not have been taken into consideration in taking a decision in the matter. In this regard, Mr. Nariman referred to the decision of this Court in *S. Partap Singh Vs. State of Punjab* [(1964) 4 SCR 733], wherein it was held that if while exercising a power, an authority takes into account a factor which it was not entitled to, the exercise of the power would be bad. However, where the purpose sought to be achieved are mixed, some relevant and some not germane to the purpose, the difficulty is resolved by finding the dominant purpose which impelled the action and where the power itself is conditioned by a purpose, such exercise of power was required to be invalidated.

36. Mr. Nariman submitted that at every stage the Speaker had favoured Shri Yeddyurappa and even though Rule 7(2) of the 1986 Rules provided for the dismissal of the petition which did not comply with the requirements of Rule 6, as in the present

case, the Speaker did not do so. Even the period of seven days' which was required to be granted to allow the Appellants to respond to the Show-Cause notices, only three days' time was given to the Appellants to submit their response which could be done only in a hurried manner for an interim purpose and despite the request made by the Appellants to the Speaker to postpone the date in order to give the Appellants a proper opportunity of responding to the allegations contained in the Show-Cause notices, such request was turned down thereby denying the Appellants a proper opportunity of representing their case, particularly when neither the Show-Cause notices nor the Disqualification Application filed by Shri Yeddyurappa along with all annexures had been supplied to the Appellants.

37. Referring to the decisions which had been mentioned by the Speaker in his order, Mr. Nariman pointed out that both in Mahachandra Prasad Singh's case and also in *Ravi S. Naik's* case (supra), this Court had held that the 1986 Rules were only directory in nature and that as a result the order dated 10th October, 2010, could be questioned not only on the ground of violation of the Rules, but in the facts of the case itself. It was pointed out that in Mahachandra Prasad Singh's case it had never been disputed that the petitioner therein had been elected to the Legislative Council on an Indian National Congress ticket and had contested Parliamentary elections as an independent candidate. It was submitted that it was in such background that this Court had held that non-supply of a copy of the letter of the Leader of the Congress Legislative Party had not caused any prejudice to the petitioner. Mr. Nariman reiterated that the Appellants had all said in separate voices that they had not left the BJP and had only withdrawn support to the Government led by Shri Yeddyurappa and that they were ready to support any new Government formed by the BJP, without Shri Yeddyurappa as its leader.

38. Mr. Nariman also referred to the decision of this Court in *Kihoto Hollohan's* case (supra) and urged that the order of disqualification passed against the Appellants for merely

expressing their disagreement with the manner of functioning of the Respondent No.1 as Chief Minister, had not only impinged upon the Appellants' right of free speech, as guaranteed under Article 19(1)(a) of the Constitution, but from a bare reading of the letter dated 6th October, 2010, written by the Appellants to the Governor, it could not be held that the same indicated their intention to voluntarily give up the membership of the BJP. Mr. Nariman submitted that the impugned orders and the order of the Speaker dated 10th October, 2010, were unsustainable since they had been engineered to prevent the Appellants from participating in the Vote of Confidence fixed on 11th October, 2010.

39. Mr. P.P. Rao, learned Senior Advocate, who appeared for the Appellants in the Civil Appeals arising out of Special Leave Petition (Civil) Nos.33533-33565 of 2010, submitted that in order to attract the disqualification clause under paragraph 2(1)(a) of the Tenth Schedule, Shri Yeddyurappa had first to establish that the Appellants had voluntarily given up their membership of the BJP. It was submitted that in the Disqualification Application filed by Shri Yeddyurappa, there is no averment to the said effect and what has been averred is that the Appellants had withdrawn their support to his government and had informed the Governor of Karnataka about their decision, despite there being no decision in the party in this regard, which made such action a clear violation of the Tenth Schedule to the Constitution. Mr. Rao submitted that the Disqualification Application did not even refer to paragraph 2(1)(a) of the Tenth Schedule to the Constitution and that the same should, therefore, have been rejected by the Speaker in terms of Rule 6(2) of the 1986 Rules.

40. Reiterating Mr. Nariman's submissions, Mr. Rao submitted that withdrawal of support by the Appellants to the Government led by Shri Yeddyurappa did not amount to voluntarily relinquishing the membership of the BJP since the Government led by a particular leader and the political party are

not synonymous. Mr. Rao also urged that asking the Governor to institute the constitutional process for replacing one Chief Minister by another, did not also amount to voluntary relinquishment of the membership of the party. According to Mr. Rao, withdrawal of support to the incumbent Chief Minister and intimation thereof to the Governor, could, at best, be said to be a pre-voting exercise in regard to the Vote of Confidence sought by the Chief Minister, but the question of disqualification will arise only if the Appellants voted in the House contrary to the directions of the whip issued by the BJP. However, even such a transgression could be condoned by the party within 15 days of such voting. Mr. Rao submitted that announcement of withdrawal of support to the Chief Minister before actual voting in violation of the whip would not bring the case within the ambit of paragraph 2(1)(a) of the Tenth Schedule to the Constitution and make him liable to disqualification.

41. Mr. Rao submitted that the minority view taken by N. Kumar, J. that "dissent" could not be regarded as defection was a correct view and did not amount to voluntarily relinquishing membership of the political party, since such act expresses a lack of confidence in the leader of the party, but not in the party itself. Quoting the minority view expressed by N. Kumar, J., Mr. Rao submitted that the object of paragraph 2(1)(a) was not to curb internal democracy or the right to dissent, since dissent is the very essence of democracy, but neither the Chief Justice nor V.G. Sabhahit, J. even adverted to such basic principle of Parliamentary democracy and erred in equating withdrawal of support to the Government led by Shri B.S. Yeddyurappa with withdrawing support to the BJP Government. According to Mr. Rao, the Appellants were only doing their duty as conscious citizens to expose the corruption and nepotism in the Government led by Shri B.S. Yeddyurappa. Mr. Rao referred to and relied upon the decisions of this Court in (1) *State of M.P. Vs. Ram Singh* [(2000) 5 SCC 88] and (2) *B.R. Kapur Vs. State of T.N.* [(2001) 7 SCC 231], wherein, such sentiments had also been expressed. Mr. Rao contended that it is a well-

settled principle of law that when a power is conferred by the Statute and the procedure for executing such power is prescribed, the power has to be exercised according to the procedure prescribed or not at all. In this regard, Mr. Rao referred to the celebrated decision of the *Privy Council in Nazir Ahmad Vs. King Emperor* [63 Indian Appeals 372] and *State of U.P. Vs. Singhara Singh* [(1964) 4 SCR 485]. Mr. Rao urged that the 1986 Rules had a statutory flavour and had to be treated as part of the Representation of the Peoples Act, 1951. Going one step further, Mr. Rao also urged that the Rules and Administrative Instructions lay down certain norms and guidelines and violation thereof would attract Article 14 of the Constitution and even if the said Rules were directory, they had to be substantially complied with.

42. Mr. Rao also contended that the order of disqualification passed by the Speaker was vitiated by mala fide on the part of the Chief Minister Shri Yeddyurappa, who filed the application for disqualification with the deliberate intention of preventing the Appellants from participating in the Trust Vote to be taken on 11th October, 2010. It was urged that such mala fide acts on the part of the Speaker would be evident from the fact that although the Disqualification Application did not conform to Rules 6(4), (6) and (7) of the 1986 Rules read with Order VI Rule 15(2)(4) of the Code of Civil Procedure, the same was entertained by the Speaker and a separate page of verification was subsequently inserted, which ought not to have been permitted by the Speaker. Mr. Rao reiterated the submissions made by Mr. Nariman that the Disqualification Application was liable to be dismissed under Rule 7(2) of the aforesaid Rules which says that "if the petition does not comply with the requirement of Rule 6, the Speaker shall dismiss the petition and intimate the petitioner". Despite the fact that the application was not properly verified, the same was not dismissed. Mr. Rao submitted that in blatant disregard of the above-mentioned Rules, the Speaker had entertained the defective petition filed by Shri Yeddyurappa in complete

disregard of Rules 6 and 7 of the 1986 Rules. It was submitted that the said steps were taken by the Speaker in a partisan manner and against the highest traditions of the Office of the Speaker with the obvious intention of bailing out the Chief Minister to whom he owed his Chair as Speaker, which he could lose if the Chief Minister failed to win the Vote of Confidence in the Assembly.

43. Mr. Rao repeated Mr. Nariman's submissions regarding the purported violation of Rule 7(3) of the 1986 Rules, but added that such breach not only amounted to violation of principles of natural justice but also in violation of Article 14 of the Constitution itself, as was held in *Union of India Vs. Tulsiram Patel* [(1985) 3 SCC 398]. Mr. Rao submitted that this was a clear case of abuse of constitutional powers conferred on the Speaker by paragraph 6 of the Tenth Schedule, with the sole motive of saving his own Chair and the Chair of the Chief Minister. The Show-Cause notice was not only unconstitutional and illegal, but motivated and *mala fide* and devoid of jurisdiction.

44. Referring to the judgment of the Chief Justice, which was in variance with the decision of N. Kumar, J., Mr. Rao urged that the Chief Justice had only noted and considered ground "K" to the Writ Petition, without considering grounds C, D, F, H and I, which dealt with the very maintainability of the Disqualification application on account of improper verification. Mr. Rao submitted that indecent haste with which the Disqualification Application was processed was clearly in violation of the mandate of Rule 7 of the 1986 Rules, which provided for at least 7 days' time to reply to a Show-Cause notice issued under Rule 6.

45. Mr. Rao also submitted that despite pointed references made to the corruption and nepotism in the Government led by Shri Yeddyurappa, the same has not been denied by Shri B.S. Yeddyurappa and this Court should draw an adverse inference when such allegations of bias or *mala fide* had not been denied

by Shri B.S. Yeddyurappa.

46. Mr. Rao also repeated and reiterated Mr. Nariman's submissions regarding non-service of Notices and copies of the application and the annexures thereto on the Appellants and the introduction of the affidavit filed by Shri K.S. Eshwarappa and the Statements of Shri M.P. Renukacharya and Shri Narasimha Nayak without serving copies thereof on the Appellants and giving them reasonable opportunity to deal with the same. It was submitted that by adopting the procedure as mentioned above, the Speaker denied the Appellants a proper opportunity of contesting the Disqualification Application despite the fact that the additional affidavit and the submissions made by Shri M.P. Renukacharya and Shri Narasimha Nayak contained factual allegations against the Appellants which they could only answer. Mr. Rao submitted that the Speaker rushed through the formalities of an enquiry within four days from the issuance of the Show-Cause notices knowing that the Chief Minister had to face a Confidence Vote in the Assembly on 11th October, 2010.

47. On the scope of justiceability of an order passed by the Speaker under paragraph 6 of the Tenth Schedule to the Constitution, Mr. Rao submitted that such a question had been gone into and settled by this Court firstly by the Constitution Bench in *Kihoto Hollohan's* case (supra) and thereafter in *Dr. Mahachandra Prasad Singh's* case (supra), wherein it had been held that Rules 6 and 7 of the Disqualification Rules were directory and not mandatory in nature and hence the finality clause in paragraph 6 did not completely excluded the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution. It is pointed out that it had been indicated in *Kihoto Hollohan's* case (supra) that the very deeming provision implies that the proceedings for disqualification are not before the House but only before the Speaker as a substantially distinct authority and that the decision under paragraph 6(1) of the Tenth Schedule is not the decision of the House nor is it subject

to approval of the House and that the said decision operates independently of the House. It was accordingly held that there was no immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising powers under paragraph 6(1) of the Tenth Schedule. Mr. Rao pointed out that paragraph 100 of the decision in *Kihoto Hollohan's* case (supra) declares the Speaker or the Chairman acting under paragraph 6 of the Tenth Schedule to be a Tribunal. Mr. Rao submitted that the view taken in *Ravi S. Naik's* case (supra) that the Disqualification Rules being procedural in nature, any violation of the same would amount to irregularity in procedure which was immune from judicial scrutiny in view of Rule 6(2) of the 1986 Rules, was an inaccurate statement of law in view of the decision of the Constitution Bench in *Kihoto Hollohan's* case (supra). Mr. Rao also pointed out that the decision in *Ravi S. Naik's* case (supra) had been considered by a Bench of 3 Judges of this Court in *Mayawati Vs. Markandeya Chand* [(1998) 7 SCC 517], wherein K.T. Thomas J. had observed that the decision in Kihoto Hollohan's case had not been considered in Ravi S. Naik's case in its proper perspective. M. Srinivasan, J. did not agree with the views expressed by K.T. Thomas, J. and quoted approvingly from the decision in *Ravi S. Naik's* case (supra). However, Chief Justice M.M. Punchhi took the view that the matter was required to be referred to a Constitution Bench, as the decision in *Kihoto Hollohan's* case (supra) is silent on the question as to whether cognizance taken by the Speaker of the occurrence of a split is administrative in nature, unconnected with the decision making process or is it an adjunct thereto. Mr. Rao submitted that the decision in *Dr. Mahachandra Prasad Singh's* case (supra) suffered from the same vice and was, therefore, per incuriam.

48. Mr. Rao also contended that the view subsequently taken by the Constitution Bench in *Rajendra Singh Rana Vs. Swami Prasad Maurya* [(2007) 4 SCC 270] that the failure on the part of the Speaker to decide an application seeking

disqualification cannot be said to be merely in the realm of procedure, goes against the very constitutional scheme contemplated under the Tenth Schedule, read in the context of Articles 102 and 191 of the Constitution. It was also observed that it also went against the Rules framed in that behalf and the procedure that was expected to be followed by the Speaker. It was further observed that the lapse on the part of the Speaker amounted to jurisdictional error. Mr. Rao urged that the pronouncement in the aforesaid case was final on this aspect of the matter and was required to be reiterated in the present case.

49. The submissions made on behalf of the Appellants were strongly opposed by Mr. Soli J. Sorabjee, learned Senior Advocate appearing for the Respondent No.1, Shri B.S. Yeddyurappa, Chief Minister of Karnataka. He identified six issues which, according to him, had arisen in the Appeals for consideration. The same are reproduced hereinbelow:-

(i) The extent and scope of Judicial Review available against the order of the Speaker passed in exercise of powers under the Tenth Schedule to the Constitution.

(ii) Whether the Karnataka Disqualification Rules framed in exercise of powers under paragraph 8 of the Tenth Schedule are directory and procedural in nature and whether judicial review is available against an alleged breach of the said Rules?

(iii) Whether the Speaker's order impugned herein is mala fide?

(iv) Whether Speaker's order can be said to be vitiated on account of non-compliance with the principles of natural justice?

(v) The scope of paragraph 2(1)(a) of the Tenth schedule; and

(vi) Whether the Speaker's inference from the conduct of the MLA's in the present case that they have given up the membership of the political party to which they belong, can be said to be 'perverse'?

50. It was submitted that the scope of judicial review of the order of the Speaker of the Legislative Assembly was extremely limited in view of the finality attached to the Speaker's order under paragraph 6(1) of the Tenth Schedule. Mr. Sorabjee submitted that in Kihoto Hollohan's case this Court had held that the immunity granted under sub-paragraph (2) of paragraph 6 was in respect of the procedural aspect of the disqualification proceedings, but that the decision itself was not totally immune from judicial scrutiny. However, having regard to the finality attached to the decision of the Speaker, as indicated in sub-paragraph (1), judicial review of the said order would be confined to infirmities based on (a) violation of constitutional mandate; (b) mala fides; (c) non-compliance with the rules of natural justice; and (d) perversity. Mr. Sorabjee submitted that the Speaker's order impugned in these proceedings did not suffer from any of the infirmities mentioned in paragraph 6(1) of the Tenth Schedule to the Constitution and that on account of the decision in *Kihoto Hollohan's* case (supra), the decision of the Speaker could not be assailed even on the ground of violation of any of the Rules framed by the Speaker.

51. Relying heavily on the decision of this Court in *Ravi S. Naik's* case (supra), Mr. Sorabjee pointed out that this Court had held that the 1986 Rules had been framed to regulate the procedure to be followed by the Speaker for exercising his powers under paragraph 6(1) of the Tenth Schedule. The same are, therefore, procedural in nature and any violation thereof would be a procedural irregularity which is immune from judicial scrutiny in view of the provisions of paragraph 6(2) as was construed by this Court in *Kihoto Hollohan's* case (supra). Mr. Sorabjee submitted that the 1986 Rules framed by the Speaker being subordinate legislation, the same could not be equated

with the provisions of the Constitution and could not, therefore, be regarded as constitutional mandates and violation of the 1986 Rules did not afford a ground for judicial review of the order of the Speaker.

52. Mr. Sorabjee also placed strong reliance on the decision of this Court in *Dr. Mahachandra Prasad Singh's* case (supra), wherein the same view was reiterated. It was observed that the Rules being in the domain of procedure, they were intended to facilitate the holding of an inquiry and not to frustrate or obstruct the same by introducing innumerable technicalities. Mr. Sorabjee submitted that the Rules being directory, any alleged breach thereof cannot also be a ground for striking down the Speaker's order or make the same susceptible to judicial review as per the parameters laid down in *Kihoto Hollohan's* case (supra). It was also submitted that the power of the Speaker flowed from the Tenth Schedule and was not dependent on the framing of Rules and even in the absence of Rules, the Speaker always has the authority to resolve any dispute raised before him, without any fetter on his powers by the Rules.

53. As to the period of three days given to the Appellants to reply to the Show-Cause notices, instead of seven days mentioned in Rule 7(3) of the 1986 Rules, Mr. Sorabjee submitted that it was quite clear that the use of the expression "within 7 days" clearly indicated that the full period of 7 days was not required to be given by the Speaker for showing cause by the Member concerned. Mr. Sorabjee submitted that since the period of 7 days was the maximum period prescribed, it did not circumscribe the Speaker's authority to require such response to the Show-Cause notice within a lesser period and, in any event, the said issue was a non-starter since the Rules had been held by this Court to be directory and not mandatory. In any event, in *Ravi S. Naik's* case (supra), it had been observed that while applying the principles of natural justice, it had to be kept in mind that "they were not cast in a rigid mould

nor can they be put in a legal strait jacket." Mr. Sorabjee submitted that the same view had been reiterated in *Jagjit Singh's* case (supra) and the contention that the Speaker ought not to have relied upon his personal knowledge was specifically rejected in the said case.

54. Mr. Sorabjee urged that this Court in *Kihoto Hollohan's* case (supra) had drawn a distinction between the procedure followed by the Speaker and the decision rendered by him and had held that the procedure followed would be immune from judicial review, being administrative in nature, though the decision could be challenged on grounds of jurisdictional errors. It was urged that in any event the decision in *Ravi S. Naik's* case (supra) which had been subsequently approved in *Dr. Mahachandra Prasad Singh's* case (supra) is binding upon this Bench, having been rendered by a Bench of three Judges.

55. As far as the charge of mala fides against the Speaker is concerned, Mr. Sorabjee submitted that such a charge was not maintainable since the Speaker had been made a Respondent in the proceedings not in his personal capacity but in his capacity as Speaker. It was contended that as had been held by this Court in *Sangramsinh P. Gaekwad Vs. Shantadevi P. Gaekwad* [(2005) 11 SCC 314], allegation of mala fide has to be pleaded with full particulars in support of the charge. Making bald allegations that the Chief Minister had influenced the Speaker to get the Appellants removed from the membership of the House before the Trust Vote scheduled to be held on 11th October, 2010, without any material in support of such allegations, could not and did not amount to mala fides on the part of the Speaker. Mr. Sorabjee submitted that as was also observed in the case of *E.P. Royappa Vs. State of Tamil Nadu* [(1974) 4 SCC 3], the allegations of mala fide are often more easily made than proved and the very seriousness of such allegations demands proof of a high order of credibility.

56. Mr. Sorabjee submitted that coupled with the allegation of mala fides was the allegation that the Speaker had conducted the entire exercise of disqualifying the Appellants from the membership of the House in great haste so that they would not be able to participate in the Trust Vote. Mr. Sorabjee submitted that proceedings under the Tenth Schedule have to be decided as early as possible in order to avoid the participation of a disqualified Member in the House. It was contended that in view of the decision of the Constitution Bench in Rajendra Singh Rana's case, the Speaker was under an obligation to decide the issue of eligibility of the Member to cast his vote before the Confidence Vote was taken. Mr. Sorabjee submitted that as had been held in Rajendra Singh Rana's case, disqualification occurs on the date of the act of the Member and not on the date of the Speaker's order. Applying the said analogy to the facts of this case, it had to be presumed that the disqualification had already occurred when the concerned Member had presented his letter to the Governor and as a result since the Vote of Confidence was fixed for the next day, the Speaker had no option but to decide the question of disqualification before the Vote of Confidence was taken. Mr. Sorabjee submitted that even N. Kumar, J. while dissenting from the order of the Chief Justice, concurred with him on the issue regarding absence of mala fides on the part of the Speaker.

57. Mr. Sorabjee urged that although various charges had been made against the Appellants, they had neither denied the same before the Speaker nor in the Writ Petition nor in the proceedings before the High Court, which gave rise to a presumption that there was a ring of truth in such allegations. Mr. Sorabjee urged that the case of the Appellants that they had not been provided a proper opportunity of dealing with and replying to the Show-Cause notices, was completely incorrect, since they had sent detailed replies to the Speaker in response to the Show-Cause notices.

58. Mr. Sorabjee submitted that after detailed replies had been filed by the Appellants, a full-fledged hearing had been given to them and hence the Appellants did not suffer any prejudice on account of the procedure adopted by the Speaker in disposing of Shri Yeddyurappa's Disqualification application.

59. On the question as to whether the Appellants incurred disqualification under paragraph 2(1)(a) of the Tenth Schedule on account of their conduct, Mr. Sorabjee submitted that it was settled law that for a Member to incur disqualification under paragraph 2(1)(a) of the Tenth Schedule, he was not required to formally resign from the party, but an inference to that effect could be drawn from his conduct which may be incompatible with his political allegiance to the Party. Relying again on paragraph 11 of the decision in *Ravi S. Naik's* case (supra), Mr. Sorabjee submitted that a person could voluntarily give up his membership of a political party, even without tendering his resignation from the membership of that party and in the absence of a formal resignation from the membership, an inference can be drawn from the conduct of the Member that he had voluntarily given up his membership of the political party to which he belonged. Mr. Sorabjee submitted that the view expressed in *Ravi S. Naik's* case (supra) had been reiterated in *Jagjit Singh's* case (surpa) and had also been approved by the Constitution Bench in *Rajendra Singh Rana's* case (supra).

60. Once again referring to the letters written by the Appellants withdrawing support from the Government of their own political party and asserting that a situation had arisen in which the governance of the State could not be carried on in accordance with the provisions of the Constitution, Mr. Sorabjee submitted that the language of the letters submitted by the Appellants contemplated a situation where the governance of the State could not be carried out in accordance with the provisions of the Constitution. It was submitted that the reproduction of the words of Article 356 of the Constitution, which enables imposition of President's Rule and dissolution

of the Assembly, coupled with the request to the Governor to intervene and initiate the constitutional process, could only mean that the Appellants had voluntarily resigned from the Bharatiya Janata Party and wanted President's Rule to be imposed in the State.

61. Mr. Sorabjee submitted that there is no constitutional provision which permits the Members of a House from withdrawing support to the Chief Minister alone. It is the entire Council of Ministers that is collectively responsible to the House. In other words, a Vote of Confidence is expressed in the entire Council of Ministers and not in the Chief Minister alone. According to Mr. Sorabjee, the arguments advanced on behalf of the Appellants, that expression of honest political dissent must not be seen as defection, had been rejected in *Kihoto Hollohan's* case (supra) where this Hon'ble Court observed that a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independent of the political party's declared policies, would not only embarrass its public image and popularity but also undermine public confidence in it.
Mr. Sorabjee submitted that it necessarily follows that as long as a Member professes to belong to a political party, he must abide by and be bound by the decision of the majority within the party. He is free to express dissent within the party platform, but disparate stands in public or public display of revolt against the party, undeniably undermines the very foundation of the party. The very object of the Tenth Schedule was to bring about political stability and prevent members from conspiring with the opposite party.

62. Having dealt with the disqualification of the Appellants by the Speaker, Mr. Sorabjee next took up the question of the rejection of the disqualification application in relation to Shri M.P. Renukacharya and Shri Narasimha Nayak, who were

among the 13 MLAs who had submitted individual but identical letters to the Governor withdrawing support to the Bharatiya Janata Party Government led by Shri B.S. Yeddyurappa, on the ground that they had lost confidence in him in view of the corruption and nepotism prevalent in the administration under him. It was pointed out that the Speaker had made a distinction between the said two MLAs and the other eleven on the ground that while the other two MLAs had retracted their letter to the Governor, they had also indicated that they had full faith in the Government led by Shri Yeddyurappa, whereas the Appellants had simply indicated that they were willing to support any other Government formed by the Bharatiya Janata Party, but with a different Chief Minister. Mr. Sorabjee submitted that while the two MLAs had retracted their letters to the Governor upon reiterating their faith in the Government led by Shri Yeddyurappa, the Appellants were bent upon bringing down the Bharatiya Janata Party Government with the ulterior motive of forming a new Government with the Members of the opposition. It was submitted that the concept of collective responsibility is essentially a political concept. The Cabinet which takes a collective decision relating to policy stands or falls together and any individual member of the Government cannot show a face which is different from that of the Cabinet, as anything contrary would contribute to serious weakening of the Government itself.

63. Mr. Sorabjee submitted that even if the Speaker's decision was wrong, it could not be said to be a perverse order, since there was no deviation from the accepted rules and norms which had prejudiced the Appellants. It was also urged that while the Chief Justice and V.G. Sabhahit, J. had taken one view, N. Kumar, J. had taken a different view, which only reinforced the proposition that in this case two views are possible since the majority decision was that the view of the Speaker could not be regarded as perverse, the Appeals were liable to be dismissed.

64. In addition to the submissions made by Mr. Sorabjee, which he adopted, Shri Satyapal Jain, appearing for Shri Yeddyurappa in the several Civil Appeals, submitted that two other issues were also required to be taken into consideration, namely, (1) whether the Appellants had been prejudiced by the action of the Speaker; and (2) whether the action of withdrawing support from the Chief Minister amounted to voluntarily giving up the membership of the Bharatiya Janata Party which disqualified them under paragraph 2(i)(a) of the Tenth Schedule.

65. Mr. Jain submitted that the crucial facts had not been denied by the Appellants and hence it could not be said that any prejudice had been caused to them. Mr. Jain submitted that it was for the Appellants to deny the allegations made regarding their moving in a group from Karnataka to Goa and to other places where they had issued press releases stating that they were together and had withdrawn support to the Government. Mr. Jain also submitted that the Appellants had not denied the allegation that they had negotiated with another party of the State led by Shri H.D. Kumaraswamy, exploring the possibility of forming an alternate Government.

66. Mr. Jain submitted that apart from denying the allegations made against them, the Appellants could not establish that they had in any way been prejudiced by the order passed by the Speaker and such fact had been duly noted by the Chief Justice in his judgment.

67. On the question of construction of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, Mr. Jain reiterated the submissions made by Mr. Sorabjee relying on the decision of this Court in *Ravi S. Naik's* case (supra) which was upheld in *Rajendra Singh Rana's* case (supra).

68. Mr. Jain submitted that even the question of not having received the copy of the notice sent by the Speaker was a clear afterthought, since detailed replies had been submitted by them and if the Appellants had to differ with the functioning of Shri

Yeddyurappa, they should have taken up the matter within the party without writing to the Governor withdrawing their support to the Bharatiya Janata Party Government led by Shri Yeddyurappa. Mr. Jain submitted that it was quite obvious from the letters written by the Appellants to the Governor that they were bent upon effecting the fall of the Bharatiya Janata Party Government, led by Shri Yeddyurappa, in breach of party discipline, and, as a result, the order passed by the Speaker was fully justified and did not warrant any interference in these proceedings.

69. The main questions which emerge from the submissions made on behalf of the respective parties and the facts of the case may be summarised as follows :

(a) Did the Appellants voluntarily give up their membership of the Bharatiya Janata Party?

(b) Since only three days' time was given to the Appellants to reply to the Show-Cause notices, as against the period of 7 days or more, prescribed in Rule 7(3) of the Disqualification Rules, were the said notices vitiated?

(c) Did the Speaker act in hot haste in disposing of the Disqualification Application filed by Shri B.S. Yeddyurappa introducing a whiff of bias as to the procedure adopted?

(d) What is the scope of judicial review of an order passed by the Speaker under Paragraph 2(1)(a) of the Tenth Schedule to the Constitution, having regard to the provisions of Article 212 thereof?

70. The facts of the case reveal that the Appellants along with Shri M.P. Renukacharya and Shri Narasimha Nayak, wrote identical letters to the Governor on 6th October, 2010, indicating that as MLAs of the Bharatiya Janata Party they had become disillusioned with the functioning of the Government headed by

Shri B.S. Yeddyurappa. According to them, there was widespread corruption, nepotism, favouritism, abuse of power and misuse of Government machinery in the functioning of the Government headed by Chief Minister, Shri Yeddyurappa, *and that a situation had arisen when the governance of the State could not be carried on in accordance with the provisions of the Constitution* (Emphasis added). Accordingly, they were withdrawing their support from the Government headed by Shri Yeddyurappa with a request to the Governor to intervene and to *institute the constitutional process as the constitutional head of the State* (Emphasis added).

71. The Speaker took the view that the said letter and the conduct of the Appellants in moving from Karnataka to Goa and other places and issuing statements both to the print and electronic media regarding withdrawal of support to the BJP Government led by Shri Yeddyurappa and the further fact that the Appellants are said to have negotiated with Shri H.D. Kumaraswamy, the leader of the State Janata Dal, and its members, regarding the formation of an alternative Government was sufficient to attract the provisions of Paragraph 2(1)(a) of the Tenth Schedule to the Constitution. It was held by the Speaker that in the absence of any denial to the allegations made by Shri K.S. Eswarappa, the State President of the BJP, the same had to be accepted as having been proved against the Appellants.

72. In this regard, the Speaker referred to the views expressed by the Constitution Bench in *Kihoto Hollohan's* case (supra), wherein, one of the issues which had been raised and decided was that the act of voluntarily giving up membership of a political party may be either express or implied. Even greater emphasis was laid on the decision in *Ravi S. Naik's* case (supra), wherein, it was observed that there was no provision in the Tenth Schedule which indicated that till a petition, signed and verified in the manner laid down in the Civil Procedure Code for verification of pleadings, was made to the

Chairman or Speaker of the House, he did not get jurisdiction to give a decision as to whether a Member of the House had become subject to disqualification under Paragraph 2(1)(a) of the Tenth Schedule or not.

73. The aforesaid view taken by the Speaker has to be tested in relation to the action of the concerned Members of the House and it has to be seen whether on account of such action a presumption could have been drawn that they had voluntarily given up their membership of the BJP, thereby attracting the provisions of Paragraph 2(1)(a) of the Tenth Schedule.

74. In the instant case, the Appellants had in writing informed the Governor on 6th October, 2010, that having become disillusioned with the functioning of the Government headed by Shri B.S. Yeddyurappa, they had chosen to withdraw support to the Government headed by Shri B.S. Yeddyurappa and had requested the Speaker to intervene and institute the constitutional process as constitutional head of the State. The said stand was re-emphasized in their replies to the Show-Cause notices submitted by the Appellants on 9th October, 2010, wherein they had, inter alia, denied that their conduct had attracted the vice of "defection" within the scope of Paragraph 2(1)(a) of the Tenth Schedule. In their said replies they had categorically indicated that nowhere in the letter of 6th October, 2010, had they indicated that they would not continue as Members of the Legislature Party of the BJP. On the other hand, they had reiterated that they would continue to support the BJP and any Government formed by the BJP headed by any leader, other than Shri B.S. Yeddyurappa, as Chief Minister of the State. They also reiterated that they would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka according to the Constitution of India and that it was only to save the party and Government and to ensure that the State was rid of a corrupt Chief Minister, that the letter had been

submitted to the Governor on 6th October, 2010.

75. At this point let us consider the contents of the letter dated 6th October, 2010, written by the Appellants to the Governor, which has been reproduced hereinbefore. The letter clearly indicates that the author thereof who had been elected as a MLA on a Bharatiya Janata Party ticket, having become disillusioned with the functioning of the Government headed by Shri B.S. Yeddyurappa on account of widespread corruption, nepotism, favouritism, abuse of power and misuse of Government machinery, was convinced that a situation had arisen in which the governance of the State could not be carried on in accordance with the provisions of the Constitution and that Shri Yeddyurappa had forfeited the confidence of the people. The letter further indicates that it was in the interest of the State and the people of Karnataka that the author was expressing his lack of confidence in the Government headed by Shri Yeddyurappa and that he was, accordingly, withdrawing his support to the Government headed by Shri Yeddyurappa with a request to the Governor to intervene and institute the constitutional process as constitutional head of the State.

76. Although, Mr. Sorabjee was at pains to point out that the language used in the letter was similar to the language used in Article 356 of the Constitution, which, according to him, was an invitation to the Governor to take action in accordance with the said Article, the same is not as explicit as Mr. Sorabjee would have us believe. The "constitutional process", as hinted at in the said letter did not necessarily mean the constitutional process of proclamation of President's rule, but could also mean the process of removal of the Chief Minister through constitutional means. On account thereof, the Bharatiya Janata Party was not necessarily deprived of a further opportunity of forming a Government after a change in the leadership of the legislature party. In fact, the same is evident from the reply given by the Appellants on 9th October, 2010, in reply to the Show-Cause notices issued to them, in which they had re-emphasized

their position that they not only continued to be members of the Bharatiya Janata Party, but would also support any Government formed by the Bharatiya Janata Party headed by any leader, other than Shri B.S. Yeddyurappa, as the Chief Minister of the State. The conclusion arrived at by the Speaker does not find support from the contents of the said letter of 6th October, 2010, so as to empower the Speaker to take such a drastic step as to remove the Appellants from the membership of the House.

77. The question which now arises is whether the Speaker was justified in concluding that by leaving Karnataka and going to Goa or to any other part of the country or by allegedly making statements regarding the withdrawal of support to the Government led by Shri Yeddyurappa and the formation of a new Government, the Appellants had voluntarily given up their membership of the B.J.P. and were contemplating the formation of a Government excluding the Bharatiya Janata Party. The Speaker has proceeded on the basis that the allegations must be deemed to have been proved, even in the absence of any corroborative evidence, simply because the same had not been denied by the Appellants. The Speaker apparently did not take into consideration the rule of evidence that a person making an allegation has to prove the same with supporting evidence and the mere fact that the allegation was not denied, did not amount to the same having been proved on account of the silence of the person against whom such allegations are made. Except for the affidavit filed by Shri K.S. Eswarappa, State President of the B.J.P., and the statements of two of the thirteen MLAs, who had been joined in the Disqualification Application, there is nothing on record in support of the allegations which had been made therein. Significantly, the said affidavits had not been served on the Appellants. Since Shri K.S. Eswarappa was not a party to the proceedings, the Speaker should have caused service of copies of the same on the Appellants to enable them to meet the allegations made therein. In our view, not only did the Speaker's action amount to denial of the principles of

natural justice to the Appellants, but it also reveals a partisan trait in the Speaker's approach in disposing of the Disqualification Application filed by Shri B.S. Yeddyurappa. If the Speaker wished to rely on the statements of a third party which were adverse to the Appellants' interests, it was obligatory on his part to have given the Appellants an opportunity of questioning the deponent as to the veracity of the statements made in the affidavit. This conduct on the part of the Speaker is also indicative of the "hot haste" with which the Speaker disposed of the Disqualification Petition as complained of by the Appellants. The question does, therefore, arise as to why the Speaker did not send copies of the affidavit affirmed and filed by Shri Eswarappa as also the affidavits of the two MLAs, who had originally withdrawn support to the Government led by Shri Yeddyurappa, but were later allowed to retract their statements, to the Appellants. Given an opportunity to deal with the said affidavits, the Appellants could have raised the question as to why the said two MLAs, Shri M.P. Renukacharya and Shri Narasimha Nayak, were treated differently on account of their having withdrawn the letters which they had addressed to the Governor, while, on the other hand, disqualifying the Appellants who had written identical letters to the Governor, upon holding that they had ceased to be members of the Bharatiya Janata Party, notwithstanding the Show-Cause notices issued to them. The explanation given as to why notices to show cause had been issued to the Appellants under Rule 7 of the Disqualification Rules, giving the Appellants only three days' time to respond to the same, despite the stipulated time of seven days or more indicated in Rule 7(3) itself, is not very convincing. There was no compulsion on the Speaker to decide the Disqualification Application filed by Shri Yeddyurappa in such a great hurry within the time specified by the Governor to the Speaker to conduct a Vote of Confidence in the Government headed by Shri Yeddyurappa. It would appear that such a course of action was adopted by the Speaker on 10th October, 2010, since the Vote of Confidence on the Floor of the House was slated for 12th October, 2010. The element of hot haste is also evident in the action of the Speaker in this regard as well.

78. In arriving at the conclusion that by such short notice, no prejudice has been caused to the Appellants, since they had filed their detailed replies to the Show-Cause notices, the Speaker had relied on the two decisions of this Court, referred to hereinbefore in *Dr. Mahachandra Prasad Singh's* case and *Ravi S. Naik's* case, wherein it had been held that the 1986 Rules were directory and not mandatory in nature, and, as a result, the order dated 10th October, 2010, could not be set aside only on the ground of departure therefrom. Even if less than seven days' time is given to reply to the Show-Cause notice, the legislator must not be prejudiced or precluded from giving an effective reply to such notice.

79. One of the questions which was raised and answered in *Dr. Mahachandra Prasad Singh's* case was the nature and effect of non-compliance with the provisions of Rules 6 and 7 of the Disqualification Rules, 1994. It was held therein by a Bench of Three Judges of this Court that the said provisions were directory and not mandatory and the omission to file an affidavit neither rendered the petition invalid nor did it affect the assumption of jurisdiction by the Chairman to initiate proceedings to determine the question of disqualification of a Member of the House. In the facts of the said case it was held that the 1994 Rules being subordinate legislation, they were directory and not mandatory as they could not curtail the content and scope of the substantive provision under which they were made. However, the facts of this case differ significantly from the facts in *Mahachandra's* case (supra).

80. In *Mahachandra's* case, a member of the Indian National Congress, who had been elected as a Member of the Legislative Council on the ticket of the Indian National Congress, contested a Parliamentary election as an independent candidate, which facts were part of official records

and not merely hearsay, as in the present case. In the aforesaid circumstances, the Chairman held that by contesting as an Independent Candidate, the said Member had given up his membership of the Indian National Congress. It is in that context that it was held that since the Member had not disputed the allegations, but had, in fact, admitted the same in his writ petition, he had not suffered any prejudice in not being provided with a copy of the letter from the leader of the Indian National Congress on which reliance had been placed by the Chairman. The distinguishing feature of the facts of Mahachandra Prasad Singh's case and this case is that the facts in the former case were admitted and were part of the official records, while in this case the allegations are highly disputed and are in the realms of allegation which were yet to be proved with corroborating evidence, though according to the Speaker, such allegations were not disputed.

81. As far as the decision in *Ravi S. Naik's* case (supra) is concerned, the facts of the said case are somewhat different from the facts of this case. What is commonly known and referred to as *Ravi S. Naik's* case is, in fact, a decision in respect of the two Civil Appeals, namely, Civil Appeal No.2904 of 1993 filed by Ravi S. Naik and Civil Appeal No.3309 of 1993 filed by Shri Sanjay Bandekar and Shri Ratnakar Chopdekar. There is a certain degree of similarity between the facts of the latter appeal and this case. At the relevant time, the Congress (I) initially formed the Government with the support of one independent member. Subsequently, seven members of the Congress (I) left the party and formed the Goan People's Party and formed a coalition government with the Maharashtrawadi Gomantak Party under the banner of Progressive Democratic Front (PDF). The said government was also short-lived and ultimately President's Rule was imposed in the State and the Legislative Assembly was suspended on 14th December, 1990. Prior to proclamation of President's Rule, Shri Ramakant Khalap, who was the leader of the Progressive Democratic Front, staked his claim to form a Government, but no further

action was taken on such claim since the Assembly was suspended on 14th December, 1990. However, Shri Ramakant Khalap filed a petition before the Speaker under Article 191(2) read with paragraphs 2(1)(a) and 2(1)(b) of the Tenth Schedule to the Constitution for disqualification of two Members, who had joined the Congress Democratic Front inspite of being Members of the Maharashtrawadi Gomantak Party. By his order dated 13th December, 1990, the Speaker disqualified the said two Members from the House on the ground of defection.

82. On 25th January, 1991, President's Rule was revoked and Shri Ravi S. Naik was sworn in as Chief Minister of Goa. On the same day, one Dr. Kashinath G. Jhalmi, belonging to the Maharashtrawadi Gomantak Party, filed a petition before the Speaker for Shri Naik's disqualification on the ground of defection. Simultaneously with the above, the Speaker, Shri Sirsat, was removed from the Office and was replaced by the Deputy Speaker who began to function as Speaker in his place. Shri Bandekar and Shri Chopdekar filed an application before the Deputy Speaker for review of the order dated 13th December, 1990, by which they had been disqualified from the membership of the House. The same was allowed by the Deputy Speaker by his order dated 7th March, 1991, and the earlier order dated 13th December, 1990, was set aside. Similarly, Shri Ravi Naik also filed an application for review of the order dated 15th February, 1991, which was allowed by the Deputy Speaker by his order of 8th March, 1991. The said two orders passed by the Deputy Speaker were challenged by way of Writ Petitions which were allowed and the orders passed by the Deputy Speaker on 7th and 8th March, 1991, were held to be void. Consequently, the Writ Petitions filed by Shri Bandekar and Shri Chopdekar and by Shri Ravi S. Naik stood revived with a direction for disposal of the same on merits. The Writ Petitions were ultimately dismissed against which two appeals were filed.

83. It was in the appeal filed by Shri Bandekar and Shri Chopdekar that the issue of voluntary resignation from membership of the Maharashtrawadi Gomantak Party fell for consideration of the High Court, while in Ravi S. Naik's case the question was whether a valid split of the aforesaid party had been effected with Shri Naik forming a new party with seven other Members of the said party. The said question was answered in Shri Ravi Naik's favour and his appeal was allowed and the order of his disqualification from the House was set aside. The other appeal filed by Shri Bandekar and Shri Chopdekar was dismissed and their disqualification by the Speaker was upheld. In other words, the High Court approved the proposition that it was not necessary for a Member of the House to formally tender his resignation from the party but that the same should be inferred from his conduct. It was held that a person may voluntarily give up his/her membership of a political party, even though he/she had not tendered his/her resignation from the membership of that party. However, the Division Bench of the High Court approved the said proposition in the facts and circumstances of that case, where, after the Government was initially formed, there was an exodus from the principal party resulting in the formation of a new party which stood protected under paragraph 4 of the Tenth Schedule to the Constitution. Of course, it will also have to be noted that Shri Bandekar and Shri Chopdekar had not only accompanied Dr. Barbosa to the Governor and had informed the Governor that it did not support the Maharashtrawadi Gomantak Party any further, but they had also made it known to the public that they had voluntarily resigned from the membership of the said party. It is in these facts that a presumption was drawn from the conduct of the Members that they had voluntarily resigned from the membership of the Maharashtrawadi Gomantak Party. In the said case also, after Show-Cause notices were issued, both persons filed their replies stating that they had not given up the membership of the Maharashtrawadi Gomantak Party voluntarily or would otherwise continue to be a Member of the said party and no document had been produced by the

complainant nor has anything disclosed to show that they had resigned from the membership of the party. It was also denied that they had informed the Governor that they did not support the Maharashtrawadi Gomantak Party or that they had informed anybody that they had voluntarily resigned from the membership of said party. The Speaker, however, rejected the explanation given by Shri Bandekar and Shri Chopdekar and recorded that he was satisfied that by their conduct, actions and speech, they had voluntarily given up the membership of the Maharashtrawadi Gomantak Party.

84. This brings us to the next question regarding the manner in which the Disqualification Application filed by Shri B.S. Yeddyurappa was proceeded with and disposed of by the Speaker. On 6th October, 2010, on receipt of identical letters from the 13 BJP MLAs and the 5 independent MLAs withdrawing support to the BJP Government led by Shri B.S. Yeddyurappa, the Governor on the very same day, wrote a letter to the Chief Minister, informing him of the developments regarding the withdrawal of support by 13 BJP MLAs and 5 independent MLAs and requesting him to prove his majority in the Assembly on or before 12th October, 2010 by 5.00 p.m. The Speaker was also requested accordingly. On the very same day, Shri Yeddyurappa, as the leader of the Bharatiya Janata Legislative Party in the Legislative Assembly, filed an application before the Speaker under Rule 6 of the Disqualification Rules, 1986, being Disqualification Application No.1 of 2010, for a declaration that all the thirteen MLAs elected on BJP tickets along with two other MLAs had incurred disqualification in view of the Tenth Schedule to the Constitution. Immediately thereafter, on 7th October, 2010, the Speaker issued Show-Cause notices to the aforesaid MLAs informing them of the Disqualification Application filed by Shri B.S. Yeddyurappa and informing them that by submitting letters to the Governor withdrawing support to the Government led by Shri Yeddyurappa, they had violated paragraph 2(1)(a) of the Tenth Schedule to the Constitution and were, therefore,

disqualified from continuing as Members of the House. The Appellants were given time till 5.00 p.m. on 10th October, 2010, to submit their objection, if any, to the said application. Even if as held by this Court in *Mahachandra Prasad Singh's* case (supra), Rules 6 and 7 of the Disqualification Rules are taken as directory and not mandatory, the Appellants were still required to be given a proper opportunity of meeting the allegations mentioned in the Show-Cause notices. The fact that the Appellants had not been served with notices directly, but that the same were pasted on the outer doors of their quarters in the MLA complex and that too without copies of the various documents relied upon by Shri Yeddyurappa, giving them three days' time to reply to the said notices justifies the Appellants' contention that they had not been given sufficient time to give an effective reply to the Show-Cause notices. Furthermore, the Appellants were not served with copies of the affidavit filed by Shri K.S. Eswarappa, although, the Speaker relied heavily on the contents thereof in arriving at the conclusion that the Appellants stood disqualified under paragraph 2(1)(a) of the Tenth Schedule to the Constitution.

85. Likewise, the Appellants were also not supplied with the copies of the affidavits filed by Shri M.P. Renukacharya and Shri Narasimha Nayak, whereby they retracted the statements which they had made in their letters submitted to the Governor on 6th October, 2010. The Speaker not only relied upon the contents of the said affidavits, but also dismissed the Disqualification Application against them on the basis of such retraction, after having held in the case of the Appellants that the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution were attracted immediately upon their intention to withdraw their support to the Government led by Shri Yeddyurappa. The Speaker ignored the claim of the Appellants to be given reasonable time to respond to the Show-Cause notices and also to the documents which were handed over to the learned Advocates of the Appellants at the time of hearing of the Disqualification Application. Incidentally, a further

incidence of partisan behaviour on the part of the Speaker will be evident from the fact that not only were the Appellants not given an adequate opportunity to deal with the contents of the affidavits affirmed by Shri K.S. Eswarappa, Shri M.P. Renukacharya and Shri Narasimha Nayak, but the time given to submit the Show-Cause on 10th October, 2010, was preponed from 5.00 p.m. to 3.00 p.m., making it even more difficult for the Appellants to respond to the Show-Cause notices in a meaningful manner. The explanation given by the Speaker that the Appellants had filed detailed replies to the Show-Cause notices does not stand up to the test of fairness when one takes into consideration the fact that various allegations had been made in the three affidavits filed by Shri K.S. Eswarappa, Shri M.P. Renukacharya and Shri Narasimha Nayak, which could only be answered by the Appellants themselves and not by their learned Advocates.

86. The procedure adopted by the Speaker seems to indicate that he was trying to meet the time schedule set by the Governor for the trial of strength in the Assembly and to ensure that the Appellants and the other independent MLAs stood disqualified prior to the date on which the Floor Test was to be held. Having concluded the hearing on 10th October, 2010, by 5.00 p.m., the Speaker passed a detailed order in which various judgments, both of Indian Courts and foreign Courts, and principles of law from various authorities were referred to, on the same day, holding that the Appellants had voluntarily given up their membership of the Bharatiya Janata Party by their acts and conduct which attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, whereunder they stood disqualified. The Vote of Confidence took place on 11th October, 2010, in which the disqualified members could not participate and, in their absence Shri B.S. Yeddyurappa was able to prove his majority in the House.

87. Unless it was to ensure that the Trust Vote did not go against the Chief Minister, there was no conceivable reason

for the Speaker to have taken up the Disqualification Application in such a great hurry. Although, in *Mahachandra Prasad Singh's* case (supra) and in *Ravi S. Naik's* case (supra), this Court had held that the Disqualification Rules were only directory and not mandatory and that violation thereof amounted to only procedural irregularities and not violation of a constitutional mandate, it was also observed in *Ravi S. Naik's* case (supra) that such an irregularity should not be such so as to prejudice any authority who is affected aversely by such breach. In the instant case, it was a matter of survival as far as the Appellants were concerned. In such circumstances, they deserved a better opportunity of meeting the allegations made against them, particularly when except for the newspaper cuttings said to have been filed by Shri Yeddyurappa along with the Disqualification Application, there was no other evidence at all available against the Appellants.

88. We are quite alive to the decision in Jagjit Singh's case (supra), where it was held that failure to provide documents relied upon by the Speaker to the concerned Member, whose membership of the House was in question, and denying him the right of cross-examination, did not amount to denial of natural justice and did not vitiate the proceedings. However, a rider was added to the said observation to the effect that the Speaker's decision in such a situation would have to be examined on a case-to-case basis. In *Jagjit Singh's* case (supra), video recordings of TV interviews, participation in the meeting of the Congress Legislative Party in the premises of the Assembly, the signatures on the register maintained by the Congress Legislative Party, were produced before the Speaker, who decided the matter on the basis thereof. That is not so in the present case. As mentioned hereinbefore, the Disqualification Application filed by Shri Yeddyurappa contained only bald allegations, which were not corroborated by any direct evidence. The application did not even mention the provision under which the same had been made. By allowing Shri K.S. Eswarappa, who was not even a party to the

proceedings, and Shri M.P. Renukacharya and Shri Narasimha Nayak to file their respective affidavits, the short-comings in the Disqualification Application were allowed to be made up. The Speaker, however, relied on the same to ultimately declare that the Appellants stood disqualified from the membership of the House, without even serving copies of the same on the Appellants, but on their learned Advocates, just before the hearing was to be conducted. If one were to take a realistic view of the matter, it was next to impossible to deal with the allegations at such short notice. In the circumstances, we cannot but hold that the conduct of the proceedings by the Speaker and the decision given by the Speaker on the basis thereof did not meet even the parameters laid down in *Jagjit Singh's* case (supra).

89. We cannot also lose sight of the fact that although the same allegations, as were made against the Appellants by Shri Yeddyurappa, were also made against Shri M.P. Renukacharya and Shri Narasimha Nayak, their retraction was accepted by the Speaker, despite the view expressed by him that upon submitting the letter withdrawing support to the BJP Government led by Shri Yeddyurappa, all the MLAs stood immediately disqualified under paragraph 2(1)(a) of the Tenth Schedule to the Constitution, and they were, accordingly, permitted to participate in the Confidence Vote for reasons which are not required to be spelt out.

90. On the question of justiceability of the Speaker's order on account of the expression of finality in paragraph 6 of the Tenth Schedule to the Constitution, it has now been well-settled that such finality did not include the powers of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker. Under paragraph 2(1)(a) of the Tenth Schedule, the Speaker functions in a quasi-judicial capacity, which makes an order passed by him in such capacity, subject to judicial review. The scope of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, therefore,

enables the Speaker in a quasi-judicial capacity to declare that a Member of the House stands disqualified for the reasons mentioned in paragraph 2(1)(a) of the Tenth Schedule to the Constitution.

91. Having considered all the different aspects of the matter and having examined the various questions which have been raised, we are constrained to hold that the proceedings conducted by the Speaker on the Disqualification Application filed by Shri B.S. Yeddyurappa do not meet the twin tests of natural justice and fair play. The Speaker, in our view, proceeded in the matter as if he was required to meet the deadline set by the Governor, irrespective of whether, in the process, he was ignoring the constitutional norms set out in the Tenth Schedule to the Constitution and the Disqualification Rules, 1986, and in contravention of the basic principles that go hand-in-hand with the concept of a fair hearing.

92. As we have earlier indicated, even if the Disqualification Rules were only directory in nature, even then sufficient opportunity should have been given to the Appellants to meet the allegations levelled against them. The fact that the Show-Cause notices were issued within the time fixed by the Governor for holding the Trust Vote, may explain service of the Show-Cause notices by affixation at the official residence of the Appellants, though without the documents submitted by Shri Yeddyurappa along with his application, but it is hard to explain as to how the affidavits, affirmed by Shri K.S. Eswarappa, Shri M.P. Renukacharya and Shri Narasimha Nayak, were served on the learned Advocates appearing for the Appellants only on the date of hearing and that too just before the hearing was to commence. Extraneous considerations are writ large on the face of the order of the Speaker and the same has to be set aside.

93. Incidentally, in paragraph 5 of the Tenth Schedule, which was introduced into the Constitution by the Fifty-second Amendment Act, 1985, to deal with the immorality of defection

and Floor crossing during the tenure of a legislator, it has been indicated that notwithstanding anything contained in the said Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of the State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under the Schedule if he by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election, and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party. The object behind the said paragraph is to ensure that the Speaker, while holding office, acts absolutely impartially, without any leaning towards any party, including the party from which he was elected to the House.

94. The Appeals are, therefore, allowed. The order of the Speaker dated 10th October, 2010, disqualifying the Appellants from the membership of the House under paragraph 2(1)(a) of the Tenth Schedule to the Constitution is set aside along with the majority judgment delivered in Writ Petition (Civil) No.32660-32670 of 2010, and the portions of the judgment delivered by Justice N. Kumar concurring with the views expressed by the Hon'ble Chief Justice, upholding the decision of the Speaker on the Disqualification Application No.1 of 2010 filed by Shri B.S. Yeddyurappa. Consequently, the Disqualification Application filed by Shri B.S. Yeddyurappa is dismissed.

95. There will be no order as to costs.

B.B.B. Appeals allowed.

ABHAY SINGH CHAUTALA
v.
C.B.I.
(Criminal Appeal No. 1257 of 2011)

JULY 04, 2011

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

Prevention of Corruption Act, 1988: s.19 – Interpretation of – Previous sanction for prosecution – Appellants were tried before the Special Judge, CBI for offences u/ss.13(1)(e) and 13(2) of the Act r/w s.109 IPC – Allegation that while working as Members of Legislative Assembly they had accumulated wealth disproportionate to their known sources of income – However, there was no sanction for prosecution u/s.19 of the Act against the appellants – Objection raised regarding the absence of sanction – Special Judge held that the allegations in the charge sheet did not contain the allegation that the appellants had abused their current office as Member of Legislative Assembly and, therefore, no sanction was necessary – High Court upheld the order by placing reliance upon the judgment of this Court in Prakash Singh Badal – Justification – Plea of appellants that the judgment in Prakash Singh Badal as also the relied on judgment in A.R. Antulay's case were not correct and required reconsideration by a Larger Bench – The appellants contended that the law declared in A R. Antulay was obiter dictum; that the said case was decided per incuriam of s.6(2) of the Act, as it therein existed and further that, in effect, the decision in A R. Antulay added a further proviso to s.19(1) of the Act which was impermissible – Held: In Antulay's case, the Court held that the relevant date of sanction would be the date on which the cognizance was taken of the offence and that since the accused in that case did not continue to hold the office that he had allegedly abused on the date of cognizance, there was no necessity of

granting any sanction – The Court held so in the most unequivocal terms – It cannot be said that the question decided by the Court regarding the abuse of a particular office and the effects of the accused not continuing with that office or holding an altogether different office was obiter – In fact, it is on that very basis that the judgment of A.R.Antulay proceeded – The decision in Antulay's case has been followed right up to the decision in Prakash Singh Badal and even thereafter – The law settled in Antulay's case has stood the test of time for last over 25 years and as per the maxim stare decisis et non quieta movere, it would be better to stand by that decision and not to disturb what is settled – As regards the contention that Antulay's case was decided per incuriam, it is not as if s.6(2) of the Act as it then existed, was ignored or was not referred to therein, in fact, the Bench had very specifically made a reference to and had interpreted s.6 as a whole – Merely because a concept of doubt is contemplated in s.19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction – The concept of 'doubt' or 'plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of s.19(1) would be different from that given in Antulay's case or Prakash Singh Badal – The argument regarding the addition of the proviso must also fall as the language of the suggested proviso contemplates a different "post" and not the "office", which are entirely different concepts – It cannot be said that the decision in Antulay's case and the subsequent decisions require any reconsideration – Even on merits, there is no necessity of reconsidering the relevant ratio laid down in Antulay's case – The High Court was absolutely right in relying on the decision in Prakash Singh Badal to hold that the appellants had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction u/s.19 of the Act – Maxims – "stare decisis et non quieta movere".

The appellants were tried before the Special Judge, CBI for offences punishable under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act read with Section 109 of IPC in separate trials. It was alleged that both the accused-appellants while working as Members of Legislative Assembly had accumulated wealth disproportionate to their known sources of income.

Admittedly, there was no sanction for prosecution under Section 19 of the Act against both the appellants. An objection regarding the absence of sanction was raised before the Special Judge, who held that the allegations in the charge sheet did not contain the allegation that the appellants had abused their current office as member of Legislative Assembly and, therefore, no sanction was necessary. This order was challenged by way of a petition under Section 482, Cr.P.C. before the High Court. The High Court dismissed the said petition by placing reliance upon the judgment of this Court in *Prakash Singh Badal*.

The appellants contended before this Court that on the day when the charges were framed or on any date when the cognizance was taken, both the appellants were admittedly public servants and, therefore, under the plain language of Section 19(1) of the Act, the Court could not have taken cognizance unless there was a previous sanction under Section 19 of the Act. The appellants further urged that the judgment of this Court in *Prakash Singh Badal* **as also the reliance on judgment in** *A R. Antulay* **were not correct and required reconsideration and urged for a reference to a Larger Bench.**

In *Antulay's* ***case*****, the Court had held that where a public servant holds a different capacity altogether from the one which he is alleged to have abused, there would be no necessity of sanction at all. The appellants**

contended that the law declared in *A R. Antulay* **was** *obiter dictum*; **that the said case was decided per incuriam of Section 6(2) of the Act, as it therein existed (and which is** *pari materia* **with Section 19(2) of the Act) and further that, in effect, the decision in** *A R. Antulay* **added a further proviso to Section 19(1) of the Act which was impermissible.**

Dismissing the appeals, the Court

HELD:1.1. In *A. R. Antulay's* **case, the Court held that the relevant date of sanction would be the date on which the cognizance was taken of the offence and that since the accused in that case did not continue to hold the office that he had allegedly abused on the date of cognizance, there was no necessity of granting any sanction. The Court held so in the most unequivocal terms. It cannot be said that the question decided by the Court regarding the abuse of a particular office and the effects of the accused not continuing with that office or holding an altogether different office was obiter. In fact it is on that very basis that the judgment of *A.R.Antulay* proceeded. [Para 20] [980-D-F]**

1.2. This finding is buttressed by the decision reported in *Balakrishnan Ravi Menon* **which decision came almost immediately after** *Prakash Singh Badal* **case. Whether the finding given in the judgment of** *Antulay's* ***case*** **was obiter was the question that directly fell for consideration in that case. The Court unequivocally rejected the contention that the finding given in** *Antulay's* ***case*** **regarding the abuse of office of Chief Minister was obiter. In** *Antulay's* ***case*** **the complainant had specifically and basically raised the point that since the accused had ceased to hold the office of Chief Minister on the date of cognizance, there was no question of any sanction and that was the main issue which was decided in** *Antulay's* ***case*** **as the basic issue. The finding given in** *Antulay's*

case **thus cannot be said to be in any manner obiter and does not require reconsideration. [Paras 22, 23] [981-C-G]**

1.3. Further, the decision in *Antulay's* ***case*** **has been followed right up to the decision in** *Prakash Singh Badal* **and even thereafter. The law settled in** *Antulay's* ***case*** **has stood the test of time for over 25 years and it is trite that going as per the maxim** *stare decisis et non quieta* ***movere*****, it would be better to stand by that decision and not to disturb what is settled. [Para 24] [982-D-E]**

1.4. The appellants thereafter contended that the decision in *Antulay's* ***case*** **is hit by the doctrine of** *per incuriam***. In support of their argument, the appellants contended that in** *Antulay's* ***case*****, Section 6(2) of the Act, as it therein existed, was ignored. The argument was that Section 6(2) which is parimateria with Section 19(2) of the Act provides that in case of doubt as to which authority should give the sanction, the time when the offence is alleged to have been committed is relevant. The further argument was that if that is so, then the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken so as to cause doubt about the sanctioning authority and thus, there would be necessity of a sanction on the date of cognizance and, therefore, in ignoring this aspect, the decision in** *Antulay's* ***case*** **has suffered an illegality. This argument is basically incorrect. In** *Antulay's* ***case*****, it is not as if Section 6(2) of the Act as it then existed, was ignored or was not referred to, but the Constitution Bench had very specifically made a reference to and had interpreted Section 6 as a whole. Therefore, it cannot be said that the Constitution Bench had totally ignored the provisions of Section 6 and more particularly, Section 6(2). Once the Court had held that if**

the public servant had abused a particular office and was not holding that office on the date of taking cognizance, there would be no necessity to obtain sanction, it was obvious that it was not necessary for the Court to go up to Section 6(2) as in that case, there would be no question of doubt about the sanctioning authority. It cannot be said that the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken. That is not the eventuality contemplated in Section 6(2) or Section 19(2), as the case may be. The view taken in *Antulay's* ***case*** **was on a specific interpretation of Section 6 generally and more particularly, Section 6(1)(c), which is parimateria to Section 19(1)(c) of the Act. Once it was held that there was no necessity of sanction at all, there would be no question of there being any doubt arising about the sanctioning authority. The doubt expressed in Section 19(2) is not a pointer to suggest that a public servant may have abused any particular office, but when he occupies any other office subsequently, then the sanction is a must. That will be the incorrect reading of the Section. The Section simply contemplates a situation where there is a genuine doubt as to whether sanctioning authority should be the Central Government or the State Government or any authority competent to remove him. The words in Section 19(2) are to be read in conjunction with Sections 19(1)(a), 19(1)(b) and 19(1)(c). These clauses only fix the sanctioning authority to be the authority which is capable of "removing a public servant". The doubt could arise in more manners than one and in more situations than one, but to base the interpretation of Section 19(1) of the Act on the basis of Section 19(2) would be putting the cart before the horse. The two Sections would have to be interpreted in a rational manner. Once the interpretation is that the prosecution**

of a public servant holding a different capacity than the one which he is alleged to have abused, there is no question of going to Section 6(2) / 19(2) at all in which case there will be no question of any doubt. This interpretation of Section 6(1) or, as the case may be, Section 19(1), is on the basis of the expression "office" in three sub-clauses of Section 6(1), or the case may be, Section 19(1). For all these reasons, it cannot be said that *Antulay's* ***case*** **was decided** *per incuriam* **of Section 6(2). [Paras 25, 26 and 27] [983-E-H; 984-A-H; 985-A-C; 986-F-H; 987-A-B]**

1.5. The appellants, in support of their argument that *Antulay's case* requires reconsideration, urged that that interpretation therein amounted to re-writing of Section 19(1) and as if a proviso would be added to Section 19(1) to the following effect:- "Provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed." The argument regarding the addition of the proviso must also fall as the language of the suggested proviso contemplates a different "post" and not the "office", which are entirely different concepts. That is apart from the fact that the interpretation regarding the abuse of a particular office and there being a direct relationship between a public servant and the office that he has abused, has already been approved of in *Antulay's* ***case*** **and the other cases following** *Antulay's* ***case*** **including** *Prakash Singh Badal***. It was also urged that a literal interpretation is a must, particularly, to sub-Section (1) of Section 19. That argument also must fall as sub-Section (1) of Section 19 has to be read with in tune with and in light of sub-Sections (a), (b) and (c) thereof. Therefore, the theory of *litera regis* is rejected while interpreting Section 19(1). On the same lines, the argument based on the word**

"is" in sub-Sections (a), (b) and (c) is also rejected. It is true that the Section operates *in praesenti*; however, the Section contemplates a person who continues to be a public servant on the date of taking cognizance. However, as per the interpretation, it excludes a person who has abused some other office than the one which he is holding on the date of taking cognizance, by necessary implication. Once that is clear, the necessity of the literal interpretation would not be there in the present case. Therefore, giving the literal interpretation to the Section would lead to absurdity and some unwanted results, as had already been pointed out in *Antulay's* ***case.*** **[Paras 28, 29] [987-C-F; 988-H]**

1.6. Based on the language of Sections 19(1) and (2), the appellant contended that two different terms were used in the whole Section, one term being "public servant" and the other being "a person". It was, therefore, urged that since the two different terms were used by the Legislature, they could not connote the same meaning and they had to be read differently. The argument was that the term "public servant" in relation to the commission of an offence connotes the time period of the past whereas the term "a person" in relation to the sanction connotes the time period of the present and therefore, since the two terms are not synonymous and convey different meanings in respect of time/status of the office, the term "public servant" should mean the "past office" while "person" should mean the "present status/present office". While the different terms used in one provision would have to be given different meaning, it cannot be said that by accepting the interpretation of Section 19(1) in *Antulay's case*, the two terms referred to above get the same meaning. The term "public servant" is used in Section 19(1) as Sections 7, 10, 1 and 13 which are essentially the offences to be committed by public servants only. Section 15 is the attempt by a public

servant to commit offence referred to in Section 13(1)(c) or 13(1)(d). Section 19(1) speaks about the cognizance of an offence committed by a public servant. It is not a cognizance of the public servant. The Court takes cognizance of the offence, and not the accused, meaning, the Court decides to consider the fact of somebody having committed that offence. In case of this Act, such accused is only a public servant. Then comes the next stage that such cognizance cannot be taken unless there is a previous sanction given. The sanction is in respect of the accused who essentially is a public servant. The use of the term "a person" in sub-Sections (a), (b) and (c) only denotes an "accused". An "accused" means who is employed either with the State Government or with the Central Government or in case of any other person, who is a public servant but not employed with either the State Government or the Central Government. It is only "a person" who is employed or it is only "a person" who is prosecuted. His capacity as a "public servant" may be different but he is essentially "a person" – an accused person, because the Section operates essentially qua an accused person. It is not a "public servant" who is employed; it is essentially "a person" and after being employed, he becomes a "public servant" because of his position. It is, therefore, that the term "a person" is used in clauses (a), (b) and (c). The key words in these three clauses are "*not removable from his office save by or with the sanction of ....*". It will be again seen that the offences under Sections 7, 10, 11 and 13 are essentially committed by those persons who are "public servants". Again, when it comes to the removal, it is not a removal of his role as a "public servant", it is removal of "a person" himself who is acting as a "public servant". Once the Section is read in this manner, then there is no question of assigning the same meaning to two different terms in the Section. [Para 30] [989-A-H; 990-A-D]

1.7. Again on the basis of the definition of "public servant" as given in Section 2(c) of the Act, and more particularly clause 2(c)(vi), which provides that an arbitrator, on account of his position as such, is public servant, it was contended by the appellants that some persons, as contemplated in Sections 2(c)(vii), (viii), (ix) and (x), may adorn the character of a public servant only for a limited time and if after renouncing that character of a public servant on account of lapse of time or non-continuation of their office they are to be tried for the abuse on their part of the offices that they held, then it would be a very hazardous situation. The contention cannot be accepted. If the person concerned at the time when he is to be tried is not a public servant, then there will be no necessity of a sanction at all. Section 19(1) is very clear on that issue. This Court does not see how it will cause any hazardous situation. Similarly, it was tried to be argued that a Vice-Chancellor who is a public servant and is given a temporary assignment of checking the papers or conducting examination or being invigilator by virtue of which he is a public servant in an entirely different capacity as from that of a Professor or a Vice-Chancellor, commits an offence in the temporary capacity, then he would not be entitled to the protection and that will be causing violence to such public servant and, therefore, such could not have been the intention of the Legislature. The example is wholly irrelevant in the light of the clearest possible dictum in *Antulay's case* and in *Prakash Singh Badal's* case. If the concerned person continues to be a Vice-Chancellor and if he has abused his office as Vice-Chancellor, there would be no doubt that his prosecution would require a sanction. So, it will be a question of examining as to whether such person has abused his position as a Vice-Chancellor and whether he continues to be a Vice-Chancellor on the date of taking of the cognizance. If, however, he has not abused his position as Vice-Chancellor but has committed some

other offence which could be covered by the sub-Sections of Section 19, then there would be no necessity of any sanction. [Para 31] [990-E-H; 991-A-D]

1.8. The concept of 'doubt' or 'plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of Section 19(1) would be different from that given in *Antulay's* ***case*** **or** *Prakash Singh Badal*. **Merely because a concept of doubt is contemplated in Section 19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction. The appellants tried to support their argument on the basis of the theory of "legal fiction". This Court does not see as to how the theory of "legal fiction" can work in this case. It may be that the appellants in this case held more than one office during the check period which they are alleged to have abused; however, there will be no question of any doubt if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction. [Para 32] [991-F-H; 992-A-D]**

1.9. It cannot be said that the decision in *Antulay's* ***case*** **and the subsequent decisions require any reconsideration. Even on merits, there is no necessity of**

reconsidering the relevant ratio laid down in *Antulay's case*. The High Court was absolutely right in relying on the decision in *Prakash Singh Badal* **to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19 of the Act as held in** *K. Karunakaran v. State of Kerala* and the later decision in *Prakash Singh Badal*. **[Paras 33, 34] [992-E-G]**

Prakash Singh Badal v. State of Punjab **2007 (1) SCC 1: 2006 (10) Suppl. SCR 197;** *K. Karunakaran v. State of Kerala* **2007 (1) SCC 59: 2006 (10) Suppl. SCR 283;** *S.A. Venkataraman v. State* **AIR 1958 SC 107: 1958 SCR 1040;** *Balakrishnan Ravi Menon v. Union of India* **2007 (1) SCC 45 and** *Shanker Raju Vs. Union of India* **2011 (2) SCC 132: 2011 (2) SCR 1–relied on.**

R. S. Nayak v. A R. Antulay **1984 (2) SCC 183: 1984 (2) SCR 495 – explained and relied on.**

Air Commodore Kailash Chand v. The State (S.P.E. Hyderabad) **(1973) 2 AWR 263;** *P.V. Narsimha Rao Vs. State* **1998 (4) SCC 626: 1998 (2) SCR 870;** *Waman Rao Vs. Union of India* **1981 (2) SCC 362: 1981 (2) SCR 1;** *Manganese Ore (India) Ltd. Vs. CST* **1976 (4) SCC 124: 1976 (3) SCR 99;** *Ganga Sugar Corpn. Vs. State of U.P.* **1980 (1) SCC 223: 1980 (1) SCR 769;** *Union of India Vs. Raguhbir Singh* **1989 (2) SCC 754: 1989 (3) SCR 316;** *Krishena Kumar Vs. Union of India* **1990 (4) SCC 207: 1990 (3) SCR 352;** *Union of India Vs. Paras Laminates (P) Ltd.* **1990(4) SCC 453: 1990 (3) SCR 789;** *Hari Singh Vs. State of Haryana* **1993 (3) SCC 114: 1993 (3) SCR 61;** *Punjab Land Development Reclamation Corporation Ltd. v. Presiding Officer* **1990 (3) SCC 682: 1990 (3) SCR 111 and** *Nirmal Jeet Kaur Vs. State of M.P.* **2004 (7) SCC 558: 2004 (3) Suppl. SCR 1006 – referred to.**

Robert Wigram Crawford Vs. Richard Spooner **4 MIA 179;** *Re Bedia Vs. Genreal Accident, Fir and Life Assurance Corporation Ltd.* **1948 (2) All ER 995;** *Bourne (Inspector of Taxes) Vs. Norwich Crematorium Ltd.* **1967 (2) All ER 576;** *Tiverton Estates Ltd. Vs. Wearwell Ltd.* **1974 (1) WLR 176 – referred to.**

Habibullah Khan v. State of Orissa & Anr. **1995 (2) SCC 437: 1995 (1) SCR 819;** *Abdul Wahab Ansari Vs. State of Bihar* **2000 (8) SCC 500: 2000 (3) Suppl. SCR 747;** *Baij Nath Prasad Tripathi Vs. State of Bhopal* **1957 (1) SCR 650;** *Director of Settlement, State of A.P. v. M.R. Apparao* **2002 (4) SCC 638: 2002 (2) SCR 661;** *State of Haryana Vs. Ranbir @ Rana* **2006 (5) SCC 167: 2006 (3) SCR 864;** *Division Controller, KSRTC v. Mahadeva Shetty & Anr.* **2003(7) SCC 197: 2003 (2) Suppl. SCR 14;** *H.H. Maharajadhiraja Mahdav Rao Jiwaji Rao Scindia Bahadur Vs. Union of India* **AIR 1971 SC 530: 1971 (3) SCR 9;** *State of Orissa Vs. Sudhansu Sekhar Misra* **AIR 1968 SC 647: 1968 SCR 154;** *ADM Jabalpur etc. Vs. Shivkant Shukla* **1976 (2) SCC 521: 1976 (0) Suppl. SCR 172;** *K. Veeraswami Vs. Union of India* **1991 (3) SCC 655: 1991 (3) SCR 189 and** *Marta Silva & Ors. Vs. Piedade Cardazo & Ors*. **AIR 1969 Goa 94 – cited.**

Quinn Vs. Leathem **1901 AC 495 – cited.**

Case Law Reference:

2006 (10) Suppl. SCR 197	**relied on**	**Paras 8,11,13, 21,24,29, 30,31,32,33 and 34**
1984 (2) SCR 495	**explained and relied on**	**Paras 8,9, 11,13,16, 20-34**
2007 (1) SCC 45	**relied on**	**Paras 9,11**
2006 (10) Suppl. SCR 283	**relied on**	**Paras 9, 11**

1995 (1) SCR 819	**cited**	**Paras 9, 11**
2000 (3) Suppl. SCR 747	**cited**	**Para 10**
1957 (1) SCR 650	**cited**	**Para 10**
2002 (2) SCR 661	**cited**	**Paras 13,23,**
2006 (3) SCR 864	**cited**	**Paras 13,23**
2003 (2) Suppl. SCR 14	**cited**	**Paras 13, 23**
1971 (3) SCR 9	**cited**	**Paras 13, 23**
1968 SCR 154	**cited**	**Paras 13, 23**
1901 AC 495	**cited**	**Para 13**
1976 (0) Suppl. SCR 172	**cited**	**Paras 13, 23**
1991 (3) SCR 189	**cited**	**Para 13**
1958 SCR 1040	**relied on**	**Paras 13, 15, 32**
(1973) 2 AWR 263	**referred to**	**Para 15**
1998 (2) SCR 870	**referred to**	**Paras 17,20,**
AIR 1969 Goa 94	**cited**	**Para 23**
2011 (2) SCR 1	**relied on**	**Para 24**
1974 (1) WLR 176	**referred to**	**Para 24**
1981 (2) SCR 1	**referred to**	**Para 24**
1976 (3) SCR 99	**referred to**	**Para 24**
1980 (1) SCR 769	**referred to**	**Para 24**
1989 (3) SCR 316	**referred to**	**Para 24**
1990 (3) SCR 352	**referred to**	**Para 24**
1990 (3) SCR 789	**referred to**	**Para 24**

1993 (3) SCR 61	**referred to**	**Para 24**
1990 (3) SCR 111	**cited**	**Para 25**
2004 (3) Suppl. SCR 1006	**referred to**	**Para 25**
4 MIA 179	**referred to**	**Para 29**
1948 (2) All ER 995	**referred to**	**Para 29**
1967 (2) All ER 576	**referred to**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1257 of 2011.

From the Judgment & Order dated 8.7.2010 of the High Court of Delhi at New Delhi in Criminal Misc. No. 915 of 2010.

WITH

Crl. A.No. 1258 of 2011

Mukul Rohtagi, U.U. Lalit, Daya Krishan Shrama, S.K. Gupta, Amit Sahni, Anil Rathi, Monika Sharma, Ninand Laud, Ranjeeta Rohtagi for the Appellant.

Gopal Subramanium, SG, Dayan Krishnan, Gautam Narayan, N.A. Menon (for Arvind Kumar Sharma) for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment will dispose of two Special Leave Petitions, they being SLP (Crl.) No. 7384 of 2010 and SLP (Crl.) No. 7428 of 2010. While Abhay Singh Chautala is the petitioner in the first Special Leave Petition, the second one has been filed by Shri Ajay Singh Chautala. The question involved is identical in both the SLPs and hence they are being disposed of by a common judgment.

2. Leave granted in both the Special Leave Petitions.

3. Whether the sanction under Section 19 of The Prevention of Corruption Act (hereinafter called "the Act" for short) was necessary against both the appellants and, therefore, whether the trial which is in progress against both of them, a valid trial, is common question. This question was raised before the Special Judge, CBI before whom the appellants are being tried for the offences under Sections 13(1) (e) and 13(2) of the Prevention of Corruption Act read with Section 109 of Indian Penal Code in separate trials.

4. Separate charge sheets were filed against both the appellants for the aforementioned offences by the CBI. It was alleged that both the accused while working as the Members of Legislative Assembly had accumulated wealth disproportionate to their known sources of income. The charges were filed on the basis of the investigations conducted by the CBI. This was necessitated on account of this Court's order in Writ Petition (Crl.) No.93 of 2003 directing the CBI to investigate the JBT Teachers Recruitment Scam. The offences were registered on 24.5.2004. The CBI conducted searches and seized incriminating documents which revealed that Shri Om Prakash Chautala and his family had acquired movable and immovable properties valued at Rs.1,467 crores. On this basis a Notification came to be issued on 22.2.2006 under Sections 5 and 6 of the DSPE Act with the consent of the Government of Haryana extending powers and jurisdiction under the DSPE Act to the State of Haryana for investigation of allegations regarding accumulation of disproportionate assets by Shri Om Prakash Chautala and his family members under the Prevention of Corruption Act. A regular First Information Report then came to be registered against Shri Om Prakash Chautala who is the father of both the appellants. It is found that in the check period of 7.6.2000 to 8.3.2005, appellant Abhay Singh Chautala had amassed wealth worth Rs.1,19,69,82,619/- which was 522.79 % of appellant Abhay Singh Chautala's known sources of income. During the check period, Shri Abhay Singh Chautala was the Member of the

Legislative Assembly Haryana, Rori Constituency. Similarly, in case of Ajay Singh Chautala, his check period was taken as 24.5.1993 to 31.5.2006 during which he held the following offices:-

1.	2.3.90 to 15.12.92	MLA Vidhan Sabha, Rajasthan
2.	28.12.93 to 31.11.98	MLA Vidhan Sabha, Rajasthan
3.	10.10.99 to 6.2.2004	Member of Parliament, Lok Sabha from Bhiwani Constituency
4.	2.8.2004 to 03.11.09	Member of Parliament, Rajya Sabha

He was later on elected as MLA from Dabwali constituency, Haryana in November, 2009. It was found that he had accumulated wealth worth Rs.27,74,74,260/- which was 339.26 % of his known sources of income. It was on this basis that the charge sheet came to be filed.

5. Admittedly, there is no sanction to prosecute under Section 19 of the Act against both the appellants.

6. An objection regarding the absence of sanction was raised before the Special Judge, who in the common order dated 2.2.2010, held that the allegations in the charge sheet did not contain the allegation that the appellants had abused their current office as member of Legislative Assembly and, therefore, no sanction was necessary.

7. This order was challenged by way of a petition under Section 482 Cr.P.C. before the High Court. The High Court dismissed the said petition by the order dated 8.7.2010.

8. The learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, urged that on the day when the charges were framed or on any date when the cognizance was taken, both the appellants were admittedly

public servants and, therefore, under the plain language of Section 19 (1) of the Act, the Court could not have taken cognizance unless there was a sanction. The learned senior counsel analyzed the whole Section closely and urged that in the absence of a sanction, the cognizance of the offences under the Prevention of Corruption Act could not have been taken. In this behalf, learned senior counsel further urged that the judgment of this Court in *Prakash Singh Badal v. State of Punjab* [2007 (1) SCC 1] as also the relied on judgment in *RS Nayak v. A R. Antulay* [1984 (2) SCC 183] were not correct and required reconsideration and urged for a reference to a Larger Bench.

9. Against these two judgments as also the judgments in *Balakrishnan Ravi Menon v. Union of India* [2007 (1) SCC 45], *K. Karunakaran v. State of Kerala* [2007 (1) SCC 59] and *Habibullah Khan v. State of Orissa & Anr.* [1995 (2) SCC 437], this Court had clearly laid down the law and had held that where the public servant had abused the office which he held in the check period but had ceased to hold "that office" or was holding a different office then a sanction would not be necessary. The learned Solicitor General appearing for the respondent urged that the law on the question of sanction was clear and the whole controversy was set at rest in AR Antulay's case (cited supra) which was followed throughout till date. The Solicitor General urged that the said position in law should not be disturbed in view of the principle of staire decicis. Extensive arguments were presented by both the parties requiring us now to consider the question.

Section 19 runs as under:-

"19. Previous sanction necessary for prosecution.

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, -

(a) In the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) In the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) In the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973-

(a) No finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby;

(b) No court shall stay the proceedings under this Act

on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) No court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation: For the purposes of this Section, -

(a) Error includes competency of the authority to grant sanction;

(b) A sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

10. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, firstly pointed out that the plain meaning of Section 19(1) of the Act is that when any public servant is tried for the offences under the Act, a sanction is a must. The learned senior counsel were at pains to point out that in the absence of a sanction, no cognizance can be taken against the public servant under Sections 7, 10,

11, 13 and 15 of the Act and thus, a sanction is a must. The learned senior counsel relied on the decision in *Abdul Wahab Ansari Vs. State of Bihar* [2000 (8) SCC 500], more particularly, paragraph 7, as also the decision in *Baij Nath Prasad Tripathi Vs. State of Bhopal* [1957 (1) SCR 650]. The plain language of Section 19(1) cannot be disputed. The learned senior counsel argued that Section 19(1) of the Act creates a complete embargo against taking cognizance of the offences mentioned in that Section against the accused who is a public servant. The learned senior counsel also argued that it is only when the question arises as to which authority should grant a sanction that the sub-Section (2) will have to be taken recourse to. However, where there is no duty of any such nature, the Court will be duty bound to ask for the sanction before it takes cognizance of the offences mentioned under this Section.

11. As against this, Shri Gopal Subramanium, learned Solicitor General, pointed out the decision in *RS Nayak v. A R. Antulay* (cited supra) and the subsequent decisions in *Balakrishnan Ravi Menon v. Union of India* (cited supra), *K. Karunakaran v. State of Kerala* (cited supra), *Habibullah Khan v. State of Orissa & Anr.* (cited supra) and lastly, in *Prakash Singh Badal v. State of Punjab* (cited supra).

12. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, have no quarrel with the proposition that in all the above cases, it is specifically held that where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction.

13. To get over this obvious difficulty, the learned senior counsel appearing on behalf of the appellants contended that the basic decision in *RS Nayak v. A R. Antulay* (cited supra) was not correctly decided, inasmuch as the decision did not consider the plain language of the Section which is clear and without any ambiguity. The learned senior counsel contended

that where the language is clear and admits of no ambiguity, the Court cannot reject the plain meaning emanating out of the provision. Further, the learned senior counsel pointed out that even in the judgments following the judgment in *RS Nayak v. A R. Antulay* (cited supra) upto the judgment in the case of *Prakash Singh Badal v. State of Punjab* (cited supra) and even thereafter, the learned Judges have not considered the plain meaning and on that count, those judgments also do not present correct law and require reconsideration. Another substantial challenge to the judgment in *RS Nayak v. A R. Antulay* (cited supra) is on account of the fact that the law declared to the above effect in *RS Nayak v. A R. Antulay* (cited supra) was obiter dictum, inasmuch as it was not necessary for the Court to decide the question, more particularly, decided by the Courts in paragraphs 23 to 26. The learned senior counsel pointed out that, firstly, the Court in *RS Nayak v. A R. Antulay* (cited supra), came to the conclusion that Shri Antulay who was a Member of the Legislative Assembly, was not a public servant. It is contended that once that finding was arrived at, there was no question of further deciding as to whether, the accused being a public servant in a different capacity, the law required that there had to be a sanction before the Court could take the cognizance. Learned senior counsel further argued that where the Court makes an observation which is either not necessary for the decision of the court or does not relate to the material facts in issue, such observation must be held as obiter dictum. In support of this proposition, the learned senior counsel relied on the decision in Director of Settlement, *State of A.P. Vs. M.R. Apparao* [2002 (4) SCC 638] (Paragraph 7), *State of Haryana Vs. Ranbir @ Rana* [2006 (5) SCC 167], *Division Controller, KSRTC Vs. Mahadeva Shetty & Anr.* [2003(7) SCC 197] (Paragraph 23), *H.H. Maharajadhiraja Mahdav Rao Jiwaji Rao Scindia Bahadur Vs. Union of India* [AIR 1971 SC 530] (Paragraph 325 onwards), *State of Orissa Vs. Sudhansu Sekhar Misra* [AIR 1968 SC 647] [in which the celebrated decision in *Quinn Vs. Leathem* 1901 AC 495] was relied on and *ADM Jabalpur etc. Vs. Shivkant Shukla* [1976 (2) SCC

521] etc. The learned senior counsel also argued that the whole class of public servant would be deprived of the protection if the decision in *RS Nayak v. A R. Antulay* (cited supra) is followed. For this purpose, learned senior counsel argued that in such case, public servants would be exposed to frivolous prosecutions which would have disastrous effects on their service careers, though they are required to be insulated against such false, frivolous and motivated complaints of wrong doing. It is then argued that the decision in *K. Veeraswami Vs. Union of India* [1991 (3) SCC 655] has in fact removed the very foundation of the decision in *RS Nayak v. A. R. Antulay* (cited supra) in respect of the sanction. It is also argued that, in effect, the decision in *RS Nayak v. A R. Antulay* (cited supra) has added further proviso to the effect "provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed". It is argued that such an addition would be clearly impermissible as it would negate the very foundation of criminal law which requires a strict interpretation in favour of the accused and not an interpretation which results into deprivation of the accused of his statutory rights. The decision in *S.A. Venkataraman Vs. State* [AIR 1958 SC 107] is also very heavily relied upon, more particularly, the observations in paragraphs 14 and 16 thereof.

14. It will be, therefore, our task to see as to whether the judgment in *A. R. Antulay's* case (cited supra) and the law decided therein, particularly in paragraphs 24, 25 and 26 is obiter. Paragraphs 24, 25 and 26 are as under:

> "24. Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or

misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to use. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned Counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was- in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. Ode can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take

cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant/while abusing one office which he may have ceased to hold. Such an interpretation in contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rougue's charter. (See *Davis & Sons Ltd. v. Atkins* [1977] ICR 662

25. Support was sought to be drawn for the submission from the decision of the Andhra Pradesh High Court in *Air Commodore Kailash Chand v. The State* (S.P.E. Hyderabad) (1973) 2 AWR 263 and the affirmance of that decision by this Court in *The State (S.P.E. Hyderabad) v. Air Commodore Kailash Chand* : 1980CriLJ393 . In that case accused Kailash Chand was, a member of the Indian Air Force having entered the service on 17th November 1941. He retired from the service on 15th June , 1965, but was re-employed for a period of 2 years with effect from 16th June, 1965. On 7th September, 1966, the respondent was transferred to the Regular Air Force Reserve with effect from June 16, 1965 to June 15, 1970 i.e. for a period of 5 years. On 13th March, 1968, the re-employment given to the respondent ceased and his service was terminated with effect from April 1, 1968. A charge-sheet was submitted against him for having committed an offence under Section 5(2) of the Prevention of Corruption Act, 1947 during the period March 29, 1965 to March 16, 1967. A contention was raised on behalf of the accused that the court could not take cognizance of the offence in the absence of a valid sanction of the authority competent to remove him from the office held by him as a public servant. The learned special Judge negatived the contention. In the revision petition filed by the accused in

the High Court, the learned Single Judge held that on the date of taking cognizance of the offence, the accused was a member of the Regular Air Force Reserve set up under the Reserve and Auxiliary Air Force, 1952 and the rules made there under. Accordingly, it was held that a sanction to prosecute him was necessary and in the absence of which the court could not the cognizance of the offences and the prosecution was quashed. In the appeal by certificate, this Court upheld the decision of the High Court. This Court held following the decision in S.A. Venkataraman's case that if the public servant had ceased to be a public servant at the time of taking cognizance of the offence, Section 6 is not attracted. Thereafter the court proceeded to examine whether the accused was a public servant on the date when the court took cognizance of the offence and concluded that once the accused was transferred to the Auxiliary Air Force, he retained his character as a public servant because he was required to undergo training and to be called up for service as and when required. The court further held that as such the accused was a public servant as an active member of the Indian Air Force and a sanction to prosecute him under Section 6 was necessary. This decision is of no assistance for the obvious reason that nowhere it was contended before the court, which office was alleged to have been abused by the accused and whether the two offices were separate and distinct. It is not made clear whether the accused continued to hold the office which was alleged to have been abused or misused even at the time of taking cognizance of the offence. But that could not be so because the service of the accused was terminated on April 1, 1968 while the cognizance was sought to be taken in June, 1969. Indisputably, the accused had ceased to hold that office as public servant which he was alleged to have misused or abused. The court was however, not invited to consider the contention canvassed before us: Nor was the court informed specifically whether the

subsequent office held by the accused in that case was the same from which his service was terminated meaning thereby he was re-employed to the same office. The decision appears to proceed on the facts of the case. We would however, like to make it abundantly clear that if the two decisions purport to lay down that even if a public servant has ceased to hold that office as public servant which he is alleged to have abused or misused for corrupt motives, but on the date of taking cognizance of an offence alleged to have been committed by him as a public servant which he ceased to be and holds an entirely different public office which he is neither alleged to have misused or abused for corrupt motives, yet the sanction of authority competent to remove him from such latter office would be necessary before taking cognizance of the offence alleged to have been committed by the public servant while holding an office which he is alleged to have abused or misused and which he has ceased to hold, the decisions in our opinion, do not lay down the correct law and cannot be accepted as making a correct interpretation of Section 6.

26. Therefore, upon a true construction of Section 6, it is implicit therein that Sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive and for which a prosecution is intended to be launched against him."

15. It is clear from these paragraphs that the law laid down in *Air Commodore Kailash Chand v. The State (S.P.E. Hyderabad)* [(1973) 2 AWR 263] was taken into consideration. The Court has also quoted *S.A. Venkataraman's* case (cited supra) and the decision in *Kailash Chand's* case (cited supra) was distinguished by holding thus:

"This decision is of no assistance for the obvious reason that nowhere it was contended before the court, which office was alleged to have been abused by the accused

and whether the two offices were separate and distinct. It is not made clear whether the accused continued to hold the office which was alleged to have been abused or misused even at the time of taking cognizance of the offence. But that could not be so because the service of the accused was terminated on April 1, 1968 while the cognizance was sought to be taken in June, 1969. Indisputably, the accused had ceased to hold that office as public servant which he was alleged to have misused or abused. The court was however, not invited to consider the contention canvassed before us: Nor was the court informed specifically whether the subsequent office held by the accused in that case was the same from which his service was terminated meaning thereby he was re-employed to the same office. The decision appears to proceed on the facts of the case."

16. The propositions argued by the learned Solicitor General have, therefore, been totally accepted. However, that does not solve the question. The question is whether these propositions amount to obiter. The learned senior counsel for the appellants insists that it was not at all necessary for the Court to make these observations as the Court had answered the question whether A.R. Antulay in his capacity as an MLA, was a public servant, in negative. The learned senior counsel argued that once it was found that Antulay in his capacity as an MLA, was not a public servant, it was not at all necessary for the Court to go further and probe a further question as to whether a public servant who has abused a particular office ceased to hold that office and held some other office on the date of cognizance would still require sanction for his prosecution for the offence under the Act. The argument is extremely attractive on the face of it because indeed in *Antulay's* case (cited supra) such a finding that Shri Antulay in his capacity is an MLA was not a public servant was unequivocally given. However, we do not agree to the proposition that the Court could not have gone further and

recorded its finding in paragraphs 23 to 26 as they did. It is necessary firstly to note paragraph 15 which gives a clear cut idea as to what was the exact controversy therein and how the rival parties addressed Courts on various questions. Paragraph 15 is as under:-

> "15. The appellant, the original complainant, contends that the learned special Judge was in error in holding that M.L.A. is a public servant within the meaning of the expression under Section 21(12)(a). The second submission was that if the first question is answered in the affirmative, it would be necessary to examine whether a sanction as contemplated by Section 6 is necessary. If the answer to the second question is in the affirmative it. would be necessary to identify the sanctioning authority. *The broad sweep of the argument was that the complainant in his complaint has alleged that the accused abused his office of Chief Minister and not his office, if any, as M.L.A. and therefore, even if on the date of taking cognizance of the offence the accused was M.L.A, nonetheless no sanction to prosecute him is necessary as envisaged by Section 6 of the 1947 Act. It was urged that as the allegation against the accused in the complaint is that he abused or misused his office as Chief Minister and as by the time the complaint was filed and cognizance was taken, he had ceased to hold the office of the Chief Minister no sanction under Section 6 was necessary to prosecute him for the offences alleged to have been committed by him when the accused was admittedly a public servant in his capacity as Chief Minister.*" (Emphasis supplied).

Therefore, it will be clear that the complainant's main argument was the abuse of the office of Chief Minister which the accused ceased to hold and hence no sanction was necessary. In that the complainant proceeded on the premise that the accused as the MLA was a public servant.

17. In paragraph 16 the contention of the accused is noted which suggests that he was a public servant within the contemplation of clauses (3) and (7) of Section 21 of IPC as also under section 21 (12) (a). In fact it was the argument of accused by way of the next claim that if the accused holds plurality of offices each of which confers the status of a public servant and even if it is alleged that he has abused or misused one office as a public servant notwithstanding the fact that there was no allegation of the abuse or misuse of other office held as public servant, the sanction of each authority competent to remove him from each of the offices would be a sine qua non under Section 6 before a valid prosecution can be launched against the accused. Therefore, the question of accused being a public servant was inextricably mixed with the question of the office which accused was alleged to have misused. There was no dichotomy between the two questions. Strangely enough, the accused claimed to be a public servant, unlike the present case and it was on that premise that the accused had raised a question that there would have to be the sanction qua each office that he continued to hold on the date when the cognizance was taken. In the present case, it is not disputed that the accused was a public servant. Undoubtedly they were public servants. By the subsequent judgment in *P.V. Narsimha Rao Vs. State* [1998 (4) SCC 626] it has been clearly held now that the Members of Legislative Assembly and the Members of Parliament are public servants. Therefore, the question which was addressed in that case by the accused claiming himself to be a public servant is an identical question which fell for consideration before the High Court as also before us. In paragraph 17, the Court formulated the questions to be decided precisely on the basis of the contention raised by the accused in that case. Following were those questions :

> "(a) What is the relevant date with reference to which a valid sanction is a pre-requisite for the prosecution of a public servant for offences enumerated in Section 6 of the 1947 Act?

(b) If the accused holds plurality of offices occupying each of which makes him a public servant, is sanction of each one of the competent authorities entitled to remove him from each one of the offices held by him necessary and if anyone of the competent authorities fails or declines to grant sanction, is the Court precluded or prohibited from taking cognizance of the offence with which the public servant is charged?

(c) Is it implicit in Section 6 of the 1947 Act that sanction of that competent authority alone is necessary, which is entitled to remove the public servant from the office which is alleged to have been abused for misused for corrupt motives?

(d) Is M.L.A. a public servant within the meaning of the expression in Section 21(12)(a) IPC?

(e) Is M.L.A. a public servant within the meaning of the expression, in Section 21(3) and Section 21(7) IPC?

(f) Is sanction as contemplated by Section 6 of the 1947 Act necessary for prosecution of M.L.A.?

(g) If the answer to (f) is in the affirmative, which is the Sanctioning Authority competent to remove M.L.A. from the office of Member of the Legislative Assembly?"

18. It will be seen from the nature of the questions that the whole controversy was covered by those questions particularly, the question raised in (b), (c), (d) and (e) were nothing but the result of the contentions raised by the parties which directly fell for consideration.

19. The Court answered the first question that the relevant date of sanction would be the date on which the cognizance

was taken of the offence. Since in paragraph 23 to 26 the Court found that the accused in that case did not continue to hold the office that he had allegedly abused on the date of cognizance, there was no necessity of granting any sanction. The Court held so in paragraph 27 in the most unequivocal terms. The Court goes on to record *"therefore, it is crystal clear that the complaint filed against the accused charged him with criminal abuse or misuse of only his office as Chief Minister. By the time, the court was called upon to take cognizance of the offences, so alleged in the complaint, the accused had ceased to hold the office of the Chief Minister. On this short ground, it can be held that no sanction to prosecute him was necessary as former Chief Minister of Maharashtra State. The appeal can succeed on this short ground.*" (Emphasis supplied).

20. However, subsequently, the question whether an MLA was a public servant was also canvassed at length. The Court then went on to examine the question in further paragraphs and came to the conclusion that MLA was not a public servant which law was, of course thereafter, upset in *Narsimha Rao's* case (cited supra). It cannot be said that the question decided by the Court regarding the abuse of a particular office and the effects of the accused not continuing with that office or holding an altogether different office was obiter. In fact it is on that very basis that the judgment of *A.R.Antulay* (cited supra) proceeded. The question of MLA not being a public servant was decided as a subsidiary question.

21. This finding of ours is buttressed by the decision reported in *Balakrishnan Ravi Menon v. Union of India* (cited supra) which decision came almost immediately after *Prakash Singh Badal v. State of Punjab* (cited supra) case. Whether the finding given in the judgment of *Antulay's* case (cited supra) was obiter was the question that directly fell for consideration in that case. This Court quoted paragraph 24 of the judgment in *Antulay's* case (cited supra) so also some portion of

paragraph 25. It is on the basis of these two paragraphs that the Court unequivocally rejected the contention that the finding given in Antulay's case (cited supra) regarding the abuse of office of Chief Minister was obiter. Therefore, it would not be possible for us to hold that the finding given in *Antualy's* case (cited supra) was an obiter. We must point out at this juncture that in *Antulay's* case (cited supra) the Court first went on to decide the basic question that if the accused did not continue with the office that he had allegedly abused on the day cognizance was taken, then there was no requirement of sanction.

22. This finding was given as the complainant in that case had canvassed in the backdrop of the judgment of the trial Court discharging the accused holding him to be a public servant. The trial Court had held that in the absence of such sanction, the accused was entitled to be discharged. The complainant filed a writ petition against this order. This court had permitted to file a criminal revision against the order of learned Special Judge perhaps being of the opinion that the writ petition did not lie and ultimately this Court transferred the criminal revision against the trial Court's judgment here. The complainant, therefore, had specifically and basically raised the point that since the accused had ceased to hold the office of Chief Minister on the date of cognizance, there was no question of any sanction and that was the main issue which was decided in *Antulay's* case (cited supra) as the basic issue by way of question No.(b)

23. We, therefore, do not think the finding given in *Antulay's* case (cited supra) was in any manner obiter and requires reconsideration. Learned Senior Counsel relied on the decision in *Marta Silva & Ors. Vs. Piedade Cardazo & Ors.* [AIR 1969 Goa 94], *State of A.P. Vs. M.R. Apparao* (cited supra], *State of Haryana Vs. Ranbir alias Rana* (cited supra], *Division Controller, KSRTC Vs. Mahadeva Shetty & Anr.* (cited supra), *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia*

Bahadur Vs. Union of India (cited supra), *State of Orissa Vs. Sudhansu Sekhar Misra* (cited supra) and *lastly ADM, Jabalpur etc. Vs. Shivkant Shukla* (cited supra] and contended that the principles of obiter dicta in the aforementioned decisions would apply to *Antulay's* case (cited supra) also. We have already shown that the principles regarding the abuse of a particular office, decided in *Antulay's* case (cited supra), could not be termed as Obiter dicta. We have nothing to say about the principles in the aforementioned decisions. However, in the circumstances, which we have shown above, all these cases would be of no help to the appellants herein, particularly in the light of our conclusion that the principles arrived at in *Antulay's* case (cited supra) could not be termed as obiter dicta. We, therefore, reject the argument on that count.

24. There is one more reason, though not a major one, for not disturbing the law settled in *Antulay's* case (cited supra). That decision has stood the test of time for last over 25 years and it is trite that going as per the maxim stare decisis et non quieta movere, it would be better to stand by that decision and not to disturb what is settled. This rule of interpretation was approved of by Lord Coke who suggested – "those things which have been so often adjudged ought to rest in peace". This Court in *Shanker Raju Vs. Union of India* [2011 (2) SCC 132], confirmed this view while relying on the decision in *Tiverton Estates Ltd. Vs. Wearwell Ltd.* [1974 (1) WLR 176] and more particularly, the observations of Scarman, L.J., while not agreeing with the view of Lord Denning, M.R. about desirability of not accepting previous decisions. The observations are to the following effect:-

> "….. I decline to accept his lead only because I think it damaging to the law to the long term – though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty – one of the great objectives of law."

The Court also referred to the following other cases:-

Waman Rao Vs. Union of India [1981 (2) SCC 362], *Manganese Ore (India) Ltd. Vs. CST* [1976 (4) SCC 124], *Ganga Sugar Corpn. Vs. State of U.P.* [1980 (1) SCC 223], *Union of India Vs. Raguhbir Singh* [1989 (2) SCC 754], *Krishena Kumar Vs. Union of India* [1990 (4) SCC 207], *Union of India Vs. Paras Laminates (P) Ltd.* [1990(4) SCC 453] and lastly, *Hari Singh Vs. State of Haryana* [1993 (3) SCC 114].

We respectfully agree with the law laid down in *Shanker Raju Vs. Union of India* (cited supra) and acting on that decision, desist from disturbing the settled law in *Antulay's* case (cited supra). We have in the earlier part of the judgment, pointed out as to how the decision in *Antulay's* case (cited supra) has been followed right up to the decision in *Prakash Singh Badal v. State of Punjab* (cited supra) and even thereafter.

25. This leaves us with the other contention raised by learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants. The learned senior counsel contended that the decision in *Antulay's* case (cited supra) is hit by the doctrine of per incuriam. The learned senior counsel heavily relied on the decision in *Punjab Land Development Reclamation Corporation Ltd. Vs. Presiding Officer* [1990 (3) SCC 682] and *Nirmal Jeet Kaur Vs. State of M.P.* [2004 (7) SCC 558] to explain the doctrine of per incuriam. We have absolutely no quarrel with the principles laid down in those two cases. However, we feel that the resultant argument on the part of the learned senior counsel is not correct. In support of their argument, the learned senior counsel contended that in *Antulay's* case (cited supra), Section 6(2) of the Act, as it therein existed, was ignored. In short, the argument was that Section 6(2) which is parimateria with Section 19(2) of the Act provides that in case of doubt as to which authority should give the sanction, the time when the offence is alleged to have been

committed is relevant. The argument further goes on to suggest that if that is so, then the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken so as to cause doubt about the sanctioning authority. Thus, there would be necessity of a sanction on the date of cognizance and, therefore, in ignoring this aspect, the decision in *Antulay's* case (cited supra) has suffered an illegality. Same is the argument in the present case.

26. This argument is basically incorrect. In *Antulay's* case (cited supra), it is not as if Section 6(2) of the Act as it then existed, was ignored or was not referred to, but the Constitution Bench had very specifically made a reference to and had interpreted Section 6 as a whole. Therefore, it cannot be said that the Constitution Bench had totally ignored the provisions of Section 6 and more particularly, Section 6(2). Once the Court had held that if the public servant had abused a particular office and was not holding that office on the date of taking cognizance, there would be no necessity to obtain sanction. It was obvious that it was not necessary for the Court to go up to Section 6(2) as in that case, there would be no question of doubt about the sanctioning authority. In our opinion also, Section 6(2) of the Act, which is parimateria to Section 19(2), does not contemplate a situation as is tried to be argued by the learned senior counsel. We do not agree with the proposition that the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken. That is not, in our opinion, the eventuality contemplated in Section 6(2) or Section 19(2), as the case may be. In *Antulay's* case (cited supra), the Court went on to hold that where a public servant holds a different capacity altogether from the one which he is alleged to have abused, there would be no necessity of sanction at all. This view was taken on the specific interpretation of Section 6 generally and

more particularly, Section 6(1)(c), which is parimateria to Section 19(1)(c) of the Act. Once it was held that there was no necessity of sanction at all, there would be no question of there being any doubt arising about the sanctioning authority. The doubt expressed in Section 19(2), in our opinion, is not a pointer to suggest that a public servant may have abused any particular office, but when he occupies any other office subsequently, then the sanction is a must. That will be the incorrect reading of the Section. The Section simply contemplates a situation where there is a genuine doubt as to whether sanctioning authority should be the Central Government or the State Government or any authority competent to remove him. The words in Section 19(2) are to be read in conjunction with Sections 19(1)(a), 19(1)(b) and 19(1)(c). These clauses only fix the sanctioning authority to be the authority which is capable of "removing a public servant". Therefore, in our opinion, the argument based on the language of Section 6(2) or as the case may be, Section 19(2), is not correct. This eventuality has been considered, though not directly, in paragraph 24 in the judgment in *Antulay's* case (cited supra), in the following manner:-

> "24 ….An illustration was posed to the learned Counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was- in affirmative. But the very illustration would show that such

> cannot be the law. *Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law.* One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant/while abusing one office which he may have ceased to hold. *Such an interpretation in contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided.* Legislation must at all costs be interpreted in such a way that it would not operate as a rougue's charter".
>
> (emphasis supplied)

27. It is in the light of this that the Court did not have to specify as to under what circumstances would a duty arise for locating the authority to give sanction. The doubt could arise in more manners than one and in more situations than one, but to base the interpretation of Section 19(1) of the Act on the basis of Section 19(2) would be putting the cart before the horse. The two Sections would have to be interpreted in a rational manner. Once the interpretation is that the prosecution of a public servant holding a different capacity than the one which he is alleged to have abused, there is no question of going to Section 6(2) / 19(2) at all in which case there will be no question of any doubt. It will be seen that this interpretation of Section 6(1) or, as the case may be, Section 19(1), is on

the basis of the expression "office" in three sub-clauses of Section 6(1), or the case may be, Section 19(1). For all these reasons, therefore, we are not persuaded to accept the contention that *Antulay's* case (cited supra) was decided per incuriam of Section 6(2). In our opinion, the decision in *K. Veeraswami Vs. Union of India* (cited supra) or, as the case may be, *P.V. Narsimha Rao's* case (cited supra) are not apposite nor do they support the contention raised by the learned senior counsel as regards Antulay's case (cited supra) being per incuriam of Section 6(2).

28. The learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, in support of their argument that *Antulay's* case (cited supra) require reconsideration, urged that that interpretation deprives the entire class of public servants covered by the clear words of Section 6(1)/19(1) of a valuable protection. It was further urged that such interpretation would have a disastrous effect on the careers of the public servants and the object of law to insulate a public servant from false, frivolous, malicious and motivated complaints of wrong doing would be defeated. It was also urged that such interpretation would amount to re-writing of Section 19(1) and as if a proviso would be added to Section 19(1) to the following effect:-

> "Provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed.

Lastly, it was urged that such an interpretation would negate the very foundation of criminal law, which requires a strict interpretation in favour of the accused. Most of these questions are already answered, firstly, in *Antulay's* case (cited supra) and secondly, in *Prakash Singh Badal v. State of Punjab* (cited supra). Therefore, we need not dilate on them. We specifically reject these arguments on the basis of *Antulay's* case (cited

supra) itself which has been relied upon in *Prakash Singh Badal v. State of Punjab* (cited supra). The argument regarding the addition of the proviso must also fall as the language of the suggested proviso contemplates a different "post" and not the "office", which are entirely different concepts. That is apart from the fact that the interpretation regarding the abuse of a particular office and there being a direct relationship between a public servant and the office that he has abused, has already been approved of in *Antulay's* case (cited supra) and the other cases following *Antulay's* case (cited supra) including *Prakash Singh Badal v. State of Punjab* (cited supra). We, therefore, reject all these arguments.

29. It was also urged that a literal interpretation is a must, particularly, to sub-Section (1) of Section 19. That argument also must fall as sub-Section (1) of Section 19 has to be read with in tune with and in light of sub-Sections (a), (b) and (c) thereof. We, therefore, reject the theory of litera regis while interpreting Section 19(1). On the same lines, we reject the argument based on the word "is" in sub-Sections (a), (b) and (c). It is true that the Section operates in praesenti; however, the Section contemplates a person who continues to be a public servant on the date of taking cognizance. However, as per the interpretation, it excludes a person who has abused some other office than the one which he is holding on the date of taking cognizance, by necessary implication. Once that is clear, the necessity of the literal interpretation would not be there in the present case. Therefore, while we agree with the principles laid down in *Robert Wigram Crawford Vs. Richard Spooner* [4 MIA 179], *Re Bedia Vs. Genreal Accident, Fir and Life Assurance Corporation Ltd.* [1948 (2) All ER 995] and *Bourne (Inspector of Taxes) Vs. Norwich Crematorium Ltd.* [1967 (2) All ER 576], we specifically hold that giving the literal interpretation to the Section would lead to absurdity and some unwanted results, as had already been pointed out in *Antulay's* case (cited supra) (see the emphasis supplied to para 24 of Antulay's judgment).

30. Another novel argument was advanced basing on the language of Sections 19(1) and (2). It was pointed out that two different terms were used in the whole Section, one term being "public servant" and the other being "a person". It was, therefore, urged that since the two different terms were used by the Legislature, they could not connote the same meaning and they had to be read differently. The precise argument was that the term "public servant" in relation to the commission of an offence connotes the time period of the past whereas the term "a person" in relation to the sanction connotes the time period of the present. Therefore, it was urged that since the two terms are not synonymous and convey different meanings in respect of time/status of the office, the term "public servant" should mean the "past office" while "person" should mean the "present status/present office". While we do agree that the different terms used in one provision would have to be given different meaning, we do not accept the argument that by accepting the interpretation of Section 19(1) in Antulay's case, the two terms referred to above get the same meaning. We also do not see how this argument helps the present accused. The term "public servant" is used in Section 19(1) as Sections 7, 10, 1 and 13 which are essentially the offences to be committed by public servants only. Section 15 is the attempt by a public servant to commit offence referred to in Section 13(1)(c) or 13(1)(d). Section 19(1) speaks about the cognizance of an offence committed by a public servant. It is not a cognizance of the public servant. The Court takes cognizance of the offence, and not the accused, meaning, the Court decides to consider the fact of somebody having committed that offence. In case of this Act, such accused is only a public servant. Then comes the next stage that such cognizance cannot be taken unless there is a previous sanction given. The sanction is in respect of the accused who essentially is a public servant. The use of the term "a person" in sub-Sections (a), (b) and (c) only denotes an "accused". An "accused" means who is employed either with the State Government or with the Central Government or in case of any other person, who is a public servant but not employed

with either the State Government or the Central Government. It is only "a person" who is employed or it is only "a person" who is prosecuted. His capacity as a "public servant" may be different but he is essentially "a person" – an accused person, because the Section operates essentially qua an accused person. It is not a "public servant" who is employed; it is essentially "a person" and after being employed, he becomes a "public servant" because of his position. It is, therefore, that the term "a person" is used in clauses (a), (b) and (c). The key words in these three clauses are "not removable from his office save by or with the sanction of ….". It will be again seen that the offences under Sections 7, 10, 11 and 13 are essentially committed by those persons who are "public servants". Again, when it comes to the removal, it is not a removal of his role as a "public servant", it is removal of "a person" himself who is acting as a "public servant". Once the Section is read in this manner, then there is no question of assigning the same meaning to two different terms in the Section. We reject this argument.

31. Another novel argument was raised on the basis of the definition of "public servant" as given in Section 2(c) of the Act. The argument is based more particularly on clause 2(c)(vi) which provides that an arbitrator, on account of his position as such, is public servant. The argument is that some persons, as contemplated in Sections 2(c)(vii), (viii), (ix) and (x), may adorn the character of a public servant only for a limited time and if after renouncing that character of a public servant on account of lapse of time or non-continuation of their office they are to be tried for the abuse on their part of the offices that they held, then it would be a very hazardous situation. We do not think so. If the person concerned at the time when he is to be tried is not a public servant, then there will be no necessity of a sanction at all. Section 19(1) is very clear on that issue. We do not see how it will cause any hazardous situation. Similarly, it is tried to be argued that a Vice-Chancellor who is a public servant and is given a temporary assignment of checking the

papers or conducting examination or being invigilator by virtue of which he is a public servant in an entirely different capacity as from that of a Professor or a Vice-Chancellor, commits an offence in the temporary capacity, then he would not be entitled to the protection and that will be causing violence to such public servant and, therefore, such could not have been the intention of the Legislature. We feel that the example is wholly irrelevant in the light of the clearest possible dictum in *Antulay's* case (cited supra) and in *Prakash Singh Badal v. State of Punjab* (cited supra). If the concerned person continues to be a Vice-Chancellor and if he has abused his office as Vice-Chancellor, there would be no doubt that his prosecution would require a sanction. So, it will be a question of examining as to whether such person has abused his position as a Vice-Chancellor and whether he continues to be a Vice-Chancellor on the date of taking of the cognizance. If, however, he has not abused his position as Vice-Chancellor but has committed some other offence which could be covered by the sub-Sections of Section 19, then there would be no necessity of any sanction.

32. Same argument was tried to be raised on the question of plurality of the offices held by the public servant and the doubt arising as to who would be the sanctioning authority in such case. In the earlier part of the judgment, we have already explained the concept of doubt which is contemplated in the Act, more particularly in Section 19(2). The law is very clear in that respect. The concept of 'doubt' or 'plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of Section 19(1) would be different from that given in *Antulay's* case (cited supra) or *Prakash Singh Badal v. State of Punjab* (cited supra). We have already explained the situation that merely because a concept of doubt is contemplated in Section 19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction. The learned senior counsel tried to support their argument on the basis of the theory of "legal fiction". We do not see as to how the theory of

"legal fiction" can work in this case. It may be that the appellants in this case held more than one offices during the check period which they are alleged to have abused; however, there will be no question of any doubt if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, as held in *S.A. Venkataraman Vs. State* (cited supra), is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction.

33. We do not, therefore, agree with learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, that the decision in *Antulay's* case (cited supra) and the subsequent decisions require any reconsideration for the reasons argued before us. Even on merits, there is no necessity of reconsidering the relevant ratio laid down in *Antulay's* case (cited supra).

34. Thus, we are of the clear view that the High Court was absolutely right in relying on the decision in *Prakash Singh Badal v. State of Punjab* (cited supra) to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19 of the Act as held in *K. Karunakaran v. State of Kerala* (cited supra) and the later decision in *Prakash Singh Badal v. State of Punjab* (cited supra). The appeals are without any merit and are dismissed.

B.B.B. Appeals dismissed.

STATE OF RAJASTHAN & ANR.
v.
J.K. SYNTHETICS LTD. & ANR.
(Civil Appeal No. 4927 of 2011)

JULY 4, 2011

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

Minerals Concession Rules, 1960 – Rule 64-A – Mines and Minerals (Development and Regulation) Act, 1957 – s.9 and Second Schedule – Royalty in respect of mining lease – Levy of interest on arrears of royalty – State Government issued notices demanding interest from respondents-lessees @ 24% p.a. – Respondents filed writ petitions – Single Judge of High Court upheld the demand for interest only to an extent of 12% p.a. – State Government filed intra-court appeals – Division Bench of High Court held that the order of the Single Judge was a consent order, being based on an admission/ concession by the Advocate General, and therefore, it was not open for the State Government to challenge the order of the Single Judge –Held: From the order of the Single Judge, it is clear that the only submission of the Advocate General before the Single Judge was that the State Government was entitled to interest @ 18% p.a. – The observation in the order that as per the trend of Supreme Court, the State Government should get interest at least @ 12% p.a. on delayed payments, as awarded in the Supreme Court decision in South Eastern Coalfields, was an observation of the Single Judge, and not a concession by the Advocate General – The order of the Single Judge was thus not based on consent or concession, but made on merits following the Supreme Court decision in South Eastern Coalfields – It was therefore open for the State Government to challenge the order of the Single Judge if it was of the view that it was entitled to get a higher rate of interest

– Code of Civil Procedure, 1908 – Concession of Advocate/ party.

Minerals Concession Rules, 1960 – Rule 64-A – Royalty in respect of mining lease – Notification increasing the rate of royalty – Respondents-lessees filed writ petition challenging the same – High Court issued interim orders directing the State Government not to take coercive steps to recover royalty at the increased rate – Writ petitions ultimately dismissed – State Government issued demand notices calling upon respondents to pay interest on the difference in royalty which had been withheld on account of the interim orders and which were belatedly paid, after rejection of the writ petitions – Justification – Held: Whenever there is an interim order of stay in regard to any revision in rate or tariff, unless the order granting interim stay or the final order dismissing the writ petition specifies otherwise, on the dismissal of the writ petition or vacation of the interim order, the beneficiary of the interim order shall have to pay interest on the amount withheld or not paid by virtue of the interim order – Where the statute or contract specifies the rate of interest, usually interest will have to be paid at such rate – Even where there is no statutory or contractual provision for payment of interest, the court will have to direct the payment of interest at a reasonable rate, by way of restitution, while vacating the order of interim stay, or dismissing the writ petition, unless there are special reasons for not doing so – Any other interpretation would encourage unscrupulous debtors to file writ petitions challenging the revision in tariffs/rates and make attempts to obtain interim orders of stay – If the obligation to make restitution by paying appropriate interest on the withheld amount is not strictly enforced, the loser will end up with a financial benefit by resorting to unjust litigation and winner will end up as the loser financially for no fault of his – Code of Civil Procedure, 1908 – s.144 – Principle of restitution – Mines and Minerals (Development and Regulation) Act, 1957 – s.9 and Second Schedule.

Minerals Concession Rules, 1960 – Rules 64-A, 31 and 27 – Royalty in respect of mining lease – Rule 64A providing for levy of interest on arrears of royalty – Word "may" in Rule 64A – Interpretation of – Whether Rule 64-A vests any discretion in the State Government to charge interest at a rate less than 24% p.a. in appropriate or deserving cases – Held: Word 'may' is used in Rule 64-A not in the context of giving discretion in regard to rate of interest to be charged, but to give an option or choice to the State Government as to whether it should determine the lease, or charge interest at 24% p.a., or do both – Therefore, where the lease is not determined as a consequence of the default, the State will have to charge interest at 24% p.a. on the outstanding amount – There is no discretion in the state government to charge interest at any lesser rate – The intention of Rule 64A is to discourage practices that may be detrimental to recovery of revenue, by providing for a higher rate of interest – If a lesser rate of interest is provided under the Rules, it may lead to unscrupulous lessees indulging in delaying tactics – Where the statute or contract prescribed a specific rate of interest, the court should normally adopt such rate while awarding interest, except where the court proposes to award a higher or lower rate of interest, for special and exceptional reasons – On facts, the respondents-lessees had filed writ petitions before the Single Judge of the High Court challenging the notification increasing the rate of royalty and in case of one of the respondents, there was a categorical direction of the writ court while granting interim stay that in the event of failure in the writ petition, it will have to pay interest @ 18% p.a. – That was a condition of interim order and though in the writ petitions of other respondents, there was no such condition regarding interest while granting the stay, but it is possible that the respondents thought, by reason of the fact that there was no condition for payment of interest while granting stay, they may not be required to pay the statutory rate of interest – More importantly, the Advocate General appearing for the State had made a submission before the Single Judge that state

government was entitled to interest only @ 18% p.a. – Though the respondent in the last case contended that the Lease Deed in its case provided that any royalty not paid within prescribed time shall be paid with simple interest @ 10% p.a. and therefore the interest on any arrears cannot be more than 10% p.a. in its case, but it is clear that the lease was governed by the Minerals and Concessions Rules and any term in the lease deed prescribing a lesser rate of interest, shall have to yield to Rule 64-A as the rule will prevail over the terms of the lease – In the peculiar and special circumstances, from the date of the notification to the date of dismissal of the respective writ petitions, the rate of interest shall be 18% p.a. on the arrears of royalty etc. and from the date of dismissal of the writ petitions till date of payment, the rate of interest shall be 24% p.a. – Mines and Minerals (Development and Regulation) Act, 1957 – s.9 and Second Schedule.

The first respondent in each of the instant appeals is or was the holder of a mining lease for limestone. Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 deals with Royalties in respect of mining leases. Sub-section (2) thereof requires the holder of a mining lease to pay royalty in respect of any mineral removed or consumed by him from the leased area at the rate specified in the Second Schedule to the Act, in respect of that mineral. Sub-section (3) thereof empowers the Central Government, by notification published in the official gazette, to amend the Second Schedule so as to enhance the rates at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification. By notification, the Central Government had amended the Second Schedule to the Act and increased the royalty in respect of (limestone) from Rs.4.50 per tonne to Rs.10 per tonne. By a subsequent notification dated 17.2.1992, the Second Schedule to the Act was again amended and the rate or royalty for limestone was increased from Rs.10/- per

tonne to Rs.25/- per tonne.

The respective first respondent in the instant appeals (the 'contesting respondents') filed writ petitions challenging the constitutional validity of section 9(3) of the Act and the notification dated 17.2.1992 increasing the rate of royalty from Rs.10 to Rs.25 per tonne. In all the cases (except in the case of J. K. Udaipur Udyog Ltd), the High Court issued interim orders directing the state government not to take coercive steps to recover royalty at the rate of Rs.25 per metric tonne in pursuance of notification dated 17.2.1992, subject to the writ petitioners paying royalty at the rate of Rs.10 per MT and furnishing bank guarantee for the difference of Rs.15 per MT. In the case of J. K. Udaipur Udyog Ltd, the High Court made an interim order as in the other cases, with an additional condition th*at in case the said writ petitioner ultimately failed in the writ petition, the difference amount due from the writ petitioner shall be recovered with interest at the rate of 18% per annum.*

Ultimately, the several writ petitions filed by the contesting respondents were dismissed. As a consequence of such dismissal, each of the contesting respondents claims to have paid the difference in royalty (that is at the rate of Rs.15/- per MT) in the years 1996-1997.

Rule 64-A of the Minerals Concession Rules, 1960 provides for levy of interest on arrears of royalty and other dues. The State of Rajasthan issued demand notices to the contesting respondents calling upon them to pay interest at the rate of 24% per annum under Rule 64-A of the Rules, on the difference in royalty which had been withheld on account of the interim orders obtained by them and which were belatedly paid, after rejection of their writ petitions.

The contesting respondents at this stage again filed a second round of writ petitions challenging the notices demanding interest, contending that they were not liable to pay interest. They submitted before the Single Judge that the claim for interest at 24% per annum was harsh, excessive and inequitable. The Single Judge upheld the demand for interest only to an extent of 12% per annum and set aside the demand for the interest at the higher rate of 24% per annum, with a condition that if interest at 12% per annum on the delayed payments was not paid within three months, the respective writ petitioners shall be liable to pay interest at 24% per annum. The contesting respondents purportedly paid the interest at the rate of 12% per annum on the delayed payments, within three months period. The State government filed intra-court appeals challenging the order of the Single Judge. A Division Bench of the High Court upheld the order of the Single Judge holding that it was based on an admission/ concession by the Advocate General and therefore, the order did not call for interference.

In the instant appeals filed by the State Government, the following questions arose for consideration: (i) Whether the Advocate General appearing for the State had consented to award of interest at 12% per annum; (ii) Whether when the High Court grants an interim stay of a demand for payment of money, in a writ petition challenging the levy which is ultimately dismissed, without any specific direction for payment of interest, the respondent can claim interest on the amount due for the period covered by the interim order; (iii) Whether Rule 64-A vests any discretion in the state government to charge interest at a rate less than 24% per annum in appropriate or deserving cases and (iv) Whether the rate of interest awarded at 12% per annum requires to be increased.

Partly allowing the appeals, the Court

HELD:

Re : Question (i)

1.1. From the order of the Single Judge, it is clear that the only submission of the Advocate General before the Single Judge was that the State Government was entitled to interest at the rate of 18% per annum. The further observation in the order that as per the trend of Supreme Court decision, the state government should get interest at least at the rate of 12% per annum on the delayed payments, as awarded in the decision in *South Eastern Coalfields*, **was an observation of the Single Judge, and not a concession by the Advocate General. The subsequent para of the order of the Single Judge makes it clear beyond doubt that the order was not on consent or concession, but was made on merits following the decision of this Court in** *South Eastern Coalfields*. **Therefore, the assumption by the Division Bench of the High Court that the Advocate General had made a concession and the order of the Single Judge was a consent order and therefore, it was not open for the State Government to challenge the order of the Single Judge, was erroneous. The order of the Division Bench cannot therefore be sustained. [Para 12] [1011-E-H; 1012-A]**

1.2. Even if it is assumed that the Advocate General had submitted that "looking to the present trend of the decision of Supreme Court", Government should at least get interest at the rate 12% per annum on the delayed payment of difference in royalty amount as had been awarded in *South Eastern Coalfields*, **that would neither be an admission nor a concession that the state government is entitled to interest only at the rate of 12% per annum in regard to the rate of interest. It would be nothing more than a statement made with reference to the decision in *South Eastern Coalfields* and such a statement would not come in the way of order being challenged if the state government is of the view that it is entitled to get a higher rate of interest. [Para 13] [1012-B-D]**

South Eastern Coalfields Ltd. vs. State of M.P. **2003 (8) SCC 648: 2003 (4) Suppl. SCR 651 – referred to.**

Re : Question (ii)

2. The question regarding liability to pay interest for the period of stay when the stay is ultimately vacated is no longer *res integra*. In view of the earlier decisions of this Court, it is evident that whenever there is an interim order of stay in regard to any revision in rate or tariff, unless the order granting interim stay or the final order dismissing the writ petition specifies otherwise, on the dismissal of the writ petition or vacation of the interim order, the beneficiary of the interim order shall have to pay interest on the amount withheld or not paid by virtue of the interim order. Where the statute or contract specifies the rate of interest, usually interest will have to be paid at such rate. Even where there is no statutory or contractual provision for payment of interest, the court will have to direct the payment of interest at a reasonable rate, by way of restitution, while vacating the order of interim stay, or dismissing the writ petition, unless there are special reasons for not doing so. Any other interpretation would encourage unscrupulous debtors to file writ petitions challenging the revision in tariffs/rates and make attempts to obtain interim orders of stay. If the obligation to make restitution by paying appropriate interest on the withheld amount is not strictly enforced, the loser will end up with a financial benefit by resorting to unjust litigation and winner will end up as the loser financially for no fault of his. [Paras 14, 17] [1013-B; 1016-C-F]

Kanoria Chemicals and Industries Ltd. vs. UP State Electricity Board **1997 (5) SCC 772: 1997 (2) SCR 844;**

Rajasthan Housing Board vs. Krishna Kumari **2005 (13) SCC 151;** *Nav Bharat Ferro Allays Ltd vs. Transmission Corporation of Andhra Pradesh Ltd* **2011 (1) SCC 216: 2010 (14) SCR 900 and** *South Eastern Coalfields Ltd. vs. State of M.P.* **2003 (8) SCC 648: 2003 (4) Suppl. SCR 651 – relied on.**

Re : Question (iii)

3.1. The contesting respondents contended that Rule 64A provides that the state government "may" charge simple interest at the rate of 24% per annum; that this being an enabling provision, there is no 'mandate' or compulsion to charge interest at 24% per annum; and that therefore, the state government has the discretion to charge interest at a rate lesser than 24% in appropriate deserving cases. However, a careful reading of the Rules makes it clear that no such discretion is given to the state government in regard to rate of interest. This will be evident from a combined reading of Rules 31 and 27 and the terms of the statutory form of lease deed (Form K), with Rule 64A. Rule 31 provides that where, an order has been made for the grant of a mining lease, a lease deed in Form K (or in a form as near thereto as circumstances of each case may require), shall be executed. Rule 27 specifies that every mining lease shall be subject to the conditions mentioned therein. Clause (5) of Rule 27 refers to determination. The above provision is accordingly incorporated in clause (2) of Part IX of the standard form of lease (Form K). [Paras 18, 19] [1016-G-H; 1017-D-E; 1018-A-B]

3.2. The rate of interest at 24% was substituted in clause (3) of Part VI of the standard form of lease, by the very same amendment which substituted the said percentage in Rule 64A namely, GSR 129 (E) dated 20.2.1991. The words "may charge simple interest" in Rule 64A should be read in the context of the words

"without prejudice to the provisions of the Act or any other Rule in these Rules". Rule 45(iv) requires the lease deed to contain a condition that if there is any default in the payment of royalty, the lessor without prejudice to any proceeding that may be taken against the lessee, determine the lease. Therefore, the word "may" used with reference to the words "charge simple interest at the rate of 24% per annum" when read with the words "without prejudice to the provisions contained in the Act or any other Rule", occurring in Rule 64A, make it clear that whenever rent/royalty/fee becomes due, the lessor has several options by way of remedy. The lessor may determine the lease, if the breach is not rectified, even after sixty days' notice to rectify the breach. Alternatively, instead of determining the lease, the rule gives the choice to charge interest at 24% per annum on the amounts due. The third alternative for the state government is to determine the lease *and also* charge interest at 24% per annum on the outstanding dues. The word 'may' is used in Rule 64-A not in the context of giving discretion in regard to rate of interest to be charged, but to give an option or choice to the State Government as to whether it should determine the lease, or charge interest at 24% per annum, or do both. Therefore, where the lease is not determined as a consequence of the default, the State will have to charge interest at 24% per annum on the outstanding amount. If Rule 64A is to be interpreted as giving any discretion, that too unguided discretion, to the authorities to charge any rate of interest, as it would result in misuse and abuse. In this view of the matter, the contentions urged by the parties as to whether the word "may" should be read as "must" or "shall", and, if so, in what circumstances, do not arise for consideration at all. [Para 20] [1018-C-H; 1019-A-B]

3.3. There is also other material in the Rules itself to show that the rate of interest mentioned in Rule 64A was

not intended to be flexible and that the rate of interest mentioned therein has to be applied in all cases of non-payment/default. When Rule 64A was amended by notification dated 20.2.1991, increasing the rate of interest to 24% per annum, clause (3) of Part IV of the standard form of lease (Form K) was also amended increasing the rate of interest payable on all dues as 24% per annum. Clause (3) of Part VI of Form K makes it clear that the rate of interest should be 24% per annum and there is no discretion in the state government to charge interest at any lesser rate. [Para 21] [1019-B-F]

3.4. It is true that annual interest at 24% per annum appears to be marginally higher than the standard market lending rate of interest. But it is not penal in nature. Revenue from mining constitutes one of the major sources of non-tax revenue of the State Governments. Mining lessees are expected to pay the mining dues promptly and without default. If a lesser rate of interest is provided under the Rules, it may lead to unscrupulous lessees indulging in delaying tactics. The intention of Rule 64A is to discourage practices that may be detrimental to recovery of revenue, by providing for a higher rate of interest. Hence, once the State Government chooses not to take the path of determining the lease, charging of interest at 24% is mandatory and leaves no discretion in the State Government in regard to rate of interest. [Para 22] [1019-G-H; 1020-A-B]

Re : Question (iv)

4.1. Where the statute or contract prescribed a specific rate of interest, the court should normally adopt such rate while awarding interest, except where the court proposes to award a higher or lower rate of interest, for special and exceptional reasons. [Para 27] [1023-G]

4.2. In the instant case, in the case of one of the

contesting respondents (*J. K. Udaipur Udyog Ltd.*), there was a categorical direction while granting interim stay that in the event of failure in the writ petition the writ petitioner will have to pay interest at the rate of 18% per annum. That was a condition of interim order and therefore, it is possible that the parties *bona fide* proceeded on the basis that interest will be only 18% per annum. In the writ petitions of other contesting respondents, there was no such condition regarding interest while granting the stay. But it is possible that the contesting respondents thought, by reason of the fact that there was no condition for payment of interest while granting stay, they may not be required to pay the statutory rate of interest. More importantly, the Advocate General appearing for the State had made a submission before the Single Judge that state government was entitled to interest only at the rate of 18% per annum. In the peculiar and special circumstances of these cases, this Court is of the view that the appellants will be entitled to interest at 18% per annum in respect of royalty that became due between 17.2.1992 and the date of dismissal of their respective writ petitions. For the period subsequent to the dismissal of the writ petitions, the contesting respondents will be liable to pay interest on the said amount, at the rate of 24% per annum till date of payment. [Para 28] [1024-A-E]

4.3. As regards the contention of contesting respondent in the last case (Shree Cement) that clause VI(iii) of the Lease Deed in its case provided that any royalty which was not paid within the prescribed time shall be paid with simple interest at the rate of 10% per annum and therefore the interest on any arrears cannot be more than 10% per annum in its case, it is clear that the lease is governed by the Minerals and Concessions Rules 1960 and execution of the lease deed was itself is in compliance with one of the requirement of the rules,

namely Rule 31. Once Rule 64A was amended by notification dated 20.2.1991 increasing the rate of interest to 24% per annum, any term in the lease deed prescribing a lesser rate of interest, shall have to yield to Rule 64-A from that date as the rule will prevail over the terms of the lease. [Para 29] [1024-F-H; 1025-A-B]

South Eastern Coalfields Ltd. vs. State of M.P. **2003 (8) SCC 648: 2003 (4) Suppl. SCR 651 and** *Saurashtra Cement and Chemical Industries Ltd. vs. Union of India* **2001 (1) SCC 91: 2000 (4) Suppl. SCR 44 – distinguished.**

Kanoria Chemicals and Industries Ltd. vs. UP State Electricity Board **1997 (5) SCC 772: 1997 (2) SCR 844 – relied on.**

State of Madhya Pradesh vs. Mahalaxmi Fabric Mills Ltd. **1995 Supp (1) SCC 642 – referred to.**

Conclusion

5. The rate of interest is modified in each case as under: (i) from 17.2.1992 to the date of dismissal of the respective writ petition (challenging the notification dated 17.2.1992), the rate of interest shall be 18% per annum on the arrears of royalty etc.; and (ii) from the date of dismissal of the writ petition till date of payment, the rate of interest shall be 24% per annum. [Para 30] [1025-C-D]

Case Law Reference:

2003 (4) Suppl. SCR 651	**Referred to.**	**Paras 12, 13**
1997 (2) SCR 844	**Relied on.**	**Paras 15, 27**
2005 (13) SCC 151	**Relied on.**	**Para 15**
2010 (14) SCR 900	**Relied on.**	**Para 15**
2003 (4) Suppl. SCR 651	**Relied on.**	**Para 16**
2003 (4) Suppl. SCR 651	**Distinguished.**	**Para 25**
1995 Supp (1) SCC 642	**Referred to.**	**Para 26**

2000 (4) Suppl. SCR 44 Distinguished. Para 26

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4927 of 2011.

From the Judgment & Order dated 14.11.2006 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Civil Writ Petition No. 4267 of 1997.

WITH

C.A. Nos. 4928, 4929, 4931, 4930 & 4932 of 2011.

Harish Salve, Soli J. Sorabjee, V. Shekhar, Dr. Manish Singhvi, AAG, D.K. Devesh, Sahil S. Chauhan, Milind Kumar, R. Gopalakrishnan, U.A. Rana, Devina Sehgal (for M/s Gagrat & Co.), Praveen Kumar, K.V. Mohan for the appearing parties.

The Judgment of the Court was delivered by

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

2. In these appeals by special leave, the appellants challenge the orders of the Division Bench of the Rajasthan High Court, dismissing its appeals against a common order of the learned Single Judge, restricting the interest on arrears of royalty to 12% per annum, instead of 24% per annum demanded by the State of Rajasthan.

3. The first respondent in each of these appeals is or was the holder of a mining lease for limestone. Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 ('Act' for short) deals with Royalties in respect of mining leases. Sub-section (2) thereof requires the holder of a mining lease to pay royalty in respect of any mineral removed or consumed by him from the leased area at the rate for the time being specified in the Second Schedule to the Act, in respect of that mineral. Sub-section (3) thereof empowers the Central Government, by notification published in the official gazette, to

amend the Second Schedule so as to enhance the rates at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification.

4. By notification dated 5.5.1987, the Central Government had amended the Second Schedule to the Act and increased the royalty in respect of (limestone) from Rs.4.50 per tonne to Rs.10 per tonne. By a subsequent notification dated 17.2.1992, the Second Schedule to the Act was again amended and the rate or royalty for limestone was increased from Rs.10/- per tonne to Rs.25/- per tonne.

5. The respective first respondent in these appeals (together referred to the 'contesting respondents') filed writ petitions challenging the constitutional validity of section 9(3) of the Act and the notification dated 17.2.1992 increasing the rate of royalty from Rs.10 to Rs.25 per tonne. In all the cases (except in the case of J. K. Udaipur Udyog Ltd), the High Court issued interim orders directing the state government not to take coercive steps to recover royalty at the rate of Rs.25 per metric tonne in pursuance of notification dated 17.2.1992, subject to the writ petitioners paying royalty at the rate of Rs.10 per MT and furnishing bank guarantee for the difference of Rs.15 per MT. In the case of J. K. Udaipur Udyog Ltd, the High Court made an interim order as in the other cases, with an additional condition tha*t in case the said writ petitioner ultimately failed in the writ petition, the difference amount due from the writ petitioner shall be recovered with interest at the rate of 18% per annum.*

6. Ultimately, the several writ petitions filed by the contesting respondents challenging the section 9(3) of the Act and the notification dated 17.2.1992 increasing the royalty, were dismissed in the year 1996 following the decision of this Court in *State of Madhya Pradesh vs. Mahalaxmi Fabric Mills Ltd.,*– 1995 Supp (1) SCC 642, wherein this Court had upheld the validity of section 9(3) of the Act and the notification revising the rate of royalty. As a consequence of such dismissal, each

of the contesting respondents claims to have paid the difference in royalty (that is at the rate of Rs.15/- per MT) in the years 1996-1997.

7. Rule 64-A of the Minerals Concession Rules, 1960 ('Rules' for short) provides for levy of interest on arrears of royalty and other dues and the same is extracted below :

> "64-A. The State Government may, without prejudice to the provisions contained in the Act or any other rule in these rules, charge simple interest at the rate of 24% per annum on any rent, royalty or fee, other than the fee payable under sub-rule (1) of Rule 54, or other sum due to that government under the Act or these rules or under the terms and conditions of any prospecting licence or mining lease from the sixtieth day of the expiry of the date fixed by that government for payment of such royalty, rent, fee or other sum and until payment of such royalty, rent, fee or other sum is made."

8. The State of Rajasthan issued the following demand notices to the contesting respondents calling upon them to pay interest at the rate of 24% per annum under Rule 64-A of the Rules, on the difference in royalty which had been withheld on account of the interim orders obtained by them and which were belatedly paid, after rejection of their writ petitions :

S. No.	Name of Lessee	Writ Petition Number (where stay was obtained)	Interest Demanded (in Rupees)	Date of Demand
1.	J. K. Synthetic Ltd	WP No. 5721/1992.	6,98,54,031	6.11.1997
2.	Birla Corporation Ltd.	WP No. 6008/1992	5,99,81,784	24.7.1997
3.	J. K. Udaipur Udyog Ltd.	WP No. 3871/1993	1,12,76,364	12.3.1997
4.	J. K. Synthetic Ltd	WP No. 5300/1992.	20,04,474	24.7.1997
5.	J. K. Corporation Ltd	WP No. 5202/1992.	1,83,10,418	4.11.1996
6.	Shree Cement Ltd.	WP No. 5004/1992	2,91,89,622	21.1.1997

9. The contesting respondents at this stage again filed a second round of writ petitions challenging the notices demanding interest, contending that they were not liable to pay interest. They also challenged the validity of Rule 64-A of the Rules. During the pendency of those petitions, this Court in *South Eastern Coalfields Ltd. vs. State of M.P.* – 2003 (8) SCC 648, upheld the validity of Rule 64A. On the peculiar facts of that case which were noticed in para 30 of the said judgment, this Court held that it will not interfere, in exercise of the jurisdiction under Article 136 of the Constitution of India, the discretion exercised by the High Court in reducing the rate of interest from 24% per annum to 12% per annum making it clear that the same shall not however be treated as precedent in any other case. After the said decision, what remained to be considered in the writ petitions filed by the contesting respondent was the rate of interest. The contesting respondents as writ petitioners submitted before the learned Single Judge that the claim for interest at 24% per annum was harsh, excessive and inequitable, and interest should not be charged at a rate higher than 9% per annum. They relied upon the decision of this court in *Saurashtra Cement and Chemical Industries Ltd., vs. Union of India* – 2001 (1) SCC 91, where this court had reduced the rate of interest on unpaid royalty imposed by the High Court (18% per annum) to 9% per annum. The learned Single Judge allowed the writ petitions of the six contesting respondents in part, by common order dated 11.8.2005. He noted that the Advocate General had submitted that the State Government was entitled to interest at 18% per annum. The learned Single Judge noted that the trend of directions by the Supreme Court showed that State should get interest at least at the rate of 12% per annum on the delayed payments. Consequently, he upheld the demand for interest only to an extent of 12% per annum and set aside the demand for the interest at the higher rate of 24% per annum, with a condition that if interest at 12% per annum on the delayed payments was not paid within three months, the respective writ

petitioners shall be liable to pay interest at 24% per annum. It is stated by the contesting respondents that all of them have paid the interest at the rate of 12% per annum on the delayed payments, within three months period. Be that as it may.

10. The state government filed intra-court appeals challenging the order of the learned Single Judge. A Division Bench of the High Court has dismissed those appeals by the impugned orders dated 14.11.2009, 13.11.2006, 13.11.2006, 13.3.2007, 14.11.2006 and 4.11.2009, on the ground that the order of the learned Single Judge was based on an admission/ concession by the learned Advocate General and therefore, the order did not call for interference. The said orders are challenged in these appeals by special leave by the state government.

11. On the contentions raised, the following questions arise for consideration :

(i) Whether the Advocate General appearing for the State had consented to award of interest at 12% per annum?

(ii) When the High Court grants an interim stay of a demand for payment of money, in a writ petition challenging the levy which is ultimately dismissed, without any specific direction for payment of interest, whether the respondent can claim interest on the amount due for the period covered by the interim order?

(iii) Whether Rule 64-A vests any discretion in the state government to charge interest at a rate less than 24% per annum in appropriate or deserving cases?

(iv) Whether the rate of interest awarded at 12% per annum requires to be increased?

Re : Question (i)

12. The first question is whether the order of the learned

Single Judge is based on any consent and whether the learned Advocate General appearing for the state had conceded that the state government is entitled to interest at only 12% per annum. We extract below the relevant portion of the order of the learned Single Judge, where there is a reference to the submission made of the learned Advocate General :

> "On the other hand, the learned Advocate General submits that the state government is entitled for the rate of interest @ 18% per annum but even looking to the present trend of Hon'ble Supreme Court, Government must at least get interest @12% per annum on the delayed payment of the difference royalty amount as has been awarded by the Hon'ble Supreme Court in *South Easter Coalfields* case (supra).
>
> Having heard the learned (counsel) for the parties, I am of the view that in the facts and circumstances of the present case, the demand of interest @ 12% per annum would meet the ends of justice in the light of the Apex Court judgement in *South Eastern Coalfields* case (supra)."

The only submission of the Advocate General before the learned Single Judge was that the State Government was entitled to interest at the rate of 18% per annum. The further observation that as per the trend of Supreme Court decision, the state government should get interest at least at the rate of 12% per annum on the delayed payments, as awarded in the decision in *South Eastern Coalfields*, is an observation of the learned Single Judge, and not a concession by the learned Advocate General. Further, subsequent para of the order of the learned Single Judge makes it clear beyond doubt that the order was not on consent or concession, but is made on merits following the decision of this Court in *South Eastern Coalfields*. Therefore, the assumption by the Division Bench of the High Court that the learned Advocate General had made a concession and the order of the learned Single Judge was a

consent order and therefore, it was not open for the State Government to challenge the order of the learned Single Judge, is obviously erroneous. The order of the Division Bench cannot therefore be sustained.

13. Even if it is assumed that the learned Advocate General had submitted that "looking to the present trend of the decision of Supreme Court", Government should at least get interest at the rate 12% per annum on the delayed payment of difference in royalty amount as had been awarded in *South Eastern Coalfields*, that would neither be an admission nor a concession that the state government is entitled to interest only at the rate of 12% per annum in regard to the rate of interest. It would be nothing more than a statement made with reference to the decision in *South Eastern Coalfields* and such a statement would not come in the way of order being challenged if the state government is of the view that it is entitled to get a higher rate of interest.

Re : Question (ii)

14. The contesting respondents filed the second round of writ petitions before the High Court challenging the demand for interest and the validity of Rule 64A, on two grounds : that Rule 64-A was invalid; that the rate of interest was excessive. The learned Single Judge negatived the first contention in view of the decision of this *South Eastern Coalfields*. He however accepted the second contention and restricted the rate of interest to 12% per annum. The contesting respondents have not challenged the order of the High Court holding that they are liable to pay interest at 12% per annum. They have in fact paid the interest at such rate. Before us, one of the contentions urged to resist the claim of the State for increase in the rate of interest, is with reference to the fundamental question about the liability itself. It was submitted that they were not liable to pay interest on the increase in royalty amount, in view of their challenge to the increase and order of interim stay of the High Court. It was submitted by the contesting respondents, that even

if the writ petitions challenging the notification dated 17.2.1992 revising the royalty rate were ultimately dismissed, in the absence of any specific direction by the High Court to pay interest on the difference in royalty amount, they were not liable to pay any interest during the period of operation of stay. This question is no longer *res integra*. We may refer to the decisions of this Court that have categorically laid down about the liability to pay interest for the period of stay when the stay is ultimately vacated.

15. In *Kanoria Chemicals and Industries Ltd. vs. UP State Electricity Board* – 1997 (5) SCC 772, this Court held that grant of stay of a notification revising the electricity charges does not have the effect of relieving the consumer of its obligation to pay interest (or late payment surcharge) on the amount withheld by them by reason of the interim stay, if and when the writ petitions are dismissed ultimately. The said principle was based on the following reasoning :

> *"Holding otherwise would mean that even though the Electricity Board, which was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/ regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the Notification revising the rates and fails in his attack upon the validity of the Notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply - which terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable proposition can be sustained in law…….*
>
> It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very notification revising/ enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is ununderstandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same Notification - the operation of which was stayed."

(emphasis supplied)

The above principles have been followed and reiterated by this Court in *Rajasthan Housing Board vs. Krishna Kumari* – 2005 (13) SCC 151 and *Nav Bharat Ferro Allays Ltd vs. Transmission Corporation of Andhra Pradesh Ltd* – 2011 (1) SCC 216.

16. The same question was considered by this Court, when examining the constitutional validity of Rule 64-A in *South Eastern Coalfields*. This Court held that Rule 64-A providing for payment of interest at the rate of 24% per annum, was valid. In that case also, it was contended before this Court that non-payment of the increased amount of royalty was protected by the interim orders of the High Court and therefore, they should not be held liable for payment of interest so long as the money

was withheld under the protective umbrella of the interim orders. It was further contended that merely because the writ petition was finally dismissed, it does not follow that the interim order becomes vitiated or erroneous, as it may still be a perfectly justified interim order. It was further argued that as they had shown their *bona fides* by paying the difference in royalty immediately after the validity of the notification dated 17.2.1992 was upheld, they could not be made liable to pay interest. All these contentions were rejected by this Court on the ground that the principle of restitution was a complete answer to the said submissions. This Court held :

> "The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed."

17. It is therefore evident that whenever there is an interim order of stay in regard to any revision in rate or tariff, unless the order granting interim stay or the final order dismissing the writ petition specifies otherwise, on the dismissal of the writ petition or vacation of the interim order, the beneficiary of the interim order shall have to pay interest on the amount withheld or not paid by virtue of the interim order. Where the statute or contract specifies the rate of interest, usually interest will have to be paid at such rate. Even where there is no statutory or contractual provision for payment of interest, the court will have to direct the payment of interest at a reasonable rate, by way of restitution, while vacating the order of interim stay, or dismissing the writ petition, unless there are special reasons for not doing so. Any other interpretation would encourage unscrupulous debtors to file writ petitions challenging the revision in tariffs/rates and make attempts to obtain interim orders of stay. If the obligation to make restitution by paying appropriate interest on the withheld amount is not strictly enforced, the loser will end up with a financial benefit by resorting to unjust litigation and winner will end up as the loser financially for no fault of his. Be that as it may.

Re : Question (iii)

18. The contesting respondents contended that Rule 64A provides that the state government "may" charge simple interest at the rate of 24% per annum; that this being an enabling provision, there is no 'mandate' or compulsion to charge interest at 24% per annum; and that therefore, the state government has the discretion to charge interest at a rate lesser

than 24% in appropriate deserving cases. It is submitted that if the legislative intent was to provide for interest at the rate of 24% per annum in all cases of delayed payment of royalty/rent/ fees without exception, the rule would have been differently worded, and read as follows : "wherever any rent, royalty or fee or other sum due to the government under the Act or the rules or under any prospecting licence or mining lease, is not paid by the due date, the lessee or licensee shall pay interest on the delayed payment at the rate of 24% per annum". It is submitted by the respondents that the word "may" used in the Rule, should be read as vesting a discretion in the government to charge interest or not to charge interest, and if interest is to be charged, at any rate not exceeding 24% per annum.

19. A careful reading of the Rules makes it clear that no such discretion is given to the state government in regard to rate of interest. This will be evident from a combined reading of Rules 31 and 27 and the terms of the statutory form of lease deed (Form K), with Rule 64A. Rule 31 provides that where, an order has been made for the grant of a mining lease, a lease deed in Form K (or in a form as near thereto as circumstances of each case may require), shall be executed. Rule 27 specifies that every mining lease shall be subject to the conditions mentioned therein. Clause (5) of Rule 27 refers to determination :

> "(5). If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under section 9A or commits a breach of any of the conditions specified in sub-rules (1), (2) and (3), except the condition referred to in clause (f) of sub-rule (1), the state government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the state government may, without prejudice to any other proceedings that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

The above provision is accordingly incorporated in clause (2) of Part IX of the standard form of lease (Form K).

20. The rate of interest at 24% was substituted in clause (3) of Part VI of the standard form of lease, by the very same amendment which substituted the said percentage in Rule 64A namely, GSR 129 (E) dated 20.2.1991. The words "may charge simple interest" in Rule 64A should be read in the context of the words "without prejudice to the provisions of the Act or any other Rule in these Rules". As noticed above, Rule 45(iv) requires the lease deed to contain a condition that if there is any default in the payment of royalty, the lessor without prejudice to any proceeding that may be taken against the lessee, determine the lease. Therefore, the word "may" used with reference to the words "charge simple interest at the rate of 24% per annum" when read with the words "without prejudice to the provisions contained in the Act or any other Rule", occurring in Rule 64A, make it clear that whenever rent/royalty/ fee becomes due, the lessor has several options by way of remedy. The lessor may determine the lease, if the breach is not rectified, even after sixty days' notice to rectify the breach. Alternatively, instead of determining the lease, the rule gives the choice to charge interest at 24% per annum on the amounts due. The third alternative for the state government is to determine the lease *and also* charge interest at 24% per annum on the outstanding dues. The word 'may' is used in Rule 64-A not in the context of giving discretion in regard to rate of interest to be charged, but to give an option or choice to the State Government as to whether it should determine the lease, or charge interest at 24% per annum, or do both. Therefore, where the lease is not determined as a consequence of the default, the State will have to charge interest at 24% per annum on the outstanding amount. If Rule 64A is to be interpreted as giving

any discretion, that too unguided discretion, to the authorities to charge any rate of interest, as it would result in misuse and abuse. In this view of the matter, the contentions urged by the parties as to whether the word "may" should be read as "must" or "shall", and, if so, in what circumstances, do not arise for consideration at all.

21. There is also other material in the Rules itself to show that the rate of interest mentioned in Rule 64A was not intended to be flexible and that the rate of interest mentioned therein has to be applied in all cases of non-payment/default. When Rule 64A was amended by notification dated 20.2.1991, increasing the rate of interest to 24% per annum, clause (3) of Part IV of the standard form of lease (Form K) was also amended increasing the rate of interest payable on all dues as 24% per annum. We extract below clause (3) of Part VI of Form K for ready reference :

> "3. Should any rent, royalty or other sums due to the State Government under the terms and conditions of these presents be not paid by the lessee/lessees within the prescribed time, the same, together with simple interest due thereon at the rate of twenty four per cent per annum may be recovered on a certificate of such officer as may be specified by the State Government by general or special order, in the same manner as an arrears of land revenue."

The said clause in Form K makes it clear that the rate of interest should be 24% per annum and there is no discretions in the state government to charge interest at any lesser rate.

22. It is true that annual interest at 24% per annum appears to be marginally higher than the standard market lending rate of interest. But it is not penal in nature. Revenue from mining constitutes one of the major sources of non-tax revenue of the State Governments. Mining lessees are expected to pay the mining dues promptly and without default. If a lesser rate of

interest is provided under the Rules, it may lead to unscrupulous lessees indulging in delaying tactics. The intention of Rule 64A is to discourage practices that may be detrimental to recovery of revenue, by providing for a higher rate of interest. Hence, once the State Government chooses not to take the path of determining the lease, charging of interest at 24% is mandatory and leaves no discretion in the State Government in regard to rate of interest.

Re : Question (iv)

23. This brings us to the last question as to what should be the rate of interest. We have seen that Rule 64-A categorically provides that where a mining lessee who is liable to pay rent or any other dues, fails to pay the same, the state government will be entitled to charge simple interest thereon at 24% per annum. The validity of this rule has been upheld by this Court in *South Eastern Coalfields*. Therefore interest on all delayed payments should be 24% per annum.

24. The contesting respondents submitted that even if the rate of interest under Rule 64-A is 24% per annum, when the liability (on account of increase in Royalty) is under challenge and the matter is pending in court and there is an interim stay of the increase, the liability to pay interest will be within the discretion of the court and court can award a lesser rate. They relied upon the decisions of this Court in *Saurashtra Cement (supra)* and the decision in *South Eastern Coalfields*, that the interest should not be more than 9% or 12% per annum, for the period when the stay was in operation.

25. In *South Eastern Coalfields* which upheld the validity of Rule 64-A, this Court did not interfere with the decision of the High Court awarding interest at 12% per annum, on the following reasoning :

> "So far as the appeal filed by the State of Madhya Pradesh seeking substitution of rate of interest by 24% per annum

in place of 12% per annum as awarded by the High Court is concerned, we are not inclined to grant that relief in exercise of our discretionary jurisdiction under Article 136 of the Constitution especially in view of the opinion formed by the High Court in the impugned decision. The litigation has lasted for a long period of time. Multiple commercial transactions have taken place and much time has been lost in between. The commercial rates of interest (including bank rates) have undergone substantial variations and for quite sometime the bank rate of interest has been below 12%. The High Court has, therefore, rightly (and reasonably) opined that upholding entitlement to payment of interest at the rate of 24% per annum would be excessive and it would meet the ends of justice if the rate of interest is reduced from 24% per annum to 12% per annum on the facts and in the circumstances of the case. We are not inclined to interfere with that view of the High Court *but make it clear that this concession is confined to the facts of this case and to the parties herein and shall not be construed as a precedent for overriding Rule 64A of the Mineral Concession Rules, 1960.* It is also clarified that the payment of dues should be cleared within six weeks from today (if not already cleared) to get the benefit of reduced rate of interest of 12%; failing the payment in six weeks from today the liability to pay interest @24% *per annum* shall stand."

(emphasis supplied)

Therefore, it is clear that the concession extended in that case by permitting interest only at 12% per annum was confined to the facts of that case and to the parties therein and is not be treated as a precedent, for nullifying or overriding Rule 64-A of the Rules.

26. In *Saurashtra Cement*, while dismissing the appeals challenging the validity of the increase in royalty following the decision in *Mahalaxmi Fabric Mills (Supra)*, this Court dealt

with a case, where the High Court had granted interim stay of the notification regarding increase in royalty but however while vacating the interim order and discharging the rule, had directed the payment of interest at 18% per annum. Pattanaik J., (as he then was) in the last line of his order reduced the rate of interest to 9% per annum without assigning any specific reason, except observing that 18% was unreasonable. In his concurring judgment, Banerjee J., observed as under :

> "The imposition of 18% interest with yearly rests cannot in our view find support in the contextual facts since the *validity of the legislation itself is in question before this Court*. *The payment of interest being in the discretion of the court*, we, therefore, do not wish to interfere with the award of interest, as such though the rate at which it has been awarded needs some modification in the contextual facts and as such we direct that the rate of interest be 9% simple interest and not as directed by the High Court."

(emphasis supplied)

A careful reading of the said judgment shows that while deciding the issue of interest, this Court had overlooked Rule 64-A which is a statutory provision entitling the government to claim interest at 24% per annum. This Court apparently proceeded on the basis that there was no statutory or contractual provision for the payment of interest, and therefore, question of interest was wholly within the discretion of the court. Therefore, the said decision may not also be of any assistance.

27. We find that the decision in *Kanoria Chemicals (supra)* throws considerable light on the logic behind court's discretion in awarding interest in such cases. That case, as noticed earlier, dealt with increase in electricity charges. The relevant provision specifically provided that in regard to delayed payments of the bills, the consumer shall pay additional charge per day of seven paisa per hundred rupees on the unpaid amount of the bill, which works out to 25.55% per annum. This

Court reduced the same to 18% per annum on the following reasoning :

> "Sri Vaidyanathan then contended that the rate of "late payment surcharge" provided by clause 7(b) is really penal in nature inasmuch as it works out to 25.5 per cent per annum. The learned counsel also submitted that the petitioners understood the decision in Adoni Ginning as relieving them of their obligation to pay interest for the period covered by the interim order and that since they were acting bona fide they should not be mulcted with such high rate of interest. We cannot agree that the rate of late payment surcharge provided by clause 7(b) is penal, *but having regard to the particular facts and circumstances of this case and having regard to the fact that petitioners could possibly have understood the decision in Adoni Ginning as relieving them of their obligation to pay interest/late payment surcharge for the period of stay*, we reduce the rate of late payment surcharge payable under clause 7(b) to eighteen per cent. But this direction is confined only to the period covered by the stay orders in writ petitions filed challenging the notification dated 21.4.1990 and limited to 1.3.1993 the date on which those writ petitions were dismissed."
>
> (emphasis supplied)

Therefore, whenever there is a challenge to a levy or challenge to an increase in the tariff or rates, and an order of interim stay of recovery is made in the said writ proceedings and the writ petition is ultimately rejected, the court should invariably award interest by way of restitution. Where the statute or contract prescribed a specific rate of interest, the court should normally adopt such rate while awarding interest, except where the court proposes to award a higher or lower rate of interest, for special and exceptional reasons.

28. Let us consider whether there are any special or

exceptional circumstances for reducing the statutory interest in this case. In the case of one of the contesting respondents (J. K. Udaipur Udyog Ltd.), there was a categorical direction while granting interim stay that in the event of failure in the writ petition the writ petitioner will have to pay interest at the rate of 18% per annum. That was a condition of interim order and therefore, it is possible that the parties *bona fide* proceeded on the basis that interest will be only 18% per annum. In the writ petitions of other contesting respondents, there was no such condition regarding interest while granting the stay. But as pointed out in *Kanoria Chemicals*, it is possible that the contesting respondents thought, by reason of the fact that there was no condition for payment of interest while granting stay, they may not be required to pay the statutory rate of interest. More importantly, the learned Advocate General appearing for the State had made a submission before the learned Single Judge that state government was entitled to interest only at the rate of 18% per annum. In the peculiar and special circumstances of these cases, we are of the view that the appellants will be entitled to interest at 18% per annum in respect of royalty that became due between 17.2.1992 and the date of dismissal of their respective writ petitions. For the period subsequent to the dismissal of the writ petitions, the contesting respondents will be liable to pay interest on the said amount, at the rate of 24% per annum till date of payment.

29. The contesting respondent in the last case (Shree Cement) raised an additional contention. It was submitted that clause VI(iii) of the Lease Deed in its case provided that any royalty which was not paid within the prescribed time shall be paid with simple interest at the rate of 10% per annum. It is therefore contended that the interest on any arrears cannot be more than 10% per annum in its case. The lease is governed by the Minerals and Concessions Rules 1960 and execution of the lease deed is itself is in compliance with one of the requirement of the rules, namely Rule 31. Once Rule 64A was amended by notification dated 20.2.1991 increasing the rate

of interest to 24% per annum, any term in the lease deed prescribing a lesser rate of interest, shall have to yield to Rule 64-A from that date as the rule will prevail over the terms of the lease. This position is evident from the decision in *South-Eastern Coalfields* also.

Conclusion

30. In view of the above, we allow these appeals in part and modify the rate of interest in each case as under :

(i) from 17.2.1992 to the date of dismissal of the respective writ petition (challenging the notification dated 17.2.1992), the rate of interest shall be 18% per annum on the arrears of royalty etc.; and

(ii) from the date of dismissal of the writ petition till date of payment, the rate of interest shall be 24% per annum.

B.B.B. Appeals partly allowed.

STATE OF GOA
v.
PRAVEEN ENTERPRISES
(Civil Appeal No. 4987 of 2011)

JULY 4, 2011

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

Arbitration and Conciliation Act, 1996 – s.11, s.23 r/w s.2(9) and s.34 – Appellant-State had entrusted construction work to respondent in terms of a contract – Contract contained an arbitration clause – Contract terminated by the appellant – Respondent raised certain claims and gave a notice to the appellant to appoint an arbitrator in terms of the arbitration clause – As appellant did not do so, respondent filed application u/s.11 of the Act for appointment of an arbitrator – Application allowed and a sole arbitrator appointed – Arbitrator considered the claims of the respondent-contractor as also counter claims of the appellant and thereafter passed arbitral award – Award challenged by respondent u/s.34 – The civil court held that the arbitrator could not enlarge the scope of the reference and entertain either fresh claims by the claimant-respondent or counter claims from the appellant – Order upheld by the High Court – On appeal, held: Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement – The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration – Appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement – Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage

earlier to the stage of pleadings before the Arbitrator – Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration – In the instant case, the arbitration clause contemplated all disputes being referred to arbitration by a sole arbitrator – It referred to an Appointing Authority (Chief Engineer, CPWD), whose role was only to appoint the arbitrator – Though the arbitration clause required the party invoking the arbitration to specify the dispute/s to be referred to arbitration, it did not require the appointing authority to specify the disputes or refer any specific disputes to arbitration nor required the Arbitrator to decide only the referred disputes – It did not bar the arbitrator deciding any counter claims – In the absence of agreement to the contrary, the counter claims by the appellant were maintainable and arbitrable having regard to s.23 r/w s.2(9) of the Act – Consequently the award of arbitrator is upheld in its entirety and the challenge thereto by the respondent is rejected.

Under an agreement, the appellant-State of Goa entrusted construction work to the respondent. Clause 25 of the agreement provided for settlement of disputes by arbitration. On the ground that the Respondent-contractor did not complete the work even by the extended date of completion, the contract was terminated by the appellant. The respondent raised certain claims and gave a notice to the appellant to appoint an arbitrator in terms of the arbitration clause. As the appellant did not do so, the respondent filed an application under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. The said application was

allowed and a sole arbitrator was appointed. The arbitrator entered upon the reference and called upon the parties to file their statement.

The respondent filed its claim statement before the arbitrator. The appellant filed its Reply Statement with counter claim. The arbitrator considered the claims of the contractor and counter claims of the appellant and thereafter passed arbitral award. Respondent filed application under section 34 of the Act, challenging the award insofar as (i) rejection of some its other claims; and (ii) award made on counter claim No.3. The civil court upheld the award in regard to the claims of the respondent but accepted the objection raised by the respondent in regard to award made on the counter claim. The court held that the arbitrator could not enlarge the scope of the reference and entertain either fresh claims by the claimant-respondent or counter claims from the appellant. The order was upheld by the High Court in appeal. The High Court held that the counter claims were bad in law as they were never placed before the court by the appellant (in the proceedings under section 11 of the Act for appointment of arbitrator) and they were not referred by the court to arbitration, and in such circumstances the arbitrator had no jurisdiction to entertain a counter claim.

In the instant appeal, the appellant contended that as a respondent in arbitration proceedings, in the absence of a bar in the arbitration agreement, it was entitled to raise its counter claims before the arbitrator, even though it had not raised them in its statement of objections to the proceedings under section 11 of the Act. It further contended that section 11 of the Act does not contemplate 'reference of disputes' by the Chief Justice or his designate; and the High Court committed a serious error in holding that in the absence of a reference by the

court, the arbitrator had no jurisdiction to entertain a counter claim.

The respondent, on the other hand, contended that having regard to the provisions of section 21 of the Act, an arbitrator will have jurisdiction to decide only those disputes which were raised and referred to him by the court.

The question which therefore arose for consideration was: Whether the respondent in an arbitration proceedings is precluded from making a counter-claim, unless a)it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration and the claimant had concurred in referring the counter claim to the same arbitrator; and/or b) it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration.

Allowing the appeal, the Court

HELD:

What is 'Reference to arbitration'

1.1. 'Reference to arbitration' can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. (a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the 'reference' contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes. (b) If an arbitration agreement provides that in the event of any dispute

between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the 'reference' contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him. (c) Where the parties fail to concur in the appointment of arbitrator/s as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement. [Para 9] [1044-F-H; 1045-A-D]

1.2. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where 'all disputes' are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes. [Para 10] [1045-E-G]

1.3. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be 'ad-hoc' arbitrations relating to

existing disputes. In such cases, there is no prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the respondent to make a counter claim. The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/counter claims to arbitration and authorize the arbitrator to decide them. [Para 11] [1045-H; 1046-A-B]

1.4. 'Reference to arbitration' can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under section 11 of the Act for appointment of an arbitrator. The judicial authority 'referring the parties to arbitration' under section 8 of the

Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator. [Para 12] [1046-C-G]

Charuvil Koshy Verghese v. State of Goa **1998 (2) SCC 21 – referred to.**

Sections 21 and 43 of the Act

2.1. Section 21 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Taking a cue from the said section, the respondent submitted that arbitral proceedings can commence only in regard to a dispute in respect of which notice has been served by a claimant upon the other party, requesting such dispute to be referred to arbitration; and therefore, a counter claim can be entertained by the arbitrator only if it has been referred to him, after a notice seeking arbitration in regard to such counter claim. There is no basis for such a contention. The purpose of section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceedings in regard to a dispute commences. This becomes relevant for the purpose of section 43 of the Act. Sub-section (1) of section 43 provides that the Limitation Act 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of section 43 provides that for the purposes of section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21 of the Act. Having regard to section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the arbitral tribunal will have to reject such claims as barred by limitation. [Para 13] [1046-H; 1047-A-E]

2.2. Section 3 of the Limitation Act, 1963 provides for bar of limitation. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of 'institution' for arbitration proceedings. Section 21 of the Act supplies the omission. But for section 21, there would be considerable confusion as to what would be the date of 'institution' in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under section 11 of the Act. In view of section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not. [Paras 14, 15] [1047-F; 1048-F-H; 1049-A-C]

2.3. There can be claims by a claimant even without a notice seeking reference. One may take an example where a notice is issued by a claimant raising disputes regarding claims 'A' and 'B' and seeking reference

thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said claims 'A' and 'B'. Subsequently if the claimant amends the claim statement by adding claim 'C' [which is permitted under section 23(3) of the Act] the additional claim 'C' would not be preceded by a notice seeking arbitration. The date of amendment by which the claim 'C' was introduced, will become the relevant date for determining the limitation in regard to the said claim 'C', whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims 'A' and 'B'. [Para 16] [1049-D-G]

2.4. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of "institution" in so far as counter claim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the

claimant and not on the date of filing of the counter claim. [Para 17] [1049-H; 1050-A-D]

Scope of sections 11 and 23 of the Act

3.1. Section 11 refers to appointment of arbitrators. Section 11 contemplates the Chief Justice or his designate appointing the arbitrator but does not contain any provision for the court to refer the disputes to the arbitrator. Sub-sections (4), (5) and (9) of section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator/s. Sub-section (6) requires the Chief Justice or his designate to 'take the necessary measure' when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an applicant filing the application under section 11, only after he has raised the disputes and only when the respondent fails to co-operate/concur in regard to appointment of arbitrator. [Paras 18 to 21] [1050-E; 1051-A-C]

3.2. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made. Similarly section 23 read with section 2(9) makes it clear that a respondent is entitled

to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". Unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation. [Para 22] [1054-D-H; 1055-A-B]

3.3. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under section 11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under section 11 of the Act, is without any basis. Equally

baseless is the assumption that where one party filed an application under section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under section 11 of the Act and not the counter claims of the respondent. [Para 23] [1055-B-F]

3.4. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than section 25 (a) or section 32(2)(a)], refers to a "claim", it shall apply to a "counter claim" and where it refers to a "defence", it shall also apply to a defence to that counter claim. This would mean that a respondent can file a counter claim giving the facts supporting the counter claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter claim) will be entitled to file his defence to such counter claim. Once the claims and counter claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter claims) and if the answer is in the affirmative, proceed to adjudicate upon the same. [Para 24] [1055-G-H; 1056-A-C]

3.5. A counter claim by a respondent pre-supposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject matter of the counter claim) by issuing a notice seeking reference to arbitration and follow it by an application under section 11 of the Act for appointment of Arbitrator, instead of raising a counter claim in the pending arbitration proceedings. The object of providing for counter claims

is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceedings being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceedings or raise the dispute by way of a counter claim, in the pending arbitration proceedings. [Para 26] [1057-B-D]

Indian Oil Corporation Ltd. vs. Amritsar Gas Service and Ors. **1991(1) SCC 533: 1990 (3) Suppl. SCR 196;** *SBP & Co. vs. Patel Engineering Ltd.* **2005 (8) SCC 618: 2005 (4) Suppl. SCR 688;** *National Insurance Co.Ltd. v Boghara Polyfab Private Ltd.* **2009 (1) SCC 267: 2008 (13) SCR 638;** *Indian Oil Corporation Ltd. v. M/s SPS Engineering Ltd*. **2011 (2) SCALE 291 – referred to.**

Heyman v. Darwins Ltd. **1942 AC 356 – referred to.**

Law and Practice of Commercial Arbitration in England [Mustill & Boyd **(1989) Second Edn., page 131] – referred to.**

Summation

4. The position may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for

referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration. [Para 32] [1062-C-G]

The position in this case

5.1. The arbitration clause in this case contemplates all disputes being referred to arbitration by a sole arbitrator. It refers to an Appointing Authority (Chief Engineer, CPWD), whose role is only to appoint the arbitrator. Though the arbitration clause requires the party invoking the arbitration to specify the dispute/s to be referred to arbitration, it does not require the appointing authority to specify the disputes or refer any specific disputes to arbitration nor requires the Arbitrator to decide only the referred disputes. It does not bar the arbitrator deciding any counter claims. In the absence of agreement to the contrary, it has to be held that the counter claims by the appellant were maintainable and arbitrable having regard to section 23 read with section 2(9) of the Act. [Para 33] [1062-H; 1063-A-H]

5.2. Counter claim no.(3) in regard to which Rs.2,94,298/- has been awarded by the Arbitrator relates to the cost of pipes entrusted by the appellant for

carriage from store to site, which were not accounted for by the respondent. It is not shown to be barred by limitation. There is no error in the reasoning of the arbitrator in awarding Rs.2,94,298/- under counter claim no.(3). [Para 34] [1063-C-D]

Conclusion

6. The order of the High Court affirming the judgment of the trial court in regard to counter claim No.3, is set aside. Consequently the award of arbitrator is upheld in its entirety and the challenge thereto by the respondent is rejected. [Para 35] [1063-E-F]

Case Law Reference:

1998 (2) SCC 21	**referred to**	**Para 6**
1990 (3) Suppl. SCR 196	**referred to**	**Para 25**
2005 (4) Suppl. SCR 688	**referred to**	**Para 27**
2008 (13) SCR 638	**referred to**	**Para 27**
2011 (2) SCALE 291	**referred to**	**Para 28**
1942 AC 356	**referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appal No. 4987 of 2011.

From the Judgment & Order dated dated 31.8.2007 of the High Court of Bombay at Goa in Arbitration Appeal No. 3 of 2006.

Harish Salve (A.C.), Jaideep Gupta, Dhruv Mehta, A. Subhashini, Yashraj Singh Deora, Rajesh Kumar, Sarv Mitter, Mitter & Mitter Co., for the appearing parties.

The Judgment of the Court was delivered by

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

2. Under an agreement dated 4.11.1992, the appellant (State of Goa) entrusted a construction work (Farm Development Works in Command Area of Water Course No.3 and 3A of minor M-3 of SIP in Salcette Taluka) to the respondent. Clause 25 of the agreement provided for settlement of disputes by arbitration, relevant portions of which are extracted below:

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department in charge of the work at the time of dispute……It is a term of contract that the party invoking arbitrations shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes."

As per the contract, the work had to be commenced on 16.11.1992 and completed by 5.5.1994. On the ground that the contractor did not complete the work even by the extended date of completion (31.3.1995), the contract was terminated by the appellant.

3. Respondent raised certain claims and gave a notice to the appellant to appoint an arbitrator in terms of the arbitration clause. As the appellant did not do so, the respondent filed an application under section 11 of the Arbitration and Conciliation

Act, 1996 ('Act' of 'new Act' for short) for appointment of an arbitrator. By order dated 4.12.1998 the said application was allowed and Mr. S.V.Salilkar, retired Adviser, Konkan Railway Corporation was appointed as the sole arbitrator. The arbitrator entered upon the reference on 22.2.1999 and called upon the parties to file their statement.

4. The respondent filed its claim statement before the arbitrator on 15.4.1999. The appellant filed its Reply Statement with counter claim on 30.6.1999. The arbitrator considered the fourteen claims of the contractor and four counter claims of the appellant. The Arbitrator made an award dated 10.7.2000. He awarded to the respondent, Rs.1,00,000/- towards claim No.2 with interest at 12% per annum from 26.8.1998 to 19.2.1999; Rs.3,63,416/- towards claim No.3 with interest at 12% per annum from 18.9.1995 to 22.2.1999; and Rs.59,075/- towards claim No. 14 (additional claim No. ii) with interest at 12% per annum from 18.9.1995 to 22.2.1999. In regard to the counter claims made by the appellant, the arbitrator awarded to the appellant Rs.2,94,298/- without any interest in regard to counter claim No.3. The arbitrator rejected the other claims of respondent and appellant. He awarded simple interest at 18% per annum on the award amount from the expiry of one month from the date of the award and directed both parties to bear their respective costs.

5. Feeling aggrieved the respondent filed an application under section 34 of the Act, challenging the award insofar as (i) rejection of its other claims; and (ii) award made on counter claim No.3. The civil court (Adhoc Additional District Judge, Fast Track Court No.1, South Goa) disposed of the matter upholding the award in regard to the claims of the respondent but accepted the objection raised by the respondent in regard to award made on the counter claim. The court held that the arbitrator could not enlarge the scope of the reference and entertain either fresh claims by the claimants or counter claims from the respondent.

6. The appellant challenged the said judgment by filing an arbitration appeal before the High Court. The High Court of Bombay dismissed the appeal by judgment dated 31.8.2007. The High Court held that the counter claims were bad in law as they were never placed before the court by the appellant (in the proceedings under section 11 of the Act for appointment of arbitrator) and they were not referred by the court to arbitration. The High Court held that in such circumstances arbitrator had no jurisdiction to entertain a counter claim. The High Court followed its earlier decision *in Charuvil Koshy Verghese v. State of Goa* - 1998 (2) SCC 21. In that case, an application was made by a contractor under Section 20 of the Arbitration Act, 1940 ('old Act' for short), for filing the arbitration agreement and referring the disputes to the arbitrator. In its reply statement to the said application, the respondent did not assert its counter claim. The court allowed the application under section 20 and appointed an arbitrator to decide the disputes raised by the contractor. However when the matter went before the arbitrator, the respondent therein made a counter claim, which was allowed by the arbitrator. The Bombay High Court held that the arbitrator had no jurisdiction to entertain or allow such a counter claim as the same had neither been placed before the court in the proceedings under section 20 nor the court had referred it to the arbitrator. The said judgment of the High Court is challenged in this appeal by special leave.

7. The appellant contends as a respondent in arbitration proceedings, in the absence of a bar in the arbitration agreement, it was entitled to raise its counter claims before the arbitrator, even though it had not raised them in its statement of objections to the proceedings under section 11 of the Act. It further contends that section 11 of the Act does not contemplate 'reference of disputes' by the Chief Justice or his designate; and the High Court committed a serious error in holding that in the absence of a reference by the court, the arbitrator had no jurisdiction to entertain a counter claim, by following its earlier decision in *Charuvil Koshy Verghese (*supra), rendered with

reference to section 20 of the old Act, which is materially different from section 11 of the new Act. The respondent supported the decision of the High Court, contending that having regard to the provisions of section 21 of the Act, an arbitrator will have jurisdiction to decide only those disputes which were raised and referred to him by the court.

8. Therefore the question that arises for our consideration is as under:

> Whether the respondent in an arbitration proceedings is precluded from making a counter-claim, unless
>
> (a) it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration and the claimant had concurred in referring the counter claim to the same arbitrator;
>
> and/or
>
> (b) it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration.

What is 'Reference to arbitration'

9. 'Reference to arbitration' describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate.

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the 'reference' contemplated is the act of parties to the

arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the 'reference' contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of arbitrator/s as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

10. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where 'all disputes' are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

11. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be 'ad-hoc' arbitrations relating to existing disputes. In such

cases, there is no prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the respondent to make a counter claim. The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/counter claims to arbitration and authorize the arbitrator to decide them.

12. 'Reference to arbitration' can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under section 11 of the Act for appointment of an arbitrator. The judicial authority 'referring the parties to arbitration' under section 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

Sections 21 and 43 of the Act

13. Section 21 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Taking a cue from the said section, the respondent submitted that arbitral proceedings can commence only in regard to a dispute in respect of which notice has been served by a claimant upon the other party, requesting such dispute to be referred to arbitration; and therefore, a counter claim can be entertained by the arbitrator only if it has been referred to him, after a notice seeking arbitration in regard to such counter claim. On a careful consideration we find no basis for such a contention. The purpose of section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceedings in regard to a dispute commences. This becomes relevant for the purpose of section 43 of the Act. Sub-section (1) of section 43 provides that the Limitation Act 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of section 43 provides that for the purposes of section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21 of the Act. Having regard to section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the arbitral tribunal will have to reject such claims as barred by limitation.

14. Section 3 of the Limitation Act, 1963 provides for bar of limitation and is extracted below:

> **"3. Bar of Limitation.** (1) Subject to the provisions contained in sections 4 to 24 (inclusive), *every suit instituted*, appeal preferred, and application made *after the prescribed period shall be dismissed* although limitation has not been set up as a defence.

> (2) *For the purposes of this Act,-*
>
> (a) *a suit is instituted,-*
>
> (i) *in an ordinary case, when the plaint is presented to the proper officer*;
>
> (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and
>
> (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;
>
> (b) *any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-*
>
> (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;
>
> (ii) *in the case of a counter claim, on the date on which the counter claim is made in court;*
>
> (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."
>
> (emphasis supplied)

15. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of 'institution' for arbitration proceedings. Section 21 of the Act supplies the omission. But

for section 21, there would be considerable confusion as to what would be the date of 'institution' in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under section 11 of the Act. In view of section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.

16. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding claims 'A' and 'B' and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said claims 'A' and 'B'. Subsequently if the claimant amends the claim statement by adding claim 'C' [which is permitted under section 23(3) of the Act] the additional claim 'C' would not be preceded by a notice seeking arbitration. The date of amendment by which the claim 'C' was introduced, will become the relevant date for determining the limitation in regard to the said claim 'C', whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims 'A' and 'B'. Be that as it may.

17. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the

counter claim is made in court shall be deemed to be the date of institution of the counter claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of "institution" in so far as counter claim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.

Scope of sections 11 and 23 of the Act

18. Section 11 refers to appointment of arbitrators. Sub-sections (4), (5), (6) and (9) of section 11 relevant for our purpose are extracted below:

> "(4) If the appointment procedure in sub-section (3) applies and-
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,
>
> *the appointment shall be made*, upon request of a party, by the Chief Justice or any person or institution Designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree *the appointment shall be made*, upon request of a party, by the Chief Justice or any person or institution Designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution Designated by him *to take the necessary measure*, unless the agreement on the *appointment procedure* provides other means for securing the appointment.

xxx xxx xxx

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him *may appoint an arbitrator* of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

(emphasis supplied)

19. Section 23 relating to filing of statements of claim and defence reads thus:

"23. Statements of claim and defence.- (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, *unless the parties have otherwise agreed as to the required elements of those statements.*

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) *Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence* during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

(emphasis supplied)

Section 2 contains the definitions. Sub-section (9) clarifies that except in sections 25(a) and 32(2)(a) , any reference in the Act to a 'claim' will apply to a 'counter-claim'. The said sub-section reads thus:

"(9) Where this Part, other than clause (a) of section 25 or clause (a) of sub-section (2) of section 32, refers to a claim, it shall also apply to a counterclaim, and where it refers to a defence, it shall also apply to a defence to that counterclaim."

20. In contrast, section 20 of the old Act which provided for applications to file the arbitration agreement in court, read as under:

"20. Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, *and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.*

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

(emphasis supplied)

21. Section 20 of the old Act required the court while ordering the arbitration agreement to be filed, to make an order

of reference to the arbitrator. The scheme of the new Act requires minimal judicial intervention. Section 11 of the new Act, on the other hand, contemplates the Chief Justice or his designate appointing the arbitrator but does not contain any provision for the court to refer the disputes to the arbitrator. Sub-sections (4), (5) and (9) of section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator/s. Sub-section (6) requires the Chief Justice or his designate to 'take the necessary measure' when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an applicant filing the application under section 11, only after he has raised the disputes and only when the respondent fails to co-operate/concur in regard to appointment of arbitrator.

22. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made. Similarly section 23 read with section 2(9) makes it clear that a respondent is entitled to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those

disputes which are specifically referred to arbitration, both the claimant and respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation.

23. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under section 11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under section 11 of the Act and not the counter claims of the respondent.

24. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than

section 25 (a) or section 32(2)(a)], refers to a "claim", it shall apply to a "counter claim" and where it refers to a "defence", it shall also apply to a defence to that counter claim. This would mean that a respondent can file a counter claim giving the facts supporting the counter claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter claim) will be entitled to file his defence to such counter claim. Once the claims and counter claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter claims) and if the answer is in the affirmative, proceed to adjudicate upon the same.

25. It is of some relevance to note that even where the arbitration proceedings were initiated in pursuance of a reference under section 20 of the old Act, this Court held (in *Indian Oil Corporation Ltd. vs. Amritsar Gas Service and Ors*. - 1991(1) SCC 533) that the respondent was entitled to raise counter claims directly before the arbitrator, where all disputes between parties are referred to arbitration. This Court observed :

> "The appellant's grievance regarding non-consideration of its counter-claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and *their reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference*. The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counter-claim could not be made at any earlier stage. Refusal to consider the counter-claim for

the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award."

(emphasis supplied)

26. A counter claim by a respondent pre-supposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject matter of the counter claim) by issuing a notice seeking reference to arbitration and follow it by an application under section 11 of the Act for appointment of Arbitrator, instead of raising a counter claim in the pending arbitration proceedings. The object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceedings being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceedings or raise the dispute by way of a counter claim, in the pending arbitration proceedings.

Respondent's contentions

27. The respondent submitted that this Court in *SBP & Co. vs. Patel Engineering Ltd.* — 2005 (8) SCC 618 and *National Insurance Co.Ltd. v Boghara Polyfab Private Ltd.* — 2009 (1) SCC 267, has observed that while deciding an application under section 11 of the Act, the Chief Justice or his designate can decide the question whether the claim was a dead one (long time barred) that was sought to be resurrected. According to appellant the logical inference from this observation is that an application under section 11 should sufficiently enumerate and describe the claims to demonstrate that they are within limitation. Extending the same logic, respondent contends that any counter claim by the respondent should also be described in his statement of objections with relevant particulars so that the Chief Justice or his designate could consider and

pronounce whether such counter claim is barred by limitation. The respondent therefore argues that every claim unless specifically mentioned in the application under section 11 of the Act, and every counter claim unless specifically mentioned in the statement of objections, cannot be the subject matter of arbitration.

28. The aforesaid contention of the respondent is based on the erroneous premises that whenever an application is filed under section 11 of the Act, it is necessary for the Chief Justice or his Designate to consider and decide whether the claims or counter claims are barred by limitation or not. In *SBP & Co*. and *Boghara Polyfab,* this Court classified the questions that may be raised in an application under section 11 of the Act into three groups : (i) those which the Chief Justice/his designate shall have to decide; (ii) those which the Chief Justice/his designate may choose to decide or alternatively leave to the decision of the Arbitral Tribunal; and (iii) those which the Chief Justice/his designate should leave exclusively for the decision of the Arbitral Tribunal. This Court held that the issue whether a claim is dead claim (long barred claim) is an issue which the Chief Justice or his designate may choose to decide or leave for the decision of the Arbitral Tribunal. The difference between a dead/stale claim and a mere time barred claim was explained by this Court in *Indian Oil Corporation Ltd. v. M/s SPS Engineering Ltd*. [2011 (2) SCALE 291] thus : -

> "When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his designate

will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act."

29. The issue of limitation is not an issue that has to be decided in an application under section 11 of the Act. *SBP & Co.* and *Boghara Polyfab* held that the Chief Justice or his designate will not examine issues relating to limitation, but may consider in appropriate cases, whether the application was in regard to a claim which on the face of it was so hopelessly barred by time, that it is already a dead/stale claim which did not deserve to be resurrected and referred to arbitration. The said decisions do not support the respondent's contention that the details of all claims should be set out in the application under section 11 of the Act and that details of all counter claims should be set out in the statement of objections, and that a claim or a counter claim which is not referred to or set out in the pleadings in the proceedings under section 11 of the Act, cannot be entertained or decided by the arbitral tribunal.

30. Reliance was next placed on the following passage from the *Law and Practice of Commercial Arbitration in England [Mustill & Boyd – (1989) Second Edn. Page 131]* to contend that the counter claim ought to have been submitted to the Arbitrator when he is appointed:

"The fourth situation, in which both the claim and the cross-

claim are arbitrable, is the one most commonly encountered in practice. *The arbitrator should carefully consider whether the subject matter of the counter claim was one of the matters submitted to him at the time of the appointment*. If it is, then it is up to him whether to allow the matter to be raised by counter claim or made the subject of a separate arbitration. In practice, we have never known the second course to be followed. If, on the other hand, the cross-claim was not a dispute which was submitted to him, he should not entertain it unless it raises a pure defence, or unless the parties clearly agree that he is to have jurisdiction over it."

(emphasis supplied)

The said observations were made with reference to the Arbitration Law prevailing in United Kingdom in the year 1989, prior to the enactment of (English) Arbitration Act, 1996. Further the observations obviously related to an arbitration where specific disputes were referred to arbitration and consequently the arbitrator was bound to restrict himself to the disputes referred. We have already adverted to this aspect earlier.

31. The respondent lastly contended that the Court is required to ascertain the precise nature of the dispute which has arisen and then decide whether the dispute is one which falls within the terms of the arbitration clause, before appointing an arbitrator; and that could be done only if the claims are set out in the application under section 11 of the Act and the counter claims are set out in the statement of objections and court had an opportunity to examine it. It is therefore submitted that a dispute (relating to a claim or counter claim) not referred in the pleadings, is not arbitrable. Reliance was placed upon certain observations in the decision of the House of Lords in *Heyman v. Darwins Ltd.*— 1942 AC 356. We extract below the paragraph containing the relied upon observations :

"The law permits the parties to a contract to include in it

as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the court of England enforce such a reference by staying legal proceedings in respect of any matter agreed to be referred "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission." Arbitration Act, 1889, sec. 4. *Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen The next question is whether the dispute is one which falls within the terms of the arbitration clause.* Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

(emphasis supplied)

The said observations were made while examining whether a suit should be stayed at the instance of the defendant on the ground that there was an arbitration agreement between the parties. If a party to an arbitration agreement files a civil suit and the defendant contends that the suit should be stayed and the parties should be referred to arbitration, necessarily, the court will have to find out what exactly is the subject matter of the suit, whether it would fall within the scope of the arbitration clause, whether the arbitration clause was valid and effective and lastly whether there was sufficient reason as to why the subject matter of the suit should not be referred to arbitration. The observations made in *Heymen,* in the context of an application seeking stay of further proceedings in a suit, are

not relevant in respect of an application under section 11 of the Act. This Court has repeatedly held that the questions for consideration in an application under section 8 by a civil court in a suit are different from the questions for consideration under section 11 of the Act. The said decision is therefore of no assistance.

Summation

32. The position emerging from above discussion may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration.

The position in this case

33. The arbitration clause in this case contemplates all disputes being referred to arbitration by a sole arbitrator. It refers

to an Appointing Authority (Chief Engineer, CPWD), whose role is only to appoint the arbitrator. Though the arbitration clause requires the party invoking the arbitration to specify the dispute/s to be referred to arbitration, it does not require the appointing authority to specify the disputes or refer any specific disputes to arbitration nor requires the Arbitrator to decide only the referred disputes. It does not bar the arbitrator deciding any counter claims. In the absence of agreement to the contrary, it has to be held that the counter claims by the appellant were maintainable and arbitrable having regard to section 23 read with section 2(9) of the Act.

34. Counter claim no.(3) in regard to which Rs.2,94,298/- has been awarded by the Arbitrator relates to the cost of pipes entrusted by the appellant for carriage from store to site, which were not accounted for by the respondent. It is not shown to be barred by limitation. We find no error in the reasoning of the arbitrator in awarding Rs.2,94,298/- under counter claim no.(3).

Conclusion

35. In view of the above, this appeal is allowed and the order of the High Court affirming the judgment of the trial court in regard to counter claim No.3, is set aside. Consequently the award of arbitrator is upheld in its entirety and the challenge thereto by the respondent is rejected.

B.B.B. Appeal allowed.

JUSTICE P. D. DINAKARAN

v.

HON'BLE JUDGES INQUIRY COMMITTEE & ORS.

(Writ Petition (Civil) No. 217 of 2011)

JULY 5, 2011

[G.S. SINGHVI AND CHANDRAMAULI KR. PRASAD, JJ.]

Constitution of India, 1950 – Article 217 r/w Article 124 – Constitution of Inquiry Committee against High Court Judge – Inclusion of respondent no.3-advocate in the Committee – Challenge to, on ground of bias – Fifty members of the Rajya Sabha submitted notice of motion for removal of the writ petitioner, who was then posted as Chief Justice of the Karnataka High Court, under Article 217 read with Article 124(4) of the Constitution – Chairman of Rajya Sabha constituted Inquiry Committee comprising of a Supreme Court Judge, Chief Justice of High Court and respondent no.3-advocate – Constitution of the Committee notified in the Official Gazette dated 15-1-2010 – Committee issued notice requiring the Petitioner to appear to answer the charges – Petitioner raised objection against inclusion of respondent No.3 – He contended that respondent no.3 was biased against him on grounds that in a seminar organized by the Bar Association of India on 28-11-2009, respondent No.3 had made a speech opposing his elevation to Supreme Court and had also drafted resolution for the said purpose – Held: The petitioner raised the plea of bias only after receiving notice dated 16-3-2011 though he could have done so immediately after publication of notification dated 15-1-2010 – Significantly respondent No.3 had taken part in the said seminar as Vice-President of the Bar Association – After the seminar, respondent No.3 is not shown to have done anything which may give slightest impression to any person of reasonable

prudence that he was ill-disposed against the petitioner – Rather, as per the petitioner's own statement, he had met respondent No.3 at the latter's residence on 6-12-2009 and was convinced that the latter had nothing against him – The facts of the case lead to an irresistible inference that the petitioner had waived his right to object to the appointment of respondent No.3 as member of the Committee – The belated raising of objection against inclusion of respondent No.3 in the Committee u/s.3(2) appears to be a calculated move on the petitioner's part – Petitioner is an intelligent person and knows that in terms of Rule 9(2)(c) of the Judges (Inquiry) Rules, 1969, the Presiding Officer of the Committee is required to forward the report to the Chairman within a period of three months from the date the charges framed u/s.3(3) of the Act were served upon him – Therefore, he wants to adopt every possible tactic to delay the submission of report which may in all probability compel the Committee to make a request to the Chairman to extend the time in terms of proviso to Rule 9(2)(c) – However, the issue of bias of respondent No.3 is not to be seen from the view point of this Court or for that matter the Committee – It has to be seen from the angle of a reasonable, objective and informed person – It is his apprehension which is of paramount importance –From the facts of the case it can be said that petitioner's apprehension of likelihood of bias against respondent No.3 is reasonable and not fanciful, though, in fact, he may not be biased – Keeping in view the finding of this Court on the issue of bias, the Chairman is requested to nominate another distinguished jurist in place of respondent No.3 – The proceedings initiated against the petitioner have progressed only to the stage of framing of charges and the Committee is yet to record its findings on the charges and submit report – Therefore, nomination of another jurist will not hamper the proceedings of the Committee and the re-constituted Committee shall be entitled to proceed on the charges already framed against the petitioner – Judges (Inquiry) Act, 1968 – ss. 3 to 6 – Judges (Inquiry) Rules, 1969 – Rule 9(2)(c).

Administration of Justice – Judicial proceedings – Rule against bias or interest – Held: The Judge should be impartial and neutral and must be free from bias – If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated – A pecuniary (bias) interest, however small it may be, disqualifies a person from acting as a Judge – Tests for deciding whether non-pecuniary bias would vitiate judicial or quasi judicial decision – 'Real likelihood' formula and 'reasonable suspicion' test – In India, the Courts have, by and large, applied the 'real likelihood test' – Real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries – Maxims – "Nemo debet esse judex in propria causa".

Fifty members of the Rajya Sabha submitted a notice of motion for presenting an address to the President of India for removal of the writ petitioner, who was then posted as Chief Justice of the Karnataka High Court, under Article 217 read with Article 124(4) of the Constitution. The notice enumerated the acts of misbehaviour allegedly committed by the petitioner. After the motion was admitted, the Chairman of Rajya Sabha constituted a Committee under Section 3(2) of the Judges (Inquiry) Act, 1968 comprising a Supreme Court Judge, the Chief Justice of a High Court and respondent No.3-Shri P.P. Rao, Senior Advocate, Supreme Court of India. The constitution of the Committee was notified in the Official Gazette dated 15.1.2010.

On 12.5.2010, the petitioner *suo moto* sent a letter to the Vice-President of India and Chairman, Rajya Sabha stating therein that through print and electronic media he had come to know about constitution of the Committee

under Section 3(2) of the Act and claiming that the allegations levelled against him were false and baseless.

After preliminary scrutiny of the material placed before it, the Committee issued notice dated 16.3.2011, which was served upon the petitioner on 23.3.2011, requiring him to appear on 9.4.2011 to answer the charges. Upon receiving the notice, the petitioner submitted representation dated 8.4.2011 to the Vice-President of India and the Chairman, Rajya Sabha with the prayer that the order admitting notice of motion may be withdrawn, the order constituting the Inquiry Committee be rescinded and notice issued by the Committee may be annulled. In that representation, the petitioner, for the first time, raised an objection against the inclusion of respondent No.3 in the Committee by alleging that the latter had already expressed views in the matter and declared him guilty of certain charges. The petitioner claimed that respondent No.3 had led a delegation of the advocates to meet the then Chief Justice of India and was a signatory to the representation made by the senior advocates against his elevation to the Supreme Court. Thereafter, on 20.4.2011, the petitioner made an application to the Committee and raised several objections against notice dated 16.3.2011 including the one that respondent No.3 was biased against him. After considering the objections of the petitioner, the Committee (respondent No.3 did not take part in the proceedings) passed detailed order dated 24.4.2011.

In the present writ petition filed under Article 32 of the Constitution, the writ petitioner prayed for grant of a declaration that the proceedings conducted by the Committee on 24.4.2011 were null and void. The petitioner contended that inclusion of respondent No.3 in the Committee constituted by the Chairman had the effect of vitiating the proceedings held so far because the

said respondent was biased against the petitioner. It was emphasized that by virtue of his active participation in the seminar organized by the Bar Association of India on 28.11.2009, respondent No.3 had disqualified himself from being a member of the Committee. Respondent no.1, on the other hand, contended that by maintaining silence for over one year against the appointment of respondent No.3 as member of the Committee, the petitioner will be deemed to have waived his right to question the constitution of the Committee.

The questions which therefore arose for consideration were: whether by virtue of his active participation in the seminar organised by the Bar Association of India on 28.11.2009 and his opposition to the elevation of the petitioner to this Court were sufficient to disqualify respondent No.3 from being included in the Committee constituted under Section 3(2) of the Act and whether by his conduct the petitioner will be deemed to have waived his right to object to the appointment of respondent No.3 as a member of the Committee.

Dismissing the writ petition, the Court

HELD:1.1. Natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural justice are 'basic values' which a man has cherished throughout the ages. Principles of natural justice control all actions of public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness. The underlying object of rules of natural justice is to ensure fundamental liberties and rights of subjects. They thus serve public interest. The golden rule which stands firmly established is that the doctrine of natural justice is not

only to secure justice but to prevent miscarriage of justice. [Para 22] [1104-E-H]

1.2. The traditional English Law recognised the following two principles of natural justice: "(a) *"Nemo debet esse judex in propria causa:* **No man shall be a judge in his own cause, or no man can act as both at the one and the same time – a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and (b)** ***Audi alteram partem*****: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority." However, over the years, the Courts throughout the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi-judicial and even administrative actions/ decisions. At the same time, the Courts have repeatedly emphasized that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions, if any, applicable, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice. [Para 23] [1105-A-E]**

1.3. In the instant case, the application of first of the two principles of natural justice recognised by the traditional English law, i.e. *Nemo debet esse judex in propria causa* **was in question. The said principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which**

he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially. [Pars 25] [1111-G-H; 1112-A-D]

1.4. A pecuniary (bias) interest, however small it may be, disqualifies a person from acting as a Judge. Other types of bias, however, do not stand on the same footing and the Courts have, from time to time, evolved different rules for deciding whether personal or official bias or bias as to subject matter or judicial obstinacy would vitiate the ultimate action/order/decision. [Para 26] [1112-E-F]

1.5. Evidently the English Courts have applied different tests for deciding whether non-pecuniary bias would vitiate judicial or quasi judicial decision. Many judges have laid down and applied the 'real likelihood' formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias. Other judges have employed a 'reasonable suspicion' test, emphasizing that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest. [Para 34] [1127-B-C]

1.6. In India, the Courts have, by and large, applied

the 'real likelihood test' for deciding whether a particular decision of the judicial or quasi judicial body is vitiated due to bias. [Para 35] [1130-H; 1131-A]

1.7. No man can be a Judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but it must not be seen to be inclined. A person having interest in the subject matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject matter of *lis*, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the 'real likelihood' test has been preferred over the 'reasonable suspicion' test and the Courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. Real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries. [Para 43] [1137-B-G]

Sub-Committee on Judicial Accountability vs. Union of India **(1991) 4 SCC 699;** *Union of India v. P.K. Roy* **AIR 1968 SC 850: 1968 SCR 186;** *Suresh Koshy George v. University of Kerala* **AIR 1969 SC 198: 1969 SCR 317 ;** *A.K. Kraipak*

v. Union of India **(1969) 2 SCC 262: 1970 (1) SCR 457;** *State of Orissa v. Dr.(Miss) Binapani Dei* **(1967) 2 SCR 625;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 248: 1978 (2) SCR 621;** *Olga Tellis v. Bombay Municipal Corporation* **(1985) 3 SCC 545:1985 (2) Suppl. SCR 51;** *S. Parthasarthi v. State of A.P.* **(1974) 3 SCC 459: 1974 (1) SCR 697;** *Ashok Kumar Yadav v. State of Haryana* **(1985) 4 SCC 417: 1985 (1) Suppl. SCR 657;** *Manak Lal v. Dr.Prem Chand Singhvi* **AIR 1957 SC 425: 1957 SCR 575;** *Dr. G. Sarana v. University of Lucknow* **(1976) 3 SCC 585: 1977 (1) SCR 64;** *Ranjit Thakur v. Union of India* **(1987) 4 SCC 611: 1988 (1) SCR 512;** *Secretary to Government, Transport Department v. Munuswamy Mudaliar* **1988 (Supp.) SCC 651;** *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* **(2003) 7 SCC 418 : 2003 (2) Suppl. SCR 812 – referred to.**

Russel v. Duke of Norfolk **(1949) 1 All ER 108;** *Byrne v. Kinematograph Renters Society Limited* **(1958) 2 All ER 579; In re: H.K. (An infant) (1967) 2 QB 617;** *Ridge v. Baldwin* **(1964) AC 40;** *The Queen v. Rand* **(1866) LR 1 (Q.B.D.) 230;** *Rex v. Sussex Justices, Ex Parte McCarthy* **(1924) 1 KB 256;** *Regina v. Camborne Justices Ex parte Pearce* **(1955) 1 QB 41;** *Eckersley v. Mersey Docks and Harbour Board* **(1894) 2 QB 667;** *Rex v. Justices of County Cork* **(1910) 2 IR 271;** *Frome United Breweries Company v. Bath Justices* **(1926) AC 586;** *Rex v. Essex Justices, Ex parte Perkins* **(1927) 2 KB 475;** *Metropolitan Properties (FGC) Ltd. v. Lannon* **(1969) 1 QB 577;** *R v. Gough* **(1993) AC 646;** In re: *Medicaments and Related Classes of Goods* **(No.2) 2001 (1) WLR 700;** *President of the Republic of South Africa v. South African Rugby Football Union* **1999 (4) SA 147;** *Johnson v. Johnson* **(2000) 174 Australian Law Reports 655 and** *R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* **(No.2)(1999)1 All ER 577 – referred to.**

M.H. Hoskot v. State of Maharashtra **(1978) 3 SCC 544: 1979 (1) SCR 192;** *Triveniben v. State of Gujarat* **(1989) 1**

SCC 678: 1989 (1) SCR 509; *Krishna Swami v. Union of India and others* **(1992) 4 SCC 605: 1992 (1) Suppl. SCR 53;** *R.K. Anand v. Delhi High Court* **(2009) 8 SCC 106: 2009 (11) SCR 1026 – cited.**

Halsbury's Laws of England **[Vol. 29(2) 4th Edn. Reissue 2002, para 560 page 379] – referred to.**

2.1. Respondent No.3 participated in the seminar organised by the Bar Association of India of which he was Vice-President. He demanded public inquiry into the charges levelled against the petitioner before his elevation as a Judge of this Court. During the seminar, many eminent advocates spoke against the proposed elevation of the petitioner on the ground that there were serious allegations against him. Thereafter, respondent No.3 drafted a resolution opposing elevation of the petitioner as a Judge of this Court. He along with other eminent lawyers met the then Chief Justice of India. These facts could give rise to reasonable apprehension in the mind of an intelligent person that respondent No.3 was likely to be biased. A reasonable, objective and informed person may say that respondent No.3 would not have opposed elevation of the petitioner if he was not satisfied that there was some substance in the allegations levelled against him. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and this Court has no doubt that respondent No.3 possesses these qualities. This Court also agrees with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the issue of bias of respondent No.3 has not to be seen from the view point of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. It is his apprehension which is of paramount importance. From the facts narrated in the earlier part of the judgment

it can be said that petitioner's apprehension of likelihood of bias against respondent No.3 is reasonable and not fanciful, though, in fact, he may not be biased. [Para 45] [1138-H; 1139-A-E]

2.2. As regards the further question as to whether order passed by the Committee on 24.4.2011 should be quashed on the ground of reasonable likelihood of bias of respondent No.3, one has to keep in mind that the petitioner is not a layperson. He is well-versed in law and possesses a legally trained mind. Further, for the last 15 years, the petitioner has held constitutional posts of a Judge and then as Chief Justice of the High Court. It is not the pleaded case of the petitioner that he had no knowledge about the seminar organized by the Bar Association of India on 28.11.2009 which was attended by eminent advocates including two former Attorney Generals and in which respondent No.3 made a speech opposing his elevation to this Court and also drafted resolution for the said purpose. The proceedings of the seminar received wide publicity in the print and electronic media. Therefore, it can be said that much before constitution of the Committee, the petitioner had become aware of the fact that respondent No.3, who, as per the petitioner's own version, had appreciated his work on the Bench and had sent congratulatory message when his name was cleared by the Collegium for elevation to this Court, had participated in the seminar and made speech opposing his elevation and also drafted resolution for the said purpose. The Chairman had appointed respondent No.3 as member of the Committee keeping in view his long experience as an eminent advocate and expertise in the field of constitutional law. The constitution of the Committee was notified in the Official Gazette dated 15.1.2010 and was widely publicised by almost all newspapers. Therefore, it can reasonably be presumed that the petitioner had become aware about the

constitution of the Committee, which included respondent No.3, in the month of January, 2010. In his representation dated 12.5.2010, the petitioner claimed that he came to know about the constitution and composition of the Committee through the print and electronic media. Thus, at least on 12.5.2010 he was very much aware that respondent No.3 had been appointed as a member of the Committee. Notwithstanding this, he did not raise any objection apparently because after meeting respondent No.3 on 6.12.2009 at the latter's residence, the petitioner felt satisfied that the said respondent had nothing against him. Therefore, belated plea taken by the petitioner that by virtue of his active participation in the meeting held by the Bar Association of India, respondent No.3 will be deemed to be biased against him does not merit acceptance. Significantly respondent No.3 had nothing personal against the petitioner. He had taken part in the seminar as Vice-President of the Association. The concern shown by senior members of the Bar including respondent No.3 in the matter of elevation of the petitioner, who is alleged to have misused his position as a Judge and as Chief Justice of the High Court for material gains was not actuated by ulterior motive. They genuinely felt that the allegations made against the petitioner need investigation. After the seminar, respondent No.3 is not shown to have done anything which may give slightest impression to any person of reasonable prudence that he was ill-disposed against the petitioner. Rather, as per the petitioner's own statement, he had met respondent No.3 at the latter's residence on 6.12.2009 and was convinced that the latter had nothing against him. This being the position, it is not possible to entertain the petitioner's plea that constitution of the Committee should be declared nullity on the ground that respondent No.3 is biased against him and order dated 24.4.2011 be quashed. [Para 46] [1139-G-H; 1140-A-H; 1141-A-D]

2.3. Also, admittedly, the petitioner raised the plea of bias only after receiving notice dated 16.3.2011 which was accompanied by statement of charges and the lists of documents and witnesses. The petitioner's knowledgeful silence in this regard for a period of almost ten months militates against the bona fides of his objection to the appointment of respondent No.3 as member of the Committee. A person of the petitioner's standing can be presumed to be aware of his right to raise an objection. If the petitioner had slightest apprehension that respondent No.3 had pre-judged his guilt or he was otherwise biased, then, he would have on the first available opportunity objected to his appointment as member of the Committee. The petitioner could have done so immediately after publication of notification dated 15.1.2010. He could have represented to the Chairman that investigation by a Committee of which respondent No.3 was a member will not be fair and impartial because the former had already presumed him to be guilty. This Court cannot predicate the result of the representation but such representation would have given an opportunity to the Chairman to consider the grievance made by the petitioner and take appropriate decision as he had done in March, 2010 when respondent No.3 had sought recusal from the Committee in the wake of demand made by a section of the Bar which had erroneously assumed that the petitioner had consulted respondent No.3. However, the fact of the matter is that the petitioner never thought that respondent No.3 was prejudiced or ill-disposed against him and this is the reason why he did not raise objection till April, 2011 against the inclusion of respondent No.3 in the Committee. This leads to an irresistible inference that the petitioner had waived his right to object to the appointment of respondent No.3 as member of the Committee. The right available to the petitioner to object to the appointment of respondent No.3 in the Committee was personal to him and it was always

open to him to waive the same. [Para 47] [1141-E-H; 1142-A-D]

3.1. In conclusion, it is held that belated raising of objection against inclusion of respondent No.3 in the Committee under Section 3(2) appears to be a calculated move on the petitioner's part. He is an intelligent person and knows that in terms of Rule 9(2)(c) of the Judges (Inquiry) Rules, 1969, the Presiding Officer of the Committee is required to forward the report to the Chairman within a period of three months from the date the charges framed under Section 3(3) of the Act were served upon him. Therefore, he wants to adopt every possible tactic to delay the submission of report which may in all probability compel the Committee to make a request to the Chairman to extend the time in terms of proviso to Rule 9(2)(c). This Court or, for that reason, no Court can render assistance to the petitioner in a petition filed with the sole object of delaying finalisation of the inquiry. [Para 51] [1146-C-E]

3.2. However, keeping in view the finding of this Court on the issue of bias, the Chairman is requested to nominate another distinguished jurist in place of respondent No.3. The proceedings initiated against the petitioner have progressed only to the stage of framing of charges and the Committee is yet to record its findings on the charges and submit report. Therefore, nomination of another jurist will not hamper the proceedings of the Committee and the reconstituted Committee shall be entitled to proceed on the charges already framed against the petitioner. [Para 52] [1146-F-G]

Lachhu Mal v. Radhey Shyam **AIR 1971 SC 2213 : 1971 SCR 693;** *Manak Lal v. Dr.Prem Chand Singhvi* **AIR 1957 SC 425: 1957 SCR 575;** *Dhirendra Nath Gorai v. Sudhir Chandra* **AIR 1964 SC 13001: 1964 SCR 1001 – referred to.**

Case Law Reference:

1978 (2) SCR 621	Referred to.	Para 13
1979 (1) SCR 192	Cited	Para 13
1988 (1) SCR 512	Referred to.	Para 13
1989 (1) SCR 509	Cited	Para 13
(1999) 1 All ER 577	Referred to.	Para 13
1992 (1) Suppl. SCR 53	Cited	Para 13
1957 SCR 575	Referred to.	Para 14
1977 (1) SCR 64	Referred to.	Para 14
2009 (11) SCR 1026	Cited	Para 14
(1991) 4 SCC 699	Referred to.	Para 18
(1949) 1 All ER 108	Referred to.	Para 24
(1958) 2 All ER 579	Referred to.	Para 24
1968 SCR 186	Referred to.	Para 24
1969 SCR 317	Referred to.	Para 24
1970 (1) SCR 457	Referred to.	Para 24
(1967) 2 SCR 625	Referred to.	Para 24
(1964) AC 40	Referred to.	Para 24
1985 (2) Suppl. SCR 51	Referred to.	Para 24
(1866) LR 1 (Q.B.D.) 230	Referred to.	Para 27
(1924) 1 KB 256	Referred to.	Para 28
(1955) 1 QB 41	Referred to.	Para 29
(1894) 2 QB 667	Referred to.	Para 29
(1910) 2 IR 271	Referred to.	Para 29

(1926) AC 586	**Referred to.**	**Para 29**
(1927) 2 KB 475	**Referred to.**	**Para 29**
(1969) 1 QB 577	**Referred to.**	**Para 30**
(1993) AC 646	**Referred to.**	**Para 31**
1999 (4) SA 147	**Referred to.**	**Para 34**
(2000) 174 Australian Law Reports 655	**Referred to.**	**Para 34**
1974 (1) SCR 697	**Referred to.**	**Para 37**
1985 (1) Suppl. SCR 657	**Referred to.**	**Para 39**
1988 (1) SCR 512	**Referred to.**	**Para 40**
1988 (Supp.) SCC 651	**Referred to.**	**Para 41**
2003 (2) Suppl. SCR 812	**Referred to.**	**Para 42**
1971 SCR 693	**Referred to.**	**Para 48**
1964 SCR 1001	**Referred to.**	**Para 50**

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

A. Sharan and U.U. Lalit, Amit Anand Tiwari, Ashutosh Jha, Vivek Singh, Romy Chacko, Nitin Sangra, A. Radhakrishnan, Prashant Bhushan and Kamini Jaiswal for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Although, the prayers made in this petition filed under Article 32 of the Constitution are for quashing order dated 24.4.2011 passed by the Committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968 (for short, "the Act") and for grant of a declaration that the proceedings

conducted by the Committee on 24.4.2011 are null and void, the tenor of the grounds on which these prayers are founded shows that the petitioner is also aggrieved by the inclusion of respondent No.3-Shri P.P. Rao, Senior Advocate, Supreme Court of India in the Committee under Section 3(2)(c) of the Act.

2. Fifty members of the Rajya Sabha submitted a notice of motion for presenting an address to the President of India for removal of the petitioner, who was then posted as Chief Justice of the Karnataka High Court, under Article 217 read with Article 124(4) of the Constitution of India. The notice enumerated the acts of misbehaviour allegedly committed by the petitioner and was accompanied by an explanatory note and documents in support of the allegations. After the motion was admitted, the Chairman of the Rajya Sabha (hereinafter referred to as, "the Chairman") constituted a Committee comprising Mr. Justice V.S. Sirpurkar, Judge, Supreme Court of India, Mr. Justice A.R. Dave, the then Chief Justice of Andhra Pradesh High Court and respondent No.3.

3. Immediately after issue of notification dated 15.1.2010 under Section 3(2) of the Act, the newspapers carried reports suggesting that there was an objection to the inclusion of respondent No.3 in the Committee on the ground that he had given legal opinion to the petitioner in December, 2009. On reading the newspaper reports, respondent No.3 sent letter dated 19.1.2010 to the Chairman with the request that he may be relieved from the Committee. Paragraph 2 of that letter reads as under:

> "Although, there is no conflict of duty and interest, as I did not render any professional service to him, there is a demand from certain quarters for my recusal which you might have noticed in today's Hindustan Times. I am sure you will appreciate that justice should not only be done but also seen to be done. Even though I have no official communication as yet about my nomination, it will not be proper for me to function as a member of the Committee

in the fact of such objection. I request you to kindly relieve me forthwith and nominate another jurist in my place and oblige."

4. After due consideration, the Chairman declined to accept the request of respondent No.3 and asked him to continue as member of the Committee. Thereupon, respondent No.3 sent letter dated 21.1.2010 and agreed to accept the assignment. On that very day, Convenor of the Campaign for Judicial Accountability and Reform sent a letter to the Vice-President wherein a demand was made in the garb of making suggestion that Mr. Justice V.S. Sirpurkar should recuse from the Committee because he had association with the petitioner as a Judge of the Madras High Court from 1997 to 2003. Similar suggestion-cum-demand was made qua respondent No.3 by stating that the petitioner had consulted respondent No.3 and the latter had advised him to get a commission of inquiry appointed to go into the charges.

5. On being instructed by the Chairman, the Secretary General of the Rajya Sabha forwarded a copy of the aforesaid letter to respondent No.3. In his response dated 27.1.2010, respondent No.3 detailed the background in which the petitioner had met him on 6.12.2009 and what transpired between them. The relevant paragraphs of that letter read as under:

"I would like to place on record as to why Chief Justice Dinakaran met me at my residence with prior appointment on Sunday, the 6th December, 2009 at 02:30 p.m. On Saturday, 28 Nov '09, there was a day-long National Seminar organized by The Bar Association of India under the Presidentship of Shri F.S. Nariman to discuss the problems of the Judiciary, in which the Hon'ble Law Minister also participated briefly in the inaugural session. I am one of the Vice-Presidents. In the course of my speech, I demanded that the Collegium should not proceed further with the recommendation to bring Chief Justice P.D. Dinakaran to the Supreme Court and there should be

a public inquiry in which Chief Justice Dinkaran should clear himself of the charges levelled against by senior members of the Bar and during the inquiry, he should step down from his office and remain on leave. Many eminent members of the Bar including two former Attorney Generals for India namely, Shri Soli J. Sorabjee and Shri Ashok Desai, a former President of International Bar Association namely Shri RKP Shankar Dass and a former President of Law Asia namely, Shri Anil Divan, who participated in the seminar expressed the same view. Finally, on the request of the President of Bar Association of India, I drafted the Resolution which was touched up by him before it was passed unanimously by the members present.

The speeches made at the seminar, including mine, were reported in the media. In the following week, Chief Justice Dinakaran visited Delhi, presumably to meet the Chief Justice of India, members of the Collegium and others. While in Delhi, he telephoned to me saying that he was surprised that I too believed that he was guilty of the charges levelled against him and he would like to meet me personally. When the Chief Justice of a High Court seeks appointment, it would be improper for any member of the legal profession to refuse it. When he met me on December 06, 2009 I told him that when serious allegations had been made against him by senior members of the Bar practicing at Chennai, Bangalore and Delhi, it was proper that there should be a public inquiry. When he said that he was totally innocent and he could convince me about it, I told him politely that he has to convince those who made the allegations on some basis and that will be possible only in a public inquiry. It was then I suggested that if he was innocent, he should himself invite an inquiry under the Commissions of Inquiry Act, 1952 and offer to proceed on leave during the Inquiry. There was neither consultation on the merits of the charges nor any opinion sought or given. He did not seek my professional

services for his case. The matter ended there. What I told him in private when he met me at my residence was nothing but what I had earlier demanded in public at the seminar. There is absolutely no question of conflict of interest and duty in such a case. When the Hon'ble Chairman of Rajya Sabha, after due consideration of my offer to quit, requested me to continue, I accepted the request most respectfully as it is a call to public duty from no less a person than the Vice-President of India, which I shall not shirk."

6. On 12.5.2010, the petitioner suo moto sent a letter to the Vice-President of India and Chairman, Rajya Sabha stating therein that through print and electronic media he had come to know about constitution of the Committee under Section 3(2) of the Act. The petitioner claimed that the allegations levelled against him were false and baseless. He expressed anguish on being prevented from performing his judicial work and prayed that the inquiry initiated against him may be completed expeditiously and his grievance be redressed at the earliest. For the sake of reference, letter dated 12.5.2010 is reproduced below:

"12th May, 2010
The Hon'ble Vice President of India
and Chairman, Rajya Sabha
Parliament
New Delhi

Your Excellency,

May I take this opportunity to present this supplication for kind consideration of Your Excellency.

2. Even though I have learnt through print and electronic media that an impeachment motion has been moved against me under Article 217 read with 124(4) of the Constitution of India before the Rajya Sabha by 75 Hon'ble Members of Parliament, as on date, I have not received

any official communication whatsoever in this regard till date.

3. *I have also learnt through print and electronic media that a Committee, as contemplated under Section 3(b) of The Judges (Inquiry) Act, 1968, has been constituted by Your Excellency consisting of Hon'ble Mr. Justice V.S. Sirpurkar, Judge, Supreme Court of India; Hon'ble Mr. Justice A.R. Dave, the then Chief Justice, Andhra Pradesh High Court and Mr. P.P. Rao, Senior Advocate, Jurist, in January, 2010,* but till date I have not officially heard anything in this connection to enable me to explain my case. Now that Mr. Justice A.R. Dave is elevated to the Supreme Court of India, the Committee requires to be reconstituted.

4. In the meanwhile, the print and electronic media had given wild publicity about the allegations made against me, causing irreparable damage to me and to my family personally and to the constitutional position I am holding. All the allegations are made with an ulterior motive to stall my elevation to the Supreme Court, when the Hon'ble collegium of the Supreme Court recommended my name for elevating me to Supreme Court.

5. It appears that Hon'ble Rajya Sabha Members have been misled by the reports of the District Collector, Thiruvallur, State of Tamil Nadu dated 8th, 10th and 15th October, 2009 stating that myself and my wife have encroached 199.53 acres of lands at Kaverirajapuram, Tiruttani Taluk, Thiruvallur District, State of Tamil Nadu. As the said reports of the District Collector were specifically denied by me as baseless, the matter was referred to a Committee under the Chairmanship of Major General (Dr.) Siva Kumar, Survey of India, Department of Science and Technology, who, ultimately on 15th February, 2010, produced a survey map to my wife, Dr. K.M. Vinodhini

Dinakaran, holding that there is no encroachment of any government/public lands either by me or by my wife.

6. All the allegations leveled against me are false and baseless.

7. Myself and my family members are humiliated and put into great hardship by the vested interest persons; and I have been prevented to discharge my obligations under the constitution to perform the judicial work, pending enquiry by the Committee. But, the enquiry is yet to commence. Your Excellency may kindly appreciate that the enquiry initiated against me cannot be an endless wait.

Having patiently waited all these days for an opportunity to explain my case that the allegations are baseless and there is no material and merit whatsoever, I earnestly request Your Excellency to do the needful, so that, my genuine grievance may kindly be redressed at the earliest and justice be rendered to me expeditiously.

With kind regards,

Yours sincerely,
Sd/-
[P.D. Dinakaran]"

(emphasis supplied)

7. In the meanwhile, Mr. Justice A.R. Dave, Chief Justice of the Andhra Pradesh High Court, was transferred to the Bombay High Court and was then elevated as Judge of this Court and in his place Mr. Justice J.S. Khehar, Chief Justice of the Uttarakhand High Court was included in the Committee. In September, 2010, Mr. Justice Aftab Alam, Judge, Supreme Court of India was appointed as Presiding Officer because Mr. Justice V.S. Sirpurkar recused from the Committee.

8. After about two months of the aforesaid development, the petitioner's wife, Dr. (Mrs.) K.M. Vinodhini Dinakaran, sent

letter dated 27.11.2010 to the Presiding Officer and the members of the Committee with the request that investigation into the allegations levelled against her husband should be got done through unbiased officials. This request was made in the context of some inquiry having been made by Mr. Govindswamy, Village Administrative Officer, Kaverirajapuram Village, Tiruttani Taluk and Mr. Veeraraghavan, former Tahasildar Tiruttani. She claimed that both the officials were in collusion with the then District Collector, Mr. Palani Kumar IAS, who was inimical to the petitioner. She requested that the investigating agency should not engage Mr. Govindswamy and Mr. Veeraraghavan because they had already acted with mala fides and bias against her family.

9. After preliminary scrutiny of the material placed before it, which included documents summoned from Government departments and agencies/instrumentalities of the State, the Committee issued notice dated 16.3.2011, which was served upon the petitioner on 23.3.2011, requiring him to appear on 9.4.2011 to answer the charges. The notice was accompanied by a statement of charges and lists of the documents and witnesses.

10. Upon receiving the notice, the petitioner submitted representation dated 8.4.2011 to the Vice-President of India and the Chairman, Rajya Sabha with the prayer that the order admitting notice of motion may be withdrawn, the order constituting the Inquiry Committee be rescinded and notice issued by the Committee may be annulled. In that representation, the petitioner, for the first time, raised an objection against the inclusion of respondent No.3 in the Committee by alleging that the latter had already expressed views in the matter and declared him guilty of certain charges. The petitioner claimed that respondent No.3 had led a delegation of the advocates to meet the then Chief Justice of India and was a signatory to the representation made by the senior advocates against his elevation to the Supreme Court.

The petitioner further claimed that he felt agitated by the attitude of respondent No.3 because earlier the said respondent had not only appreciated his work but even called upon him to communicate his appreciation and also sent congratulatory message on his name being cleared for elevation to the Supreme Court. The petitioner also stated that he along with his wife and one K. Venkatasubbaraju met respondent No.3 at his residence and, during the meeting, respondent No.3 admitted that he was misled by certain vested interest in signing the representation. Paragraphs 6, 7 and 8 of the letter written by the petitioner are reproduced below:

> "6. Once I came to know that Shri P.P. Rao has led the delegation against me demanding that I should not be elevated, I was agitated by this attitude of Shri P.P. Rao. *Earlier Shri P.P. Rao had always appreciated my work on the bench and even called on me to communicate the same. When I was a judge of the High Court of Judicature at Madras, Shri P.P. Rao called on me and appreciated my work as Judge. He also paid encomiums for my bold and independent approach. Soon after my name was considered and cleared for elevation to the Supreme Court of India Shri P.P. Rao congratulated me in writing. Therefore, I I was aghast when I learnt about his opposition to my elevation. Shri K. Venkatasubbaraju, an Advocate who is a common friend of both of us spoke to Shri P.P. Rao and arranged for a meeting between us. Accordingly, I along with Shri K. Venkatasubbaraju accompanied by my wife called on Shri P.P. Rao at his residence and confronted him with the newspaper reports. Shri P.P. Rao admitted that he was misled by certain vested interests in signing the petition against me he even went to the extent of saying that he was forced to sign the petition as an office bearer of the Association. In the light of the said explanation I though it fit to leave the matter at that.*

> 7. In the meanwhile I was shocked to see Shri P.P. Rao's name included in the Committee constituted under the Chairmanship of Hon'ble Mr. Justice V.S. Sirpurkar. Even before I could react to that the very same vested interests, who are instrumental in engineering false allegations against me, opposed the constitution of the said Committee. They took specific objection to the inclusion of Shri P.P. Rao in the Committee while objecting to the appointment of the Chairman. It was on such opposition that Hon'ble Mr. Justice V.S. Sirpurkar resigned as the Chairman of the Committee. Following suit, I expected, keeping in mind Shri P.P. Rao's standing and reputation, that Shri P.P. Rao would also quit the Committee.
>
> 8. In this background, it is clear that Shri P.P. Rao has already declared me guilty of certain charges on the basis of which he opposed my elevation to Apex Court tooth and nail. It is a travesty of justice that the Judges Inquiry Committee has been so constituted with the same Shri P.P. Rao as a sitting member of the said Committee. This is opposed to all principles of justice and rule of law. It is, in these circumstances, this petition is presented on the following amongst the other grounds."
>
> (emphasis supplied)

11. On the next day, i.e., 9.4.2011, the petitioner sent a letter to the Presiding Officer of the Committee enclosing a copy of the representation submitted to the Chairman and requested that decision on the same be awaited. On 20.4.2011, the petitioner made an application to the Committee and raised several objections against notice dated 16.3.2011 including the one that respondent No.3 was biased against him. After two days, respondent No.3 sent letter dated 22.4.2011 to the Presiding Officer of the Committee and reiterated all that he had said in letter dated 27.1.2010 but, at the same time, respondent No.3 specifically denied that he had pronounced upon the guilt of the petitioner. He also denied that the petitioner

had consulted him or that any opinion was sought and given. Respondent No.3 acknowledged that when news appeared about the petitioner's name having been cleared for elevation to the Supreme Court, he had congratulated him vide e-mail dated 30.8.2009, referred to letter dated 19.1.2010 addressed to the Chairman and indicated that it was his duty to recuse from the membership of the Committee once again. Respondent No.3 prepared a similar letter for being sent to the Chairman, but on being advised by the Presiding Officer of the Committee, he held back the same.

12. After considering the objections of the petitioner, the Committee (respondent No.3 did not take part in the proceedings) passed detailed order dated 24.4.2011, the relevant portions of which are extracted below:

> "According to the applicant, earlier when his name was recommended for appointment as a Judge of the Supreme Court, Mr. P.P. Rao had led a delegation of lawyers to the then Chief Justice of India to hand over a petition opposing his elevation to the Supreme Court. He was one of the signatories to the representation handed over to the then Chief Justice of India urging him not to elevate the applicant as a Judge of the Supreme Court. He was one of the speakers in a seminar organized by the Bar Council of India urging the authorities against the elevation of the applicant as a Judge of the Supreme Court. Mr. Rao was one of the leading personalities spearheading the campaign against his elevation to the Supreme Court. On those allegations, the applicant states that he does not expect a just and fair inquiry with Mr. P.P. Rao, being a member of the Committee.
>
> Mr. P.P. Rao has the distinction that his presence on the Committee has been, at one time or the other, objected to by both sides and perhaps this alone, apart from anything, else is sufficient to confirm his impartiality.

> It may be recalled that at the very inception of the Committee, Shri Prashant Bhushan, on behalf of one of the groups that were agitating against the recommendation for Justice Dinakaran's appointment as a judge of the Supreme Court and were demanding an enquiry for his removal as a judge of the High Court addressed a letter to the Chairman, Rajya Sabha objecting to the inclusion of Mr. P.P. Rao on the Committee. The objection was based on the ground that even before the notice of motion was presented in the Rajya Sabha, leading to the formation of the Committee, and while the demand to hold an enquiry against the judge was still gaining ground Mr. Justice P.D. Dinakaran had met and consulted Mr. Rao in the matter. On that occasion Mr. Rao had made an offer to quit the Committee but his offer was not accepted by the Chairman. As the Committee proceeded with its work, with Mr. Rao as one of its members, there was no complaint or objection from any quarter. All the misgivings were satisfied and the groups and organizations that might be called as the initial whistle-blowers appear to be quite comfortable with Mr. Rao on the Committee.
>
> Now the objection has come from the side of the Judge whose conduct is the subject of enquiry.
>
> The earlier objection was completely misconceived and without basis but it did not have any ulterior motive. Unfortunately the same can not be said about the present objection. It is clearly an after thought and has an oblique motive.
>
> *The applicant was aware that Mr. Rao is a member of the Committee from the day one. As early as on May 12, 2010, he had addressed a letter to the Chairman, Rajya Sabha urging him to have the proceedings before the Committee expedited. In the letter, he mentioned the names of each of the three members of the Committee, as it was in existence at that time, including Mr. P.P. Rao,*

Senior Advocate but there is not a whisper of protest against Mr. Rao's inclusion in the Committee. Paragraph 3 of the letter reads as follows:-

"I have also learnt through print and electronic media that a Committee, as contemplated under Section 3(b) of [The] Judges (Inquiry) Act, 1968, has been constituted by Your Excellency consisting of Hon'ble Mr. Justice V.S. Sirpurkar, Judge, Supreme Count of India; Hon'ble Mr. Justice A.R. Dave, the then Chief Justice, Andhra Pradesh High Court and Mr. P.P. Rao, Senior Advocate, jurist, in January, 2010, but till date I have not officially heard anything in this connection to enable me to explain my case. Now that Mr. Justice A.R. Dave is elevated to the Supreme Court of India, the Committee requires to be reconstituted."

Mr. Justice P.D. Dinakaran was given reply by Shri K.D. Singh, Secretary to the Committee by his letter dated August 4, 2010. From the letter it was evident that following Justice Dave's elevation, the Committee was re-constituted and Justice J.S. Khehar, who at that time was Chief Justice of the Uttarakhand High Court was brought on the Committee in his place. The letter went on to say that the Committee consisting of Hon'ble Mr. Justice V.S. Sirpurkar, Judge, Supreme Court of India, Hon'ble Mr. Justice J.S. Khehar, Chief Justice of Uttarakhand High Court and Shri P.P. Rao, Senior Advocate, was examining the Notice of Motion. Mr. Justice Dinakaran did not get back raising any objection against Mr. Rao's presence on the Committee.

On November 27, 2010, Dr. Mrs. K.M. Vinodhini Dinakaram, wife of Mr. Justice P.D. Dinakaran sent a letter addressed to the three members of the Committee urging that in connection with the enquiry her aged relatives might not be harassed and further that the Committee should not

rely upon the statements of certain persons, named in the letter, who were inimically disposed of towards them. *This letter was sent separately to all the three members, including Mr. P.P. Rao. This letter too, does not even suggest any reservation about the inclusion of Mr. Rao in the Committee.*

The objection is raised for the first time only after a notice along with the charges and the list of witnesses and documents in support of the charges were served upon the Judge.

The stage and the time at which the objection is raised make it clear that the object is to somehow scuttle the enquiry by causing delay in the Committee's proceedings."

(emphasis supplied)

13. Shri Amarendra Sharan, learned senior counsel for the petitioner argued that inclusion of respondent No.3 in the Committee constituted by the Chairman has the effect of vitiating the proceedings held so far because the said respondent is biased against the petitioner. Shri Sharan emphasized that by virtue of his active participation in the seminar organized by the Bar Association of India on 28.11.2009, respondent No.3 had disqualified himself from being a member of the Committee and on being apprised of the relevant facts, the Chairman should have changed the Committee by accepting the recusal of respondent No.3. Learned senior counsel argued that a fair, impartial and unbiased investigation into the allegations levelled against him is an integral part of fundamental right to life guaranteed to the petitioner under Articles 14 and 21 of the Constitution and he cannot be deprived of that right by invoking the doctrine of waiver. In support of his arguments, Shri Amarendra Sharan relied upon the judgments of this Court in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, *M.H. Hoskot v. State of*

Maharashtra (1978) 3 SCC 544, *Ranjit Thakur v. Union of India* (1987) 4 SCC 611, *Triveniben v. State of Gujarat* (1989) 1 SCC 678, *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* (1999) 1 All ER 577 and In re: *Medicaments and Related Classes of Goods (No.2)* 2001 (1) WLR 700. Learned senior counsel extensively referred to the dissenting view expressed by K. Ramaswamy, J. in *Krishna Swami v. Union of India and others* (1992) 4 SCC 605 and argued that the propositions laid down by the learned Judge on the issues not decided by the majority should be treated as declaration of law by this Court for the purpose of Article 141 of the Constitution and the same is binding.

14. Shri U.U. Lalit, learned senior counsel appearing for respondent No.1 invited the Court's attention to letter dated 12.5.2010 written by the petitioner to the Vice-President and Chairman of the Rajya Sabha to show that even before receiving official communication, the petitioner had become aware of the fact that respondent No.3 was a member of the Committee constituted under Section 3(2) of the Act. Shri Lalit then argued that the Court should not entertain objection to the inclusion of respondent No.3 in the Committee on the ground that he is biased against the petitioner because the latter did not raise any objection in that regard till the receipt of notice dated 16.3.2011, despite the fact that he knew that respondent No.3 had participated in the seminar organized on 28.11.2009, gave a speech opposing his elevation to this Court and also drafted a resolution to that effect. Learned senior counsel then submitted that after meeting respondent No.3 on 6.12.2009 at the latter's residence, the petitioner was fully satisfied that the said respondent had nothing against him. Learned senior counsel also pointed out that even in the letter written by the petitioner's wife there was no objection against respondent No.3 being a member of the Committee on the ground that he had pre-judged the guilt of her husband. Learned senior counsel submitted that after reading the representations made by the

petitioner and his wife, no person of reasonable prudence can carry an impression that the Committee of which respondent No.3 is a member will not be able to objectively investigate into the charges framed against the petitioner. Learned senior counsel relied upon the judgments of this Court in *Manak Lal v. Dr.Prem Chand Singhvi* AIR 1957 SC 425, *Dr. G. Sarana v. University of Lucknow* (1976) 3 SCC 585 and *R.K. Anand v. Delhi High Court* (2009) 8 SCC 106 and argued that by maintaining silence for over one year against the appointment of respondent No.3 as member of the Committee, the petitioner will be deemed to have waived his right to question the constitution of the Committee.

15. Shri Prashant Bhushan, learned counsel for the intervenor also referred to letter dated 12.5.2010 and submitted that the petitioner did not harbour any apprehension of bias of respondent No.3, whose participation in the seminar was known to him as early as in November 1999 and this was the reason he sought appointment from the said respondent and argued that belated objection raised by the petitioner against the constitution of the Committee should not be entertained.

16. We have thoughtfully considered the entire matter. Two questions which arise for consideration are whether by virtue of his active participation in the seminar organised by the Bar Association of India on 28.11.2009 and his opposition to the elevation of the petitioner to this Court are sufficient to disqualify respondent No.3 from being included in the Committee constituted under Section 3(2) of the Act and whether by his conduct the petitioner will be deemed to have waived his right to object to the appointment of respondent No.3 as a member of the Committee.

17. Since a good deal of arguments were advanced by the learned counsel on the scope of Articles 121 and 124 of the Constitution, it may be useful to notice these Articles. Article 121 declares that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court

or of a High Court in the discharge of his duties except upon a motion presenting an address to the President for the removal of the Judge. Article 124(4) lays down that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Article 124(5) lays down that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). By virtue of Article 217(1)(b), the provision contained in Article 124(4) has been made applicable in the matter of removal of a Judge of the High Court.

18. Articles 121 and 124 were interpreted by the Constitution Bench in *Sub-Committee on Judicial Accountability vs. Union of India* (1991) 4 SCC 699. In that case, the Court considered four writ petitions filed in the backdrop of an Inquiry Committee constituted by the then Speaker of the Lok Sabha to inquire into the allegations made by 108 Members of the Ninth Lok Sabha who had prayed for removal of Mr.Justice V. Ramaswami of this Court. In two of the writ petitions filed by the organizations of advocates, prayer was made for issue of a mandamus to the Union of India to take immediate steps to enable the Inquiry Committee to discharge its functions under the Act and to restrain the learned Judge from performing judicial functions and from exercising judicial powers. In the third writ petition filed by an advocate, it was prayed that the learned Judge should not be restrained from discharging his judicial functions till motion for the presentation of address for his removal was disposed of by both the Houses of Parliament. The fourth writ petition was also filed by an advocate for striking down the Act on the ground that the same was ultra vires the provisions of Articles 100, 105,

118, 121 and 124(5) of the Constitution. He had also sought a declaration that the motion presented by 108 Members of the Parliament for the removal of the Judge had lapsed with the dissolution of the Ninth Lok Sabha. Along with the four writ petitions, the Court also transferred and disposed of Writ Petition (C) No.1061 of 1991 which was pending before the Delhi High Court with prayer similar to those made in one of the four writ petitions. The majority judgment was delivered by B.C. Ray, J. on his behalf and on behalf of M.N. Venkatachaliah, J.S. Verma and S.C. Agrawal, JJ. The learned Judge noticed the procedure prevalent in England as also the provisions contained in Canadian, Australian and United States Constitutions for removal of judges of Superior Courts, referred to the resolutions passed in 19th Biennial Conference of the International Bar Association held at New Delhi in October, 1982, the First World Conference on the Independence of Justice held at Montreal on 10.6.1983, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in August-September, 1985, debate in the Constituent Assembly and observed:

> "But the constitutional scheme in India seeks to achieve a judicious blend of the political and judicial processes for the removal of Judges. Though it appears at the first sight that the proceedings of the Constituent Assembly relating to the adoption of clauses (4) and (5) of Article 124 seem to point to the contrary and evince an intention to exclude determination by a judicial process of the correctness of the allegations of misbehaviour or incapacity on a more careful examination this is not the correct conclusion."

The learned Judge then referred to the scheme of Articles 121 and 124 and observed:

> "Accordingly, the scheme is that the entire process of removal is in two parts — the first part under clause (5)

from initiation to investigation and proof of misbehaviour or incapacity is covered by an enacted law, Parliament's role being only legislative as in all the laws enacted by it; and the second part only after proof under clause (4) is in Parliament, that process commencing only on proof in accordance with the law enacted under clause (5). Thus the first part is entirely statutory while the second part alone is the parliamentary process.

The Constitution intended a clear provision for the first part covered fully by enacted law, the validity of which and the process thereunder being subject to judicial review independent of any political colour and after proof it was intended to be a parliamentary process. It is this synthesis made in our Constitutional Scheme for removal of a Judge.

If the motion for presenting an address for removal is envisaged by Articles 121 and 124(4) 'on ground of proved misbehaviour or incapacity' it presupposes that misbehaviour or incapacity has been proved earlier. This is more so on account of the expression 'investigation and proof' used in clause (5) with specific reference to clause (4). This indicates that 'investigation and proof' of misbehaviour or incapacity is not within clause (4) but within clause (5). Use of the expression 'same session' in clause (4) without any reference to session in clause (5) also indicates that session of House has no significance for clause (5) i.e., 'investigation and proof' which is to be entirely governed by the enacted law and not the parliamentary practice which may be altered by each Lok Sabha.

The significance of the word 'proved' before the expression 'misbehaviour or incapacity' in clause (4) of Article 124 is also indicated when the provision is compared with Article 317 providing for removal of a member of the Public Service Commission. The expression in clause (1) of Article 317 used for describing the ground of removal is

'the ground of misbehaviour' while in clause (4) of Article 124, it is, 'the ground of proved misbehaviour or incapacity'. The procedure for removal of a member of the Public Service Commission is also prescribed in clause (1) which provides for an inquiry by the Supreme Court on a reference made for this purpose. In the case of a Judge, the procedure for investigation and proof is to be in accordance with the law enacted by the Parliament under clause (5) of Article 124. In view of the fact that the adjudication of the ground of misbehaviour under Article 317(1) is to be by the Supreme Court, in the case of a Judge who is a higher constitutional functionary, the requirement of judicial determination of the ground is reinforced by the addition of the word 'proved' in Article 124(4) and the requirement of law for this purpose under Article 124(5).

Indeed, the Act reflects the constitutional philosophy of both the judicial and political elements of the process of removal. The ultimate authority remains with the Parliament in the sense that even if the committee for investigation records a finding that the Judge is guilty of the charges it is yet open to the Parliament to decide not to present an address to the President for removal. But if the committee records a finding that the Judge is not guilty, then the political element in the process of removal has no further option. The law is, indeed, a civilised piece of legislation reconciling the concept of accountability of Judges and the values of judicial independence."

19. We may also notice Sections 3 to 6 of the Act which was enacted by Parliament under Article 124(5) of the Constitution. The same read as under:

"3. Investigation into misbehaviour or incapacity of Judge by Committee.–(1) If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,-

(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;

(b) in the case of a notice given in the Council of States, by not less than fifty members of that Council,

then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him , either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub- section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and constitute, as soon as may be, for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom-

(a) one shall be chosen from among the Chief Justices and other Judges of the Supreme Court;

(b) one shall be chosen from among the Chief Justices of the High Courts; and

(c) one shall be a person who is, in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist:

Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman:

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

(3) The Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held.

(4) Such charges together with a statement of the grounds on which each such charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified in this behalf by the Committee.

(8) The Committee may, after considering the written statement of the Judge and the medical report, if any, amend the charges framed under sub-section (3) and in such case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence.

(9) The Central Government may, if required by the Speaker or the Chairman, or both, as the case may be, appoint an advocate to conduct the case against the Judge.

4. Report of Committee.–(1) Subject to any rules that may be made in this behalf, the Committee shall have power to regulate its own procedure in making the investigation and shall give a reasonable opportunity to the Judge of cross-examining witness, adducing evidence and of being heard in his defence.

(2) At the conclusion of the investigation, the Committee shall submit its report to the Speaker or, as the case may be, to the Chairman, or where the Committee has been

constituted jointly by the Speaker and the Chairman, to both of them, stating therein its findings on each of the charges separately with such observation on the whole case as it thinks fit.

(3) The Speaker or the Chairman, or, where the Committee has been constituted jointly by the Speaker and the Chairman, both of them, shall cause the report submitted under sub-section (2) to be laid, as soon as may be, respectively before the House of the People and the Council of States.

5. Powers of Committee.–For the purpose of making any investigation under this Act, the Committee shall have the powers of a civil court, while trying a suit, under the Code of Civil Procedure, 1908, in respect of the following matters, namely:–

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on oath;

(d) issuing commissions for the examination of witnesses or documents;

(e) such other matters as may be prescribed.

6. Consideration of report and procedure for presentation of an address for removal of Judge.–(1) If the report of the Committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with.

(2) If the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in sub-section (1) of section 3 shall, together with the report of the Committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

(3) If the motion is adopted by each House of Parliament in accordance with the provision of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted. "

20. An analysis of the above reproduced provisions shows that Section 3(1) of the Act provides for admission of motion by the Speaker or, as the case may be, the Chairman provided it is supported by 100 members of the House of the People or 50 members of the Council of States, as the case may be. The Speaker or, as the case may be, the Chairman, is entitled to consult such person, if any, as he thinks fit and to consider such material, if any, as may be available to him. If the motion is admitted, the Speaker or, as the case may be, the Chairman has to keep the motion pending and to constitute a Committee for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for [Section 3(2)]. The Committee constituted for the purpose of investigation shall consist of three members of whom – (a) one shall be chosen from among the Chief Justice and other Judges of the Supreme Court, (b) one shall be chosen from among the Chief Justices of the High Courts and (c) one shall be a person who is in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist. In terms of Section 3(3), the Committee

is required to frame definite charges against the Judge on the basis of which the investigation is proposed to be held. Section 3(4) requires that the charges together with a statement of the grounds on which each charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence. Section 3(8) deals with the situation where the Committee, after considering the written statement of the Judge, decides to amend the charges. In that event, the Judge is required to be given a reasonable opportunity of presenting a fresh written statement of defence. In terms of Section 3(9), the Central Government is empowered to appoint an advocate to conduct a case against the Judge. Section 4(1) declares that subject to any rules made in that behalf, the Committee shall have power to regulate its own procedure in making the investigation. It also lays down that the Committee shall give a reasonable opportunity to the Judge to cross-examine the witnesses, adduce evidence and be heard in his defence. Section 4(2) provides for submission of report by the Committee to the Speaker or, as the case may be, to the Chairman. It also provides for submission of report both to the Speaker and the Chairman where the Committee has been jointly constituted by them. In terms of Section 4(3), the report of the Committee is required to be placed before both the Houses of Parliament where the Committee has been constituted jointly by the Speaker and the Chairman. Section 5 lays down that for the purpose of making investigation under the Act, the Committee shall have powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 in matters relating to summoning of witnesses etc. Section 6(1) lays down that if the Committee finds that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, no further steps should be taken in either House of Parliament. Section 6(2) provides that if the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then the motion together with the report shall be taken up for consideration by the House in which the motion is pending. Section 6(3) provides that if the motion is

adopted by each House of Parliament in accordance with the provisions of Article 124(4) or, as the case may be, in accordance with that clause read with Article 218, then the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

21. In the backdrop of the relevant constitutional and statutory provisions, we shall now consider whether participation of respondent No.3 in the seminar organised by the Bar Association of India where he made speech opposing the petitioner's elevation to this Court and also drafted a resolution to that effect can lead to an inference that he was biased against the petitioner and he ought not to have been appointed as a member of the Committee in terms of Section 3(2)(c) of the Act.

22. The consideration of the aforesaid question needs to be prefaced by a brief reference to the nature and scope of the rule against bias and how the same has been applied by the Courts of common-law jurisdiction in India for invalidating judicial and administrative actions/orders. Natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural justice are 'basic values' which a man has cherished throughout the ages. Principles of natural justice control all actions of public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness. The underlying object of rules of natural justice is to ensure fundamental liberties and rights of subjects. They thus serve public interest. The golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice.

23. The traditional English Law recognised the following two principles of natural justice:

> "(a) *"Nemo debet esse judex in propria causa:* No man shall be a judge in his own cause, or no man can act as both at the one and the same time - a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and
>
> (b) *Audi alteram partem*: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority."

However, over the years, the Courts through out the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi-judicial and even administrative actions/ decisions. At the same time, the Courts have repeatedly emphasized that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions, if any, applicable, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice.

24. In *Russel v. Duke of Norfolk* (1949) 1 All ER 108, Tucker, L.J. observed:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

In *Byrne v. Kinematograph Renters Society Limited* (1958) 2 All ER 579, Lord Harman made the following observations:

> "What, then, are the requirements of natural justice in a

> case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

In *Union of India v. P.K. Roy* AIR 1968 SC 850, Ramaswami, J. observed:

> "The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

In *Suresh Koshy George v. University of Kerala* AIR 1969 SC 198, K.S. Hegde, J. observed:

> "…….The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

A.K. Kraipak v. Union of India (1969) 2 SCC 262 represents an important milestone in the field of administrative law. The question which came up for consideration by the Constitution Bench was whether Naqishbund who was a candidate seeking selection for appointment to the All India Forest Service was disqualified from being a member of the selection board. One of the issues considered by the Court was whether the rules of natural justice were applicable to purely administrative action. After noticing some precedents on the subject, the Court held:

"The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

The Court then considered whether the rules of natural justice were applicable to a case involving selection for appointment to a particular service. The learned Attorney General argued that the rules of natural justice were not applicable to the process of selection. The Constitution Bench referred to the judgments of the Queen's Bench in *re H.K. (An infant)* (1967) 2 QB 617 and of this Court in *State of Orissa v. Dr.(Miss) Binapani Dei* (1967) 2 SCR 625 and observed:

"The aim of the rules of natural justice is to secure justice

or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. *The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.* But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. *If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries.* Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala* the rules of natural justice are not embodied rules. *What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of*

the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

(emphasis supplied)

In *Maneka Gandhi v. Union of India* (supra), a larger Bench of seven Judges considered whether passport of the petitioner could be impounded without giving her notice and opportunity of hearing. Bhagwati, J, speaking for himself and for Untwalia and Fazal Ali, JJ, gave a new dimension to the rule of *audi alteram partem* and declared that an action taken in violation of that rule is arbitrary and violative of Articles 14 and 21 of the Constitution. The learned Judge referred to *Ridge v. Baldwin* (1964) AC 40, *State of Orissa v. Dr.(Miss) Binapani Dei* (supra), *re H.K.(An Infant)* (supra) and *A.K. Kraipak v. Union of India* (supra) and observed:

"The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too

ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure "established" by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article."

In *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545, the Constitution Bench dealt with the question

whether pavement and slum dwellers could be evicted without being heard. After adverting to various precedents on the subject, Chief Justice Chandrachud observed:

> "Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed says that, "from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, "He that takes the procedural sword shall perish with the sword."

25. In this case, we are concerned with the application of first of the two principles of natural justice recognized by the traditional English Law, i.e., *Nemo debet esse judex in propria causa*. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in

his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

26. A pecuniary (bias) interest, however small it may be, disqualifies a person from acting as a Judge. Other types of bias, however, do not stand on the same footing and the Courts have, from time to time, evolved different rules for deciding whether personal or official bias or bias as to subject matter or judicial obstinacy would vitiate the ultimate action/order/decision.

27. In *The Queen v. Rand* (1866) LR 1 (Q.B.D.) 230, the Queen's Bench was called upon to consider whether the factum of two justices being trustees of a hospital and a friendly society respectively, each of which had lent money to the Bradford Corporation on bonds charging the corporate fund were disqualified from participating in the proceedings which resulted in issue of certificate in favour of the corporation to take water of certain streams without permission of the mill

owners. While answering the question in negative, Blackburn, J. evolved the following rule:

> "……There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is: for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bona fide*; and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest; and we think that Reg. v. Dean of Rochester (1) is an authority, that circumstances, from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest……"

28. In *Rex v. Sussex Justices, Ex Parte McCarthy* (1924) 1 KB 256, Lord Hewart, CJ., evolved the rule that justice should not only be done, but manifestly and undoubtedly be seen to be done. The facts of that case were that on August 21, 1923, a collision took place between a motor cycle driven by the applicant and a motor cycle and side-car driven by one Whitworth, and it was alleged that the latter and his wife sustained injuries in the collision. In respect of those injuries

Messrs Langham, Son & Douglas, solicitors, Hastings, by a letter dated August 28, 1923, made a claim on behalf of Whitworth against the applicant for damages, and the police, after making inquiries into the circumstances of the collision, applied for and obtained a summon against the applicant for driving his motor cycle in a manner dangerous to the public. At the hearing of that summon on September 22, 1923, the applicant's solicitor, who stated in his affidavit that he had no knowledge of the officials of the court, inquired whether Mr. F.G. Langham, the clerk to the justices and a member of the said firm of Langham, Son & Douglas, was then sitting as clerk, and was informed that he was not, but had appointed a deputy for that day. The case was then heard, and at the conclusion of the evidence the justices retired to consider their decision, the deputy clerk retiring with them. When the justices returned into court they intimated that they had decided to convict the applicant, and they imposed a fine of 10 lakh and costs. Thereupon, the applicant's solicitor brought to the notice of the justices the fact, of which he said he had only become aware when the justices retired, that the deputy clerk was a brother of Mr. F.G. Langham, and was himself a partner in the firm of Langham, Son & Douglas, and so was interested as solicitor for Whitworth in the civil proceedings arising out of the collision in respect of which they had convicted the applicant. The solicitor in his affidavit stated that had he known the above facts he would have taken the objection before the case began. This rule was thereafter obtained on the ground that it was irregular for the deputy clerk in the circumstances to retire with the justices when considering their decision. The King's Bench quashed the conviction on the ground of bias. Lord Hewart C.J., posed the following question:

> "……..The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in

its civil aspect as to be unfit to act as clerk to the justices in the criminal matter……."

He then proceeded to observe:

"……The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point……."

29. In *Regina v. Camborne Justices Ex parte Pearce* (1955) 1 QB 41, the Divisional Court of Queen's Bench Division after reviewing large number of authorities including *Rex v. Sussex Justices, Ex parte McCarthy* (supra) and held that " real likelihood was the proper test, and that a real likelihood of bias had to be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries." The issue which arose for consideration in that case was whether the conviction of Henry Pearce was vitiated on four grounds including the one that throughout the hearing Mr. Donald Woodroffe Thomas, solicitor,

acted as clerk to the justices and was called into their private room for the purpose of advising them, although he was at the time a councilor member of the council. The facts of that case were as follows:

"On January 27, 1948, the Public Health and Housing Committee (later known as the Health Committee) of the council recommended that the authority of the council should be given to its sampling officers to institute proceedings under the Food and Drugs Act, 1938. On February 24, 1948, the council adopted this recommendation. Since that date each of the council's sampling officers, including Rundle, had from time to time been given authorities under the seal of the council appointing them inspectors and authorized officers of the council under the Food and Drugs Acts and expressly authorizing them to institute, on behalf of the council, proceedings under the Acts before any court of summary jurisdiction. On June 20, 1952, a fresh sealed authority was given to Rundle and the other sampling officers, being an extension of the earlier authorities, and this sealed authority was in force at all material times. This authority empowered the sampling officers to institute proceedings under, inter alia, the Food and Drugs Acts in their own discretion and without seeking any specific authority from the council to do so, and it became the practice for the chief sampling officer to report to the Health Committee the action his subordinates had in fact taken. On January 4, 1954, Rundle laid the two informations against the applicant. On January 19, 1954, the chief sampling officer reported to the Health Committee that such proceedings were pending against the applicant.

On February 23, 1954, the council received and adopted the report of its Health Committee dated January 19, 1954. On April 13, 1954, the chief sampling officer reported to the Health Committee the result of the proceedings against

the applicant. On May 11, 1954, the council received and adopted the report of its Health Committee dated April 13, 1954. Mr. Thomas was not present at any of the above-mentioned four meetings and indeed was never a member of the Health Committee or its predecessor, the Public Health and Housing Committee. Rundle laid the two informations in the exercise of his own discretion and upon his own responsibility in pursuance of the power conferred upon him by his sealed authority. Mr. Thomas was appointed clerk to the justices for the East Penwith Division of Cornwall on December 30, 1931. He was elected a member of Cornwall County Council on April 22, 1937. He acted as clerk to the justices during the trial of the applicant upon the informations at the Camborne Magistrates' Court on January 26, 1954. He did not retire with the justices while they were considering their verdict, but was later sent for by the chairman, who requested him to advise the justices upon a point of law. During the short time that he was with them the justices did not discuss the facts of the case at all, and having given his advice on the point of law he returned to court. Some appreciable time later the justices returned and gave their decision. At the hearing the applicant pleaded "Not Guilty." The prosecution was conducted by a solicitor in the full-time employment of the Cornwall County Council. The applicant was represented by counsel, instructed by his solicitors, Messrs. Stephens & Scown of St. Austell. An articled clerk, Mr. Philip Stephens (who was not related to any partner in the firm) attended counsel at the hearing on behalf of that firm. Neither the applicant, nor counsel, nor the articled clerk was aware at that time that the clerk to the justices was a member of the Cornwall County Council though that fact was well known to Mr. William Garfield Scown, the partner in the firm who had the conduct of the applicant's defence.

During the six years from 1948 to 1953 inclusive some 660

prosecutions by the Cornwall County Council were heard and determined by the East Penwith Magistrates' Court at which either Mr. Thomas or the deputy clerk to the justices, Mr. Garfield Uren, acted as clerk to the justices; yet so far as was known no previous objection had ever been made because Mr. Thomas acted as clerk to the justices during the hearing of an information by or on behalf of the Cornwall County Council. There was no allegation that Mr. Thomas attempted in any way improperly to influence the justices in their decision on January 26, 1954."

The question posed in that case was "what interest in "a judicial or quasi-judicial proceeding does the law regard as "sufficient to incapacitate a person from adjudicating or assisting "in adjudicating on it upon the ground of bias or appearance of "bias?" It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice? The Divisional Court referred to judgment of Blackburn, J. in *The Queen v. Rand* (supra), in which the test of real likelihood of bias was evolved, Lord Esher M.R. in *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 QB 667, *Rex v. Justices of County Cork* (1910) 2 IR 271, *Rex v. Sussex Justices, Ex parte McCarthy* (supra), *Frome United Breweries Company v. Bath Justices,* (1926) AC 586, *Rex v. Essex Justices, Ex parte Perkins* (1927) 2 KB 475 and held:

> *"In the judgment of this court the right test is that prescribed by Blackburn J., namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. This court is further of opinion that a real likelihood of bias must be made to*

appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.

In the present case, for example, the facts relied on in the applicant's statement under R.S.C., Ord. 59, r. 3 (2), might create a more sinister impression than the full facts as found by this court, all or most of which would have been available to the applicant had he pursued his inquiries upon learning that Mr. Thomas was a member of the Cornwall County Council, and none of these further facts was disputed at the hearing of this motion.

The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the Sussex Justices case that it "is of fundamental " importance that justice should not only be done, but should "manifestly and undoubtedly be seen to be done "is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

(emphasis supplied)

30. In *Metropolitan Properties (FGC) Ltd. v. Lannon* (1969) 1 QB 577, the Court of Appeal applied suspicion test and reasserted 'justice must be seen to be done' as the operative principle.

31. In *R v. Gough* (1993) AC 646, the House of Lords applied the 'real likelihood' test by using the expression 'real

danger'. Two portions of the leading speech given by Lord Goff are extracted below:

"In my opinion, if the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose"

"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. *Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that*

the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him...."

(emphasis supplied)

32. In *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* (supra), the House of Lords considered the question whether the factum of one of the Law Lords, who was a director and chairperson of Amnesty International Charity Limited, was disqualified from being a party in the proceedings of an appeal in which Amnesty International was granted leave to intervene. In that case, Senator Augusto Pinochet Ugarte applied for setting aside the decision of the House of Lords whereby the appeal of the Commissioner of Police of the Metropolis and the Government of Spain was allowed and the decision of the Queen's Bench Divisional Court quashing the provisional warrant issued for the arrest of the petitioner was set aside. The ground on which review of the decision was sought was that Lord Hoffmann, who constituted the majority of the House of Lords, was biased because he was a director and chairperson of Amnesty International Charity Limited. Lord Browne-Wilkinson, with whom other members of the Bench agreed, noted that neither Senator Pinochet nor his legal advisors were aware of any connection between Lord Hoffmann and Amnesty International until after the judgment was delivered on 25.11.1998 in the main case and the appeal filed against the judgment of the Queen's Bench Divisional Court was allowed by a majority of three to two. After the judgment, relationship of Lord Hoffmann and his wife with Amnesty International and its constituents were revealed. Lord

Browne-Wilkinson noted that there was no allegation that Lord Hoffmann was in fact biased but the argument was that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased and proceeded to observe:

"The fundamental principle is that a man may not be a judge in his on cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet Judges on Trial (1976) p 303 and De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th edn, 1995) p 525. I will call this 'automatic disqualification'.

xxx xxx xxx xxx

The importance of this point in the present case is this. Neither AI, nor AICL, have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to anyone. The interest of AI in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice AI became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of AI and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, AI. One of the constituent parts of that unincorporated association is AICL. AICL was established, for tax purposes, to carry out part of the functions of AI—those parts which were charitable—which had previously been carried on either by AI itself or by AIL. Lord Hoffmann is a director and chairman of AICL, which is wholly controlled by AI, since its members (who ultimately control it) are all the members of the international executive committee of AI. A large part of the work of AI is, as a matter of strict law, carried on by AICL which instructs AIL to do the work on its behalf. In reality, AI, AICL

and AIL are a close-knit group carrying on the work of AI.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to AI but he is not in fact AI. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running AI. Lord Hoffmann, AICL and the executive committee of AI are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an 'interest' which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, AI, shares with the government of Spain and the CPS, not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial—a non-pecuniary interest. So far as AICL is concerned, cl (c) of its memorandum provides that one of its objects is 'to procure the abolition of torture, extra-judicial execution and disappearance'. AI has, amongst other objects, the same objects. Although AICL, as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, AICL plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give

rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of AICL, was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. *But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to Immunity.* Indeed, so much I understood to have been conceded by Mr Duffy.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically" disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the

suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'."

(emphasis supplied)

33. In *re Medicaments and Related Classes of Goods (No.2)* (supra), the Court of Appeal set aside the decision of the Restrictive Practices Court on the ground of real danger of bias by making the following observations:

"……The court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the judge was biased; that the material circumstances included any explanation given by the impugned judge as to his knowledge or appreciation of those circumstances and where any such explanation was disputed the reviewing court did not have to rule whether the explanation should be accepted or rejected but rather had to decide whether the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced; that instead of determining whether R's statement was truthful the court should have considered what impression her conduct, including her explanation for it, would have had on a fair-minded observer; that such an observer would not have been convinced that all prospects of R working for the firm at some time in the future had been destroyed or that she might not still hope to work for them in due course; that, in those circumstances, the fair-minded observer would apprehend that there was a real danger that R would be unable to make an objective and impartial appraisal of the expert evidence placed before

the court by the firm; and that, accordingly, R ought to have recused herself and the other members of the court should stand down."

34. It is, thus, evident that the English Courts have applied different tests for deciding whether non-pecuniary bias would vitiate judicial or quasi judicial decision. Many judges have laid down and applied the 'real likelihood' formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias. Other judges have employed a 'reasonable suspicion' test, emphasizing that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest. The Constitutional Court of South Africa has, in *President of the Republic of South Africa v. South African Rugby Football Union* 1999 (4) SA 147 while holding that onus of establishing that there was ground for recusal of the members of the Court was on the applicant, made the following significant observations:

"……The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer

should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

The High Court of Australia has adopted a different approach, as is evident from the judgment of seven-Judge Bench in *Johnson v. Johnson* (2000) 174 Australian Law Reports 655. The parties to the appeal were married in November 1979. The marriage was dissolved in 1996. The proceedings before Anderson, J. arose out of a dispute as to the financial arrangements to be made following such dissolution. There was a substantial amount at stake. It was held that there was what the Full Court described as an "asset pool" valued at nearly $30m. Anderson, J. decided that the respondent (the wife) should receive 40% of that pool. One of the principal areas of dispute at the trial, which lasted for 66 days, concerned the extent of the appellant's assets and, in particular, whether he was beneficially interested in substantial offshore assets owned by other persons and entities. It is unnecessary to go into the detail of that dispute. What is important is that, at the trial, the respondent was asserting, and the appellant was denying, that the appellant was beneficially interested in various assets, and the investigation of that issue of fact involved a great deal of hearing time. On the 20th day of the hearing, Anderson, J. made a comment which resulted in an application by counsel for the appellant that he should disqualify himself. Anderson, J. declined the application. The Full Court of the Family Court upheld his decision. Five members of the Bench speaking through Gleeson, C.J., referred to the test applied in Australia in determining whether a Judge was disqualified by reason of the appearance of bias, i.e. whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial and unprejudiced mind to the resolution of the question require to be decided and gave the following reasons for making a departure from the test applied in England:

"That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done. It is based upon the need for public confidence in the administration of justice. "If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision." The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial"."

In his separate opinion, Kirby J. referred to the judgments of the House of Lords in *R v. Gough* (supra) as also *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* (supra) and observed:

"It is a "fundamental rule" of natural justice and an "abiding value of our legal system" that every adjudicator must be free from bias. This same principle has been accepted in the international law of human rights, which supports the vigilant approach this court has taken to the possibility that the "parties or the public might entertain a reasonable apprehension" that an adjudicator may not be impartial. *Thus, Art 14.1 of the International Covenant on Civil and Political Rights, the starting point for consideration of the relevant requirements of international law, slates:*

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit al law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.

In *Karttunen v Finland,* elaborating that Article, the United Nations Human Rights Committee concluded that "impartiality" of a court:

. . . implies that judges must not harbour preconceptions about the matter put before them, and . . . they must not act in ways that promote the interests of one of the parties ... A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

Appearance of justice: The reason commonly given for adopting the comparatively strict approach that has found favour in this court in recent years is that it mirrors the importance attached by the law not only to the actuality of justice (that is, whether the adjudicator had, in fact, prejudged issues in the case) but also the appearance of impartiality both to the parties and to the community. From the point of view of public policy, the practical foundation for a relatively strict approach lies in the obligation on an appellate court to defend the purity of the administration of justice and thereby to sustain the community's confidence in the system. *In the words of Lord Denning MR. "justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."*

(emphasis supplied)

35. In India, the Courts have, by and large, applied the 'real likelihood test' for deciding whether a particular decision of the

judicial or quasi judicial body is vitiated due to bias. In *Manak Lal v. Dr. Prem Chand Singhvi* (supra), it was observed:

> "Every member of a tribunal that sits to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and the essence of judicial decisions and judicial administration is that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

36. In *A.K. Kraipak v. Union of India* (supra), the rule of bias was discussed in some detail in the context of selection for appointment to the Indian Forest Service. Although, Naqishbund who was a candidate for selection to the All India Forest Service and was also a member of the selection board did not sit in the selection board at the time of his name was considered but participated in its deliberations when the names of other candidates, who were his rivals were considered. Two important questions considered by the Court were whether the rules of natural justice were applicable in cases involving exercise of administrative power by the public authorities and whether the selection was vitiated due to bias. The Court answered both the questions in affirmative. While answering the second question, the Court noted that even though Naqishbund had not participated in the deliberations of the committee when his name was considered, but he was present when the claims of rivals were considered and observed:

> "At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased…….. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct."

37. In *S. Parthasarthi v. State of A.P.* (1974) 3 SCC 459, Mathew, J. applied the 'real likelihood test' and restored the decree passed by the trial Court which invalidated compulsory retirement of the appellant by way of punishment. In paragraph 16 of the judgment, Mathew, J. observed:

> "…….We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision……"

38. In *Dr. G. Sarana v. University of Lucknow* (supra), the Court referred to the judgments in *A.K. Kraipak v. Union of India* (supra), *S. Parthasarthi v. State of A.P.* (supra) and observed:

> "…….the real question is not whether a member of an

administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to prove the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration……."

39. In *Ashok Kumar Yadav v. State of Haryana* (1985) 4 SCC 417, the Court while reiterating that the judgment in *A.K. Kraipak's* case represents an important landmark in the development of administrative law and has contributed in a large measure to the strengthening of the rule of law, made a significant departure in cases involving selection by the Public Service Commissions. All this is evident from paragraph 18 of the judgment, which is extracted below:

"18. We must straightaway point out that A.K. Kaipak case is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a Selection Committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation

here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and Allied Services is being made not by any Selection Committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a Commission which consists of a Chairman and a specified number of members and is a constitutional authority. *We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State.* If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him."

(emphasis supplied)

40. The real likelihood test was again applied in *Ranjit Thakur v. Union of India* (1987) 4 SCC 611. In that case, the appellant had challenged his dismissal from service on the ground of violation of the provision contained in Section 130 of the Army Act, 1950. The facts of that case were that the appellant, who was already serving sentence of 28 days rigorous imprisonment, is said to have committed another offence for which he was subjected to summary court–martial and was dismissed from service. Respondent No.4 who had earlier punished the appellant was a member of the summary court-martial in terms of Section 130 of the Army Act, 1950. The appellant was entitled to object the presence of respondent No.4 in the summary court-martial, but this opportunity was not given to him. The writ petition filed by the appellant was summarily dismissed by the High Court. This Court held that violation of the mandate of Section 130 militates against and detracts from the concept of a fair trial. The Court then proceeded to consider whether respondent No.4 would have been biased against the appellant and observed:

> "The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.
>
> It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice".
>
> As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."

41. In *Secretary to Government, Transport Department v. Munuswamy Mudaliar* 1988 (Supp.) SCC 651, this Court considered the question whether a party to the arbitration agreement could seek change of an agreed arbitrator on the ground that being an employee of the State Government, the arbitrator will not be able to decide the dispute without bias. While reversing the judgment of the High Court which had confirmed the order of learned Judge, City Civil Court directing appointment of another person as an arbitrator, this Court observed:

> "Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. *The reasonable apprehension must be based on cogent materials.* See the observations of Mustill and Boyd, Commercial Arbitration 1982 Edn., p. 214. *Halsbury's Laws of England, 4th Edn., Vol. 2, para 551, p. 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias."*
>
> (emphasis supplied)

42. In *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* (2003) 7 SCC 418, the Court applied the rule of bias in the context of a provision in the agreement which empowered the Managing Director of the appellant to terminate the agreement and also act as arbitrator. This Court applied the rule that a person cannot be a judge of his own cause and observed:

"Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal."

43. The principles which emerge from the aforesaid decisions are that no man can be a Judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but it must not be seen to be inclined. A person having interest in the subject matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject matter of *lis*, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the 'real likelihood' test has been preferred over the 'reasonable suspicion' test and the Courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries.

44. In Halsbury's Laws of England [Vol. 29(2) 4th Edn. Reissue 2002, para 560 page 379], the test of disqualification due to apparent bias has been elucidated in the following words:

"560. Test of disqualification by apparent bias. The test applicable in all cases of apparent bias, whether concerned with justices, members of inferior tribunals, jurors or with arbitrators, is whether, having regard to the relevant circumstances, there is a real possibility of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour, or disfavour, the case of a party to the issue under consideration by him. In considering this question all the circumstances which have a bearing on the suggestion that the judge or justice is biased must be considered. The question is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Cases may occur where all the justices may be affected by an appearance of bias, as, for instance, where a fellow justice or the justices' clerk is charged with an offence; where this occurs, it has been recommended that justices from another petty-sessional division should deal with the case, or, if the offence is indictable, that it should be committed for trial by a jury.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but be seen to be done is applied, and the court gives effect to the maxim by examining all the material available and concluding whether there is a real possibility of bias……."

45. In the light of the above, we shall now consider whether the petitioner can invoke the rule of bias and seek invalidation of order dated 24.4.2011 and other proceedings held by the Committee on the ground that respondent No.3 is biased and prejudiced against him and as such he could not have been made as a member of the Committee under Section 3(2) of the Act. It is not in dispute that respondent No.3 participated in the seminar organised by the Bar Association of India of which

he was Vice-President. He demanded public inquiry into the charges levelled against the petitioner before his elevation as a Judge of this Court. During the seminar, many eminent advocates spoke against the proposed elevation of the petitioner on the ground that there were serious allegations against him. Thereafter, respondent No.3 drafted a resolution opposing elevation of the petitioner as a Judge of this Court. He along with other eminent lawyers met the then Chief Justice of India. These facts could give rise to reasonable apprehension in the mind of an intelligent person that respondent No.3 was likely to be biased. A reasonable, objective and informed person may say that respondent No.3 would not have opposed elevation of the petitioner if he was not satisfied that there was some substance in the allegations levelled against him. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and we have no doubt that respondent No.3 possesses these qualities. We also agree with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the issue of bias of respondent No.3 has not to be seen from the view point of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion he would form! It is his apprehension which is of paramount importance. From the facts narrated in the earlier part of the judgment it can be said that petitioner's apprehension of likelihood of bias against respondent No.3 is reasonable and not fanciful, though, in fact, he may not be biased.

46. The next question which merits consideration is whether order passed by the Committee on 24.4.2011 should be quashed on the ground of reasonable likelihood of bias of respondent No.3. While deciding this issue, we have to keep in mind that the petitioner is not a layperson. He is well-versed in law and possesses a legally trained mind. Further, for the last 15 years, the petitioner has held constitutional posts of a

Judge and then as Chief Justice of the High Court. It is not the pleaded case of the petitioner that he had no knowledge about the seminar organized by the Bar Association of India on 28.11.2009 which was attended by eminent advocates including two former Attorney Generals and in which respondent No.3 made a speech opposing his elevation to this Court and also drafted resolution for the said purpose. The proceedings of the seminar received wide publicity in the print and electronic media. Therefore, it can be said that much before constitution of the Committee, the petitioner had become aware of the fact that respondent No.3, who, as per the petitioner's own version, had appreciated his work on the Bench and had sent congratulatory message when his name was cleared by the Collegium for elevation to this Court, had participated in the seminar and made speech opposing his elevation and also drafted resolution for the said purpose. The Chairman had appointed respondent No.3 as member of the Committee keeping in view his long experience as an eminent advocate and expertise in the field of constitutional law. The constitution of the Committee was notified in the Official Gazette dated 15.1.2010 and was widely publicised by almost all newspapers. Therefore, it can reasonably be presumed that the petitioner had become aware about the constitution of the Committee, which included respondent No.3, in the month of January, 2010. In his representation dated 12.5.2010, the petitioner claimed that he came to know about the constitution and composition of the Committee through the print and electronic media. Thus, at least on 12.5.2010 he was very much aware that respondent No.3 had been appointed as a member of the Committee. Notwithstanding this, he did not raise any objection apparently because after meeting respondent No.3 on 6.12.2009 at the latter's residence, the petitioner felt satisfied that the said respondent had nothing against him. Therefore, belated plea taken by the petitioner that by virtue of his active participation in the meeting held by the Bar Association of India, respondent No.3 will be deemed to be biased against him does not merit acceptance. It is also significant to note that respondent No.3

had nothing personal against the petitioner. He had taken part in the seminar as Vice-President of the Association. The concern shown by senior members of the Bar including respondent No.3 in the matter of elevation of the petitioner, who is alleged to have misused his position as a Judge and as Chief Justice of the High Court for material gains was not actuated by ulterior motive. They genuinely felt that the allegations made against the petitioner need investigation. After the seminar, respondent No.3 is not shown to have done anything which may give slightest impression to any person of reasonable prudence that he was ill-disposed against the petitioner. Rather, as per the petitioner's own statement, he had met respondent No.3 at the latter's residence on 6.12.2009 and was convinced that the latter had nothing against him. This being the position, it is not possible to entertain the petitioner's plea that constitution of the Committee should be declared nullity on the ground that respondent No.3 is biased against him and order dated 24.4.2011 be quashed.

47. The issue deserves to be considered from another angle. Admittedly, the petitioner raised the plea of bias only after receiving notice dated 16.3.2011 which was accompanied by statement of charges and the lists of documents and witnesses. The petitioner's knowledgeful silence in this regard for a period of almost ten months militates against the bona fides of his objection to the appointment of respondent No.3 as member of the Committee. A person on the petitioner's standing can be presumed to be aware of his right to raise an objection. If the petitioner had slightest apprehension that respondent No.3 had pre-judged his guilt or he was otherwise biased, then, he would have on the first available opportunity objected to his appointment as member of the Committee. The petitioner could have done so immediately after publication of notification dated 15.1.2010. He could have represented to the Chairman that investigation by a Committee of which respondent No.3 was a member will not be fair and impartial because the former had already presumed him to be guilty. We

cannot predicate the result of the representation but such representation would have given an opportunity to the Chairman to consider the grievance made by the petitioner and take appropriate decision as he had done in March, 2010 when respondent No.3 had sought recusal from the Committee in the wake of demand made by a section of the Bar which had erroneously assumed that the petitioner had consulted respondent No.3. However, the fact of the matter is that the petitioner never thought that respondent No.3 was prejudiced or ill-disposed against him and this is the reason why he did not raise objection till April, 2011 against the inclusion of respondent No.3 in the Committee. This leads to an irresistible inference that the petitioner had waived his right to object to the appointment of respondent No.3 as member of the Committee. The right available to the petitioner to object to the appointment of respondent No.3 in the Committee was personal to him and it was always open to him to waive the same.

48. In *Lachhu Mal v. Radhey Shyam,* AIR 1971 SC 2213, the Court considered the question whether the landlord can by way of agreement waive the exemption available to him under U.P. (Temporary) Control of Rent and Eviction Act, 1947. In that case, the landlord had entered into an agreement waiving the exemption available to him under the Act. While dealing with the issue of waiver, this Court held:

> *"The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto.* (See Maxwell on Interpretation of Statutes, Eleventh Edn., pp. 375 and 376). If there is any express prohibition against contracting out of a statute in it then no

question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Laws of England, Vol. 8, Third Edn., it is stated in para 248 at p. 143:

"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."

(emphasis supplied)

49. In *Manak Lal v. Dr. Prem Chand Singhvi* (supra), this Court held that the constitution of the Tribunal was vitiated due to bias because Chairman of the Tribunal had appeared against the appellant in a case but declined to nullify the action taken against him on the recommendations of the Tribunal on the ground that he will be deemed to have waived the right to raise objection of bias. Some of the observations made in that case are extracted below:

"……The alleged bias in a member of the Tribunal does not render the proceedings invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of his right to challenge the presence of the member in the Tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take

the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. As Sir John Romilly, M.R., has observed in Vyvyan v. Vyvyan "waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim". If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time. In other words, though the point of law raised by Shri Daphtary against the competence of the Tribunal be sound, it is still necessary for us to consider whether the appellant was precluded from raising this point before the High Court by waiver or acquiescence.

From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an

order for a fresh enquiry and thus gain time. It may be conceded in favour of Shri Daphtary that the judgment of the High Court does not in terms find against the appellant on the ground of waiver though that no doubt appears to be the substance of their conclusion. We have, however, heard Shri Daphtary's case on the question of waiver and we have no hesitation in reaching the conclusion that the appellant waived his objection deliberately and cannot now be allowed to raise it."

(emphasis supplied)

50. In *Dhirendra Nath Gorai v. Sudhir Chandra* AIR 1964 SC 1300, a three Judge Bench of this Court considered the question whether the sale made without complying with Section 35 of the Code of the Bengal Money Lenders Act, 1940 was nullity and whether the objection against the violation of that section could be waived. After examining the relevant provisions, the Court held:

"A waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction cannot be waived, for consent cannot give a court jurisdiction where there is none. Even if there is inherent jurisdiction, certain provisions cannot be waived. Maxwell in his book "On the Interpretation of Statutes", 11th Edn., a p. 357, describes the rule thus:

"Another maxim which sanctions the non-observance of a statutory provision is that cuilibet licet renuntiare juri pro se introducto. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy".

The same rule is restated in "Craies on Statute Law", 6th Edn., at p. 269, thus:

"As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being

indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court."

51. In conclusion, we hold that belated raising of objection against inclusion of respondent No.3 in the Committee under Section 3(2) appears to be a calculated move on the petitioner's part. He is an intelligent person and knows that in terms of Rule 9(2)(c) of the Judges (Inquiry) Rules, 1969, the Presiding Officer of the Committee is required to forward the report to the Chairman within a period of three months from the date the charges framed under Section 3(3) of the Act were served upon him. Therefore, he wants to adopt every possible tactic to delay the submission of report which may in all probability compel the Committee to make a request to the Chairman to extend the time in terms of proviso to Rule 9(2)(c). This Court or, for that reason, no Court can render assistance to the petitioner in a petition filed with the sole object of delaying finalisation of the inquiry.

52. However, keeping in view our finding on the issue of bias, we would request the Chairman to nominate another distinguished jurist in place of respondent No.3. The proceedings initiated against the petitioner have progressed only to the stage of framing of charges and the Committee is yet to record its findings on the charges and submit report. Therefore, nomination of another jurist will not hamper the proceedings of the Committee and the reconstituted Committee shall be entitled to proceed on the charges already framed against the petitioner.

53. In the result, the writ petition is dismissed with the aforesaid observations.

B.B.B. Writ Petition dismissed.

ELAVARASAN

v.

STATE REP. BY INSPECTOR OF POLICE

(Criminal Appeal No. 1250 of 2006)

JULY 5, 2011

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

Penal Code, 1860 – ss. 84, 304-II, 307 and 342 – Murder and attempt to murder – Defence of insanity – Tenability of – Accused-appellant assaulted his wife(PW2) and mother(PW3) with a sharp edged weapon; caused the death of his 1½ year old daughter ('A') and thereafter wrongfully confined PWs2 and 3 within the house – Plea of insanity set up by the appellant at the trial rejected – PW3 turned hostile – Conviction of appellant u/s.302 for murder of 'A' with life sentence, u/s.307 for attempt to murder PW2 with 10 years RI and u/s.342 with 1 year imprisonment – On appeal, held: Appellant was guilty of committing culpable homicide of 'A' and an attempt to commit the murder of PW2, even if the assault on PW3 is taken as doubtful on account of her turning hostile at the trial and attempting to attribute the injuries sustained by her to a fall – The fact that the appellant was working as a government servant and was posted as a Watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant – PW2 who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking – Deposition of PW3, that her son was getting treatment for mental disorder is also much too vague and deficient for this Court to record a finding of unsoundness of mind especially when the witness had turned hostile – Depositions of the doctors dealt with the mental health condition of the appellant at the time of the examination

by the doctors and not the commission of the offence which is the relevant point of time for claiming the benefit of s.84 IPC – Insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned and in that view of the matter, non-production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant is noteworthy – Writings on the inner walls of the appellant's house did not substantiate the plea of insanity especially when evidence on record established that appellant was an alcoholic, who could scribble any message or request on the walls of his house while under the influence of alcohol – Plea of insanity taken by the appellant was thus neither substantiated nor probablised – The Courts below were, therefore, justified in holding that the plea of insanity had not been proved and the burden of proof cast upon the appellant u/s.105 of the Evidence Act remained undischarged – The High Court also correctly held that the mere fact that the appellant had assaulted his wife, mother and child was not ipso facto suggestive of his being an insane person – So, also the fact that the appellant had not escaped from the place of occurrence was no reason by itself to declare him to be a person of unsound mind incapable of understanding the nature of the acts committed by him inasmuch as different individuals react differently to same or similar situations – Consequently, no reason to alter the conviction or sentence u/s.342 – Also no reason to interfere with the conviction of appellant u/s.307 but sentence reduced from 10 years RI to 7 years RI – Conviction of appellant u/s.302 not, however, justified and altered to conviction u/s.304 Part-II alongwith 10 years RI.

Penal Code, 1860 – s.84 – Principles governing burden of proof in cases where the accused pleads an exception – Defence of insanity – Burden of bringing case u/s.84 IPC – Standard of proof for discharge of burden u/s.105 – Held: The burden of bringing his/her case u/s.84 of IPC lies squarely upon the person claiming the benefit of that provision – The

standard of proof which the accused has to satisfy for the discharge of the burden cast upon him u/s.105 of the Evidence Act is not the same as is expected of the prosecution – Evidence Act, 1872 – s.105.

Penal Code, 1860 – s.304-II or 302 – Culpable homicide without pre-meditation – Accused-appellant caused death of his 1½ year old daughter ('A') – Conviction of appellant u/s.302 – Justification of – Held: On facts, not justified – There was no pre-meditation in the assault upon the child 'A' – Evidence on record shows that pursuant to a sudden quarrel between the appellant and his wife(PW2), the appellant assaulted PW2 in the heat of passion and also injured his mother(PW3) who intervened to save PW2 – The noise and wails of the injured woke up 'A' sleeping in the adjacent room who started crying thereby attracting appellant's attention towards her – Also, assault on 'A' caused only two injuries with a resultant fracture – Appellant did not evidently use the sharp edged weapon for causing injuries to 'A' with which weapon he had assaulted PWs 2 and 3 – In the circumstances, there was no intention on the part of the appellant to cause the death of 'A', though looking to the nature of the injuries suffered by 'A', the appellant must be presumed to have the knowledge that the same were likely to cause death – Appellant committed culpable homicide without premeditation in a sudden fight and in the heat of passion – The fact that the appellant did not use the sharp edged weapon with which he was armed also shows that he did not act in a cruel or unusual manner nor did he take an undue advantage – PW2 did not see the appellant assaulting 'A' – It is, therefore, just possible that a hard blow given to 'A' by his bare hand itself threw the child down from the bed causing the injuries that proved fatal – In the result, conviction of appellant modified to that u/s.304 Part-II with 10 years RI.

The prosecution case was that the appellant picked up a quarrel with his wife (PW2) and thereafter assaulted

her with a sharp edged weapon and when PW3, the mother of appellant, intervened to save PW2, she too was assaulted by the appellant and resultantly both PWs 2 and 3 were rendered injured; that due to the ruckus caused by the quarrel and the assault, 'A', the 1½ year old daughter of the appellant, who was sleeping in adjacent room, woke up and started crying, whereupon the appellant went inside that room and hit her causing her death and that thereafter the appellant did not allow PWs 2 and 3 to go out of the house and bolted the doors from inside. Next day, the police authorities with the help of PWs 1, 8 and others found the appellant inside his house armed with an *Aruval*.

Charge-sheet was filed against the appellant for offences punishable under Sections 342, 307 (2 counts) and 302 IPC. Before the Trial Court the accused-appellant set up the plea of unsoundness of mind but did not lead any evidence except making a request for medical examination which request was allowed. The two doctors- Dr. 'RC' and Dr. 'PS' who examined the appellant were summoned as court witnesses to depose about their observations and conclusions as regards the mental health of the appellant. The Trial court eventually rejected the plea of insanity and held the appellant guilty of the charges framed against him and sentenced him to undergo imprisonment for life for the murder of his daughter 'A' and to undergo 1 year rigorous imprisonment for the offence punishable under Section 342 IPC and 10 years rigorous imprisonment for each of the offences punishable under Section 307(2 counts) for attempt to murder PWs2 and 3. The sentences were ordered to run concurrently.

On appeal, the High Court held that the appellant had been caught red handed with the weapon of offence inside the house in the presence of PWs 1, 7, 8 and

others and also that there was no reason why PW2, an injured eye-witness to the entire incident, should have falsely implicated her husband i.e. the appellant. But the High Court held that since PW3, who had also been injured in the incident had turned hostile and stated that she had sustained the injuries accidently because of a fall, the appellant's conviction for the attempted murder of PW3 punishable under Section 307 was liable to be set aside. However, the High Court held that the fact that PW3 had turned hostile did not make any dent in the prosecution case in so far as the same related to the murder of 'A' and attempt made by the appellant on the life of PW2. The plea of insanity was rejected by the High Court on the ground that there was no material to show that the appellant was insane at the time of the commission of the offences. The High Court therefore upheld the conviction of the appellant and sentence awarded to him for offences punishable under Sections 302, 307 (one count- for attempted murder of PW2) and 342 of I.P.C.

In the instant appeal, it was contended on behalf of the appellant that the material on record sufficiently proved that he was a person of unsound mind; that he had been treated by a Psychiatrist and had been taking medicines for his illness; that the contents of Ex.P.3 the observation Mahazar which referred to certain writings on the walls of the appellant's house suggested that the appellant was mentally unsound even at the time of commission of crime and that the murderous assault made by the appellant on his wife, his mother and child without any ostensible reason was itself suggestive of the appellant being an insane person. The appellant's conduct after the event was also argued to be suggestive of his being of unsound mind, which aspects, it was contended that the courts below had failed to appreciate in the process denying to the appellant the benefit of

Section 84 of IPC, legitimately due to him.

The question which arose for consideration was whether the appellant was entitled to the benefit of Section 84 of IPC which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or who is incapable of knowing that what he is doing, is either wrong or contrary to law.

Partly allowing the appeal, the Court

HELD:1.1. The appellant's mother PW3, no doubt turned hostile at the trial and tried to attribute the injuries sustained by her to a fall in the house, but the deposition of PW2, the wife of the appellant completely supported the prosecution case and the sequence of events leading to the heartless killing of the innocent child 'A', who was sleeping in the adjacent room and whose only fault was that she woke up hearing the shrieks and wails of the mother and started crying. There is no reason whatsoever to disbelieve the deposition of PW2 who unlike 'A' not only suffered the murderous assault but survived to tell the tale in all its details that leave no room for any doubt about her version being completely reliable. That PW1 and PW8 also support and corroborate the version of PW2, only goes to show that it was the appellant and the appellant alone who attacked not only his wife but his daughter of tender age resulting in the death of the later. Superadded to the above is the depositions of PW19, Dr. 'R', who conducted the post-mortem of the dead body of 'A' and who proved the post-mortem report marked as Ex.P.25 enumerating the injuries found on the body of the unfortunate child. The doctor opined that death was due to coma as a result of head injuries within 24 to 36 hours prior to post-mortem and that the blunt side of a weapon like M.O.27 could have

caused the injuries found on the dead body. [Para 9] [1165-C-H; 1166-A]

1.2. Similarly, the deposition of PW16, an Assistant Surgeon in the Government Hospital proved the injury report marked Ex.P19 that listed the injuries sustained by PW2. Injuries found on the person of PW3, the mother of the appellant were described in Ex.P20 proved by the same witness. PW15, an Assistant Surgeon in the General Hospital at Karaikal who found 15 injuries on the person of PW2, stated that PW2 remained admitted to the hospital for about one and a half months. According to him the appellant's mother PW3 had also suffered six injuries and her little and index fingers in the right hand had been amputated in the course of treatment. [Paras 10,11 and 12] [1166-B-H; 1167-D]

1.3. In the light of the above evidence and in the absence of any challenge to the veracity of the witnesses produced by the prosecution there is no manner of doubt that the appellant alone was responsible for the assault on his wife PW2 and baby 'A' who lost her life as a result of the injuries sustained by her in the said incident. The appellant was guilty of committing culpable homicide of his daughter 'A' aged about 1½ year and an attempt to commit the murder of his wife, even if the assault on the mother of the appellant is taken as doubtful on account of the injured turning hostile at the trial and attempting to attribute the injuries sustained by her to a fall. [Para 13] [1167-E-G]

2. There are two aspects that bear relevance to cases where a plea of insanity is raised in defence by a person accused of a crime. The first aspect concerns the burden of proving the existence of circumstances that would bring the case within the purview of Section 84 of the I.P.C. It is trite that the burden of proving the commission of an offence is always on the prosecution and that the

same never shifts. Equally well settled is the proposition that if intention is an essential ingredient of the offence alleged against the accused the prosecution must establish that ingredient also. There is no gainsaying that intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implies that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 of the IPC lies squarely upon the person claiming the benefit of that provision. Section 105 of the Evidence Act is in this regard relevant. A careful reading of the above would show that not only is the burden to prove an exception cast upon the accused but the Court shall presume the absence of circumstances which may bring his case within any of the general exceptions in the Indian Penal Code or within any special exception or provision contained in any part of the said Code or in law defining the offence. The second aspect is that the standard of proof which the accused has to satisfy for the discharge of the burden cast upon him under Section 105 of the Evidence Act is not the same as is expected of the prosecution. [Paras 14, 15 and 16] [1168-B-G; 1169-B-C; 1170-B]

Dahyabhai Chhaganbhai Thakkar v. State of Gujarat **(1964) 7 SCR 361;** *State of U.P. v. Ram Swarup and Anr.* **(1974) 4 SCC 764: 1975 (1) SCR 409;** *Bhikari v. State of Uttar Pradesh* **AIR 1966 SC 1: 1965 SCR 194 – referred to.**

3.1. The appellant has led no evidence in defence to support the plea of legal insanity. That may be a significant aspect but by no means conclusive, for it is open to an accused to rely upon the material brought on record by the prosecution to claim the benefit of the exception. Evidence in defence may be a surplusage in cases where the defence can make out a case for the acquittal of the accused based on the evidence adduced by the prosecution. [Para 18] [1170-F-G]

3.2. PW2, apart from narrating the sequence of events leading to the incident, stated that her husband is a government servant getting a monthly salary of Rs.4000/– which he would hand over to the witness to meet the household expenses. She further stated that the couple had a peaceful married life for five years but there was a dispute between the appellant and his maternal uncle in regard to the property a part of which the appellant had already sold and the remainder he wanted to sell. The appellant had according to the witness started the quarrel around 12 p.m. but assaulted her an hour later. The witness further stated that for sleeplessness, the appellant used to take some medicine but she did not recall the name of the Clinic from where he was taking the treatment. According to the witness, the Psychiatrist who was treating the appellant had diagnosed his medical condition to be the effect of excessive drinking and advised that if the appellant took the medicines regularly he would get cured. [Para 19] [1171-B-D]

3.3. PW3 in cross-examination stated that the appellant was working as a Watchman at PWD bungalow and that she used to deliver his lunch at the appellant's office. She also referred to the dispute between the appellant and his paternal uncle regarding family properties in which connection he had filed a complaint to the police station. The witness stated that the appellant

was undergoing treatment with a Psychiatrist and that the doctor had diagnosed the appellant to be a case of mental disorder because of which he could get angry very often. [Para 20] [1171-E-H]

3.4. From the deposition of the above two witnesses, who happen to be the close family members of the appellant, it is not possible to infer that the appellant was of unsound mind at the time of the incident or at any time before that. The fact that the appellant was working as a government servant and was posted as a Watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant. Equally important is the fact that his spouse who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The deposition of PW3, that her son was getting treatment for mental disorder is also much too vague and deficient for this Court to record a finding of unsoundness of mind especially when the witness had turned hostile at the trial despite multiple injuries sustained by her which she tried to attribute to a fall inside her house. The statement of PW3 that her son was getting treatment for some mental disorder cannot in the circumstances be accepted on its face value, to rest an order of acquittal in favour of the appellant on the basis thereof. It is obvious that the mother has switched sides to save her son from the consequences flowing from his criminal act. [Para 21] [1172-A-E]

4. The two medical experts, who examined the appellant, deposed during the course of the trial. However, the depositions of the two doctors deal with the mental health condition of the appellant at the time of the examination by the doctors and not the commission of the offence which is the relevant point of time for claiming

the benefit of Section 84 I.P.C. The medical opinion available on record simply deals with the question whether the appellant is suffering from any disease, mental or otherwise that could prevent him from making his defence at the trial. It is true that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. No such evidence has been led in this case. On the contrary expert evidence comprising the deposition and certificates of Dr. 'RC' unequivocally establish that the appellant did not suffer from any medical symptoms that could interfere with his capability of making his defence. There is no evidence suggesting any mental derangement of the appellant at the time of the commission of the crime for neither the wife nor even his mother have in so many words suggested any unsoundness of mind leave alone a mental debility that would prevent him from understanding the nature and consequences of his actions. The doctor, who is alleged to have treated him for insomnia, has also not been examined nor has anyone familiar with the state of his mental health stepped into the witness box to support the plea of insanity. There is no gainsaying that insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned. Non-production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant in that view is noteworthy. Suffice it to say that the plea of insanity taken by the appellant was neither substantiated nor probablised. [Para 25] [1175-B-G]

5. Based on certain observations made in Mahazar Ex.P3 which referred to certain writings on the inner walls of the appellant's house, it was contended that the

appellant was indeed insane at the time of commission of the offences. A similar argument was advanced even before the Courts below and was rejected for reasons which is found to be fairly sound and acceptable especially when evidence on record establishes that the appellant was an alcoholic, who could scribble any message or request on the walls of his house while under the influence of alcohol. The Courts below were, therefore, justified in holding that the plea of insanity had not been proved and the burden of proof cast upon the appellant under Section 105 of the Evidence Act remained undischarged. The High Court also correctly held that the mere fact that the appellant had assaulted his wife, mother and child was not *ipso facto* suggestive of his being an insane person. [Para 26] [1175-H; 1176-A-D]

6. So, also the fact that the appellant had not escaped from the place of occurrence was no reason by itself to declare him to be a person of unsound mind incapable of understanding the nature of the acts committed by him. Different individuals react differently to same or similar situations. Some may escape from the scene of occurrence, others may not while some may even walk to the police station to surrender and report about what they have done. Such post event conduct may be relevant to determine the culpability of the offender in the light of other evidence on record, but the conduct of not fleeing from the spot would not in itself show that the person concerned was insane at the time of the commission of the offence. [Para 27] [1176-E-F]

7. In the circumstances of the case there is no reason to alter the conviction or sentence under Section 342 of the I.P.C. There is also no reason to interfere with the conviction of the appellant under Section 307 of the I.P.C. except that instead of 10 years rigorous imprisonment of 7 years, should suffice. The conviction of the appellant

under Section 302 of the I.P.C. is not, however, justified, for reasons more than one. In the first place there was no pre-meditation in the assault upon the deceased. The evidence on record shows that the family had gone to bed after dinner around 9 p.m. The quarrel between the appellant husband and his wife started around 12 midnight and escalated into an assault on the later around 1 a.m. That the quarrel was sudden and without any premeditation, is evident from the deposition of the two injured witnesses. Secondly, because in the assault following the quarrel, the appellant used a sharp edged cutting weapon against his wife and mother. Incised wounds sustained by the said two ladies bear testimony to this part of the prosecution case. The deceased 'A' was at this stage of the occurrence, in another room wholly unconnected to the incident. Thirdly, because the appellant had because of the sudden fight with his wife assaulted her in the heat of passion and injured his mother who intervened to save her. The noise and wails of the injured woke up the deceased sleeping in the adjacent room who started crying thereby attracting the appellant's attention towards her.Fourthly, because the assault on the deceased caused only two injuries with a resultant fracture. Fifthly, because the appellant did not evidently use the sharp edged weapon for causing injuries to the deceased as he had done in the case of PWs 2 and 3 respectively. In the circumstances, there was no intention on the part of the appellant to cause the death of the deceased, though looking to the nature of the injuries suffered by the deceased, the appellant must be presumed to have the knowledge that the same were likely to cause death. The fact remains that the appellant committed culpable homicide without premeditation in a sudden fight and in the heat of passion. The fact that the appellant did not use the sharp edged weapon with which he was armed also shows that he did not act in a cruel or unusual manner nor did he take an undue

advantage. It is evident from the deposition of PW2, that she did not see the appellant assaulting the deceased. It is, therefore, just possible that a hard blow given to the deceased by his bare hand itself threw the child down from the bed causing the injuries that proved fatal. [Paras 28, 29, 30, 31 and 32] [1177-A-G; 1178-B-E]

8. In the result, in modification of the judgments under appeal the appellant is convicted under section 304 Part-II and sentenced to undergo rigorous imprisonment for a period of ten years. The reduced sentence of seven years rigorous imprisonment awarded to the appellant for the offence of attempt to murder and one year rigorous imprisonment for the offence punishable under Section 342 I.P.C. shall all run concurrently with the sentence awarded under Section 304-Part II. The appellant shall be entitled to the benefit of Section 428 of the Criminal Procedure Code. [Para 33] [1178-F-H]

Case Law Reference:

(1964) 7 SCR 361	**referred to**	**Para 15**
1975 (1) SCR 409	**referred to**	**Para 16**
1965 SCR 194	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1250 of 2006.

From the Judgment & Order dated 22.3.2006 of the High Court of Judicature at Madras in Criminal Appeal No. 1215 of 2003.

K.K. Mani, Abhishek Krishna, Mayur R. Shah for the Appellant.

R. Venkatarmani, V.G. Pragasam, Aljo K. Joseph S.J. Aristotle, Prabu Ramasubramanian for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of a judgment and order passed by the High Court of Madras whereby Criminal Appeal No.1215 of 2003 has been dismissed and the conviction of the appellant and sentence awarded to him for offences punishable under Sections 302, 307 and 342 of the I.P.C. upheld.

2. Briefly stated the prosecution case is that the appellant was residing in a house situate at Yadwal Street, Poovam Koticherri, Distt. Karaikal, Tamil Nadu. Apart from his wife Smt. Dhanalakshmi, PW2 and his daughter Abirami, aged about 1½ years, his mother Smt. Valli, PW3 also lived with him. On the fateful night intervening 11-12 of December, 2000 at about 1 p.m. the appellant is alleged to have started a quarrel with his wife accusing her of having brought misfortune to him ever since she got married to him. The immediate provocation for making that accusation was his inability to sell the property owned by his mother, as the Revenue entries relating the same stood in the name of Kannan, the paternal uncle of the appellant, who it appears was not agreeable to the sale of the property. The quarrel between the husband and the wife took an ugly turn when the appellant made a murderous assault on his wife, Dhanalakshmi causing several injuries to her including those on her head, left hand, right cheek and other parts of the body. Intervention of PW3, Vali who is none other than the mother of the appellant also did not stop the appellant from assaulting his wife. In the process injuries were caused even to the mother. Due to the ruckus caused by the quarrel and the assault on the two women, Abirami who was sleeping in the adjacent room woke up and started crying. The appellant at that stage is alleged to have gone inside the room and hit the deceased resulting in her death.

3. The prosecution case further is that the appellant did not allow the injured to go out of the house and bolted the doors from inside. In the morning at about 7 a.m. Shri R. Parvathi,

PW5 is said to have gone to the house of R. Natarajan, PW1 - a resident of the same street in the village and told him about the quarrel at the house of the appellant the previous night. Both of them then came to the spot and found a pool of blood near the outer door of the house of the appellant. Since the door was bolted from inside, PW1 called the appellant by his name, who responded to the call and said that he had cut his mother and wife and wanted to commit suicide for which he demanded some poison from them. A large number of villagers in the meantime gathered on the spot but the appellant refused to open the door. The Police was informed about the incident on telephone and soon arrived at the spot to knock at the doors of the appellant's house asking him to open the same. The appellant refused to do so and threatened that he would murder anyone who ventured to enter the house. Since the appellant remained adamant in this resolve, the Police with the help of PWs 1, 8 and others forced the door open and found the appellant inside the house armed with an Aruval, and his mother and wife lying inside the house with serious cut injuries and blood all over the place. In the adjacent room they found Abirami in an injured condition. Not knowing whether she was dead or alive, she was picked up and rushed to the hospital alongwith the other two injured, where the doctor pronounced the child brought dead. On completion of the investigation, the police filed a charge-sheet against the appellant for offences punishable under Sections 342, 307 (2 counts) and 302 IPC. He was committed to the sessions at Karaikal where the appellant pleaded not guilty and claimed a trial.

4. Before the Trial Court the prosecution examined as many as 21 witnesses in support of its case while the accused-appellant who set up unsoundness of mind in defence did not lead any evidence except making a request for medical examination which request was allowed and Dr. R. Chandrasekaran and Dr. P. Srinivasan who examined the appellant summoned as court witnesses to depose about their observations and conclusions as regards the mental health of

the appellant.

5. The Trial court eventually rejected the plea of insanity and found the appellant guilty of the charges framed against him and sentenced him to undergo imprisonment for life for the murder of his child baby Abirami and to undergo 1 year rigorous imprisonment for the offence punishable under Section 342 IPC and 10 years rigorous imprisonment together with a fine of Rs.1,000/- for each of the offences punishable under Section 307 (2 counts). The sentences were ordered to run concurrently.

6. Aggrieved by the judgment and order of the Trial Court the appellant filed an appeal before the High Court of Madras, who dismissed the same and affirmed the findings recorded by the Trial Court as already noticed by us. The High Court held that the appellant had been caught red handed with the weapon of offence inside the house in the presence of PWs 1, 7, 8 and others. Besides, there was no reason why his wife PW2, who was an injured eye-witness to the entire incident, should have falsely implicated the appellant. The High Court also took the view that since PW3, the mother of the appellant who had also been injured in the incident had turned hostile and stated that she had sustained the injuries accidently because of a fall, the appellant's conviction for the attempted murder of his mother punishable under Section 307 was liable to be set aside. The fact that PW3 had turned hostile did not, opined the High Court, make any dent in the prosecution case in so far as the same related to the murder of the innocent child and an attempt made by the appellant on the life of his wife Dhanalakshmi. The plea of insanity was rejected by the High Court on the ground that there was no material to show that the appellant was insane at the time of the commission of the offences. The present appeal assails the correctness of the above judgment and order as already noticed by us.

7. Appearing for the appellant, Mr. Mani, learned counsel urged a solitary point in support of the appeal. He submitted that the material on record sufficiently proved the plea of

insanity set up by the appellant at the trial. Reliance in support was placed by the learned counsel upon the deposition of Dr. P. Srinivasan, CW1, according to whom the appellant was a person of unsound mind. He also drew our attention to the deposition of other witnesses to argue that the appellant had been treated by a Psychiatrist and had been taking medicines for his illness. Reliance in particular was placed by the learned counsel upon the contents of Ex.P.3 the observation Mahazar which refers to certain writings on the walls of the appellant's house suggesting that the appellant was mentally unsound even at the time of commission of crime. From the graffiti, it was according to Mr. Mani evident that the appellant suffered from insanity before and at the time of the incident. Mr. Mani further argued that murderous assault on his wife, his mother and child without any ostensible reason was itself suggestive of the appellant being an insane person. The appellant's conduct after the event was also, argued Mr. Mani, suggestive of his being of unsound mind, which aspects the courts below had failed to appreciate in the process denying to the appellant the benefit of Section 84 of the Indian Penal Code, legitimately due to him.

8. On behalf of the respondent Mr. Venkataramani, learned senior counsel contended that the trial court as also the High Court had correctly found the plea of insanity set up by the appellant as not proved and held the appellant guilty of the offences with which he stood charged. Mr. Ventakaramani argued that there was no credible evidence to establish legal insanity at the time of the commission of the offence so as to entitle the appellant to the benefit of Section 84 of IPC. The fact that the appellant did not run away from the place of occurrence or that he had attacked his wife and child without any reason did not establish that the appellant was of unsound mind, hence unable to understand the nature of the act or that what he was doing was either wrong or contrary to law. Reliance was placed by Mr. Venkatarmani upon the deposition of CW2 Dr. R. Chandrasekaran in support of his submission that the appellant was not an insane person at the time of the incident or at the

time he was tried for the offences committed by him.

9. There was before the courts below and even before us no challenge to the factual narrative given by the prosecution and the witnesses examined on its behalf. That the appellant lived with his mother, wife and minor child in the house owned by him was not disputed. That he assaulted his wife, who was in family way and caused several injuries to her and to his mother who intervened to save the former is also not in dispute. That injuries were caused even to Abirami who succumbed to the same was also not challenged before us by Mr. Mani. The appellant's mother PW3, no doubt turned hostile at the trial and tried to attribute the injuries sustained by her to a fall in the house, but the deposition of PW2, the wife of the appellant completely supported the prosecution case and the sequence of events leading to the heartless killing of the innocent child Abirami, who was sleeping in the adjacent room and whose only fault was that she woke up hearing the shrieks and wails of the mother and started crying. That the appellant was arrested from the house from where the injured witnesses PW2 and PW3 and Abirami were removed in an injured condition, was also not disputed. Even independent of the line of arguments adopted by the learned counsel, we are satisfied that there is no reason whatsoever to disbelieve the deposition of Dhanalakshmi, PW2 who unlike Abirami not only suffered the murderous assault but survived to tell the tale in all its details that leave no room for any doubt in our mind about her version being completely reliable. That Shri R. Natarajan, PW1 and Shri J. Ashokan, PW8 also support and corroborate the version of PW2, Dhanalakshmi, only goes to show that it was the appellant and the appellant alone who attacked not only his wife but his daughter of tender age resulting in the death of the later. Superadded to the above is the depositions of PW19, Dr. Ramamurthy, who conducted the post-mortem of the dead body of Abirami and who proved the post-mortem report marked as Ex.P.25 enumerating the injuries found on the body of the unfortunate child. The doctor opined that death was due to

coma as a result of head injuries within 24 to 36 hours prior to post-mortem and that the blunt side of a weapon like M.O.27 could have caused the injuries found on the dead body.

10. Similarly, the deposition of PW16, Dr. Anni Pula Juilet who was posted as Assistant Surgeon in the Government Hospital at Karaikal proved the injury report marked Ex.P19 that listed the injuries sustained by Dhanalakshmi, PW2, as under:

(1) Injury of 3 cms. x 3 cms. Right side of leg.

(2) Injury of 3 cms. x 3 cms. Lt. side of elbow.

(3) Injury on left side of forearm of 7 cms. x 7 cm. Suspected fracture on it. Forearm.

(4) Injury Lt. side of hand 3 cms. x 3 cms.

(5) Injury Lt. Side of hand 3 cms. x 3 cms.

(6) Injury on the palm.

(7) Injury all the fingers.

(8) Injury chest 4 cms. x 4 cms.

(9) 24 weeks foetus.

(10) Injury face angle from Lt. Side measuring 7 cms. x 7 cms.

(11) Injury scale back side of 8 cms. x 8 cms.

(12) Deep cut on the scale 10 cms. x 12 cms. Deep cut extending to the back 3 cms. x 3 cms.

(13) Abrasion frontal side of scalp.

(14) Injury Rt. Side of the hand. Lacerated injury Rt. Index finger extending bone.

(15) Deep cut injury on the scalp 6 cms. x 6 cms.

11. Injuries found on the person of PW3, the mother of the appellant were described in Ex.P20 proved by the same witness, as under:

(1) Cut injury Lt. Side of forearm hand.

(2) Cut injury Rt. Side of hand near the Wrist 7 cms. x 6 cms.

(3) Deep cut injury on the forehead 5 cms. x 5 cms. Lt. Side above ridge bone.

(4) Deep cut injury Lt. Side of forearm 7 cms. x 7 cmx. near wrist.

(5) Deep cut injury on the Lt. Side of forearm 5 cms. x 5 cms.

(6) Deep cut injury on the scalp exposing the bones about 16 cms. x 16 cms.

12. PW15, Dr. Shriramulu, was the Assistant Surgeon in the General Hospital at Karaikal who found 15 injuries on the person of PW2, stated that PW2 remained admitted to the hospital from 12th December, 2000 till 28th January, 2001. According to him the appellant's mother PW3 had also suffered six injuries and her little and index fingers in the right hand had been amputated in the course of treatment on 8th January, 2001.

13. In the light of the above evidence and in the absence of any challenge to the veracity of the witnesses produced by the prosecution we have no manner of doubt in our mind that the appellant alone was responsible for the assault on his wife PW2, Dhanlakshmi and baby Abrami who lost her life as a result of the injuries sustained by her in the said incident. Left at that there can be no escape from the conclusion that the appellant was guilty of committing culpable homicide of his daughter Abirami aged about 1½ year and an attempt to commit the murder of his wife Dhanlakshmi, even if the assault on the mother of the appellant is taken as doubtful on account of the injured turning hostile at the trial and attempting to attribute the injuries sustained by her to a fall.

14. The question, however, is whether the appellant was

entitled to the benefit of Section 84 of Indian Penal Code which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or who is incapable of knowing that what he is doing, is either wrong or contrary to law. Before adverting to the evidence on record as regards the plea of insanity set up by the appellant, we consider it necessary to refer to two aspects that bear relevance to cases where a plea of insanity is raised in defence by a person accused of a crime. The first aspect concerns the burden of proving the existence of circumstances that would bring the case within the purview of Section 84 of the I.P.C. It is trite that the burden of proving the commission of an offence is always on the prosecution and that the same never shifts. Equally well settled is the proposition that if intention is an essential ingredient of the offence alleged against the accused the prosecution must establish that ingredient also. There is no gainsaying that intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implies that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 of the IPC lies squarely upon the person claiming the benefit of that provision. Section 105 of the Evidence Act is in this regard relevant and may be extracted:

> "105. Burden of proving that case of accused comes within exceptions.-When a person is accused of any offence, the burden of proving the existence of circumstances bringing

the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

15. A careful reading of the above would show that not only is the burden to prove an exception cast upon the accused but the Court shall presume the absence of circumstances which may bring his case within any of the general exceptions in the Indian Penal Code or within any special exception or provision contained in any part of the said Code or in law defining the offence. The following passage from the decision of this Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,* (1964) 7 SCR 361 may serve as a timely reminder of the principles governing burden of proof in cases where the accused pleads an exception:

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:

(*1*) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (*2*) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (*3*) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case

the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

16. The second aspect which we need to mention is that the standard of proof which the accused has to satisfy for the discharge of the burden cast upon him under Section 105 (supra) is not the same as is expected of the prosecution. A long line of decisions of this Court have authoritatively settled the legal proposition on the subject. Reference in this connection to the decision of this Court in *State of U.P. v. Ram Swarup and Anr.,* (1974) 4 SCC 764 should suffice where this court observed:

"The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in his favour."

17. To the same effect is the decision of this Court in *Bhikari v. State of Uttar Pradesh* (AIR 1966 SC 1).

18. Let us now consider the material on record in the light of the above propositions to determine whether the appellant had discharged the burden of bringing his case under Section 84 of the IPC. The appellant has led no evidence in defence to support the plea of legal insanity. That may be a significant aspect but by no means conclusive, for it is open to an accused to rely upon the material brought on record by the prosecution to claim the benefit of the exception. Evidence in defence may be a surplusage in cases where the defence can make out a case for the acquittal of the accused based on the evidence adduced by the prosecution.

19. What falls for consideration in the light of the above is whether the present is one such case where the plea of insanity - is proved or even probablised by the evidence led by the

prosecution and the court witnesses examined at the Trial. Depositions of two prosecution witnesses viz. PW2, Dhanalakshmi and PW3, Valli immediately assume significance to which we may at this stage refer. PW2, Dhanalakshmi has, apart from narrating the sequence of events leading to the incident, stated that her husband is a government servant getting a monthly salary of Rs.4000/- which he would hand over to the witness to meet the household expenses. She further stated that the couple had a peaceful married life for five years but there was a dispute between the appellant and his maternal uncle by name Kannan in regard to the property a part of which the appellant had already sold and the remainder he wanted to sell. The appellant had according to the witness started the quarrel around 12 p.m. but assaulted her an hour later. The witness further stated that for sleeplessness, the appellant used to take some medicine but she did not recall the name of the Clinic from where he was taking the treatment. According to the witness, the Psychiatrist who was treating the appellant had diagnosed his medical condition to be the effect of excessive drinking and advised that if the appellant took the medicines regularly he would get cured.

20. That brings us to the deposition of PW3, Smt. Valli, the mother of the appellant. This witness has in cross-examination stated that the appellant was working as a Watchman at PWD bungalow and that she used to deliver his lunch at the appellant's office. She also referred to the dispute between the appellant and his paternal uncle regarding family properties in which connection he had filed a complaint to the police station. On the date of the incident, the family had their dinner at around 9 p.m. and gone to bed. But the couple started quarreling around 1 p.m. leading to an assault on PW2, Dhanalakshmi. The witness stated that the appellant was undergoing treatment with a Psychiatrist in a clinic situated at Perumal Kovi street and that the doctor had diagnosed the appellant to be a case of mental disorder because of which he could get angry very often.

21. From the deposition of the above two witnesses who happen to be the close family members of the appellant it is not possible to infer that the appellant was of unsound mind at the time of the incident or at any time before that. The fact that the appellant was working as a government servant and was posted as a Watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant. Equally important is the fact that his spouse Smt. Dhanalakshim who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The deposition of PW3, Valli that her son was getting treatment for mental disorder is also much too vague and deficient for this Court to record a finding of unsoundness of mind especially when the witness had turned hostile at the trial despite multiple injuries sustained by her which she tried to attribute to a fall inside her house. The statement of the witness that her son was getting treatment for some mental disorder cannot in the circumstances be accepted on its face value, to rest an order of acquittal in favour of the appellant on the basis thereof. It is obvious that the mother has switched sides to save her son from the consequences flowing from his criminal act.

22. That leaves us with the deposition of two medical experts who examined the appellant under the orders of the Court during the course of the trial. Dr. B. Srinivasan, Specialist in Psychiatry, in his deposition stated that the appellant was admitted to the government hospital, Karaikal on 29th July, 2002 pursuant to an order passed by the Trial Court directing his medical examination so as to evaluate his mental condition and ability to converse. The witness further stated that the appellant was kept under observation on and from the afternoon of 29th July 2000 till 6th August, 2002 during which time he found him to be conscious, ambulant dressed adequately and able to converse with the examiner. The doctor has described the condition of the appellant during this period in the following

words:

"He has restlessness, suspicious looking around at time inappropriate smile has complaints of some innervoice telling to him (abusive in nature at times), has fear and worries about others opinion about him, wants to be left alone, says he needs a few pegs of alcohol to sleep peacefully at night. He has confusion at times about the whisper within him, feels some pulling connection between his chest and brain, that prevents him from taking freely with people and with the examiner. I am of the opinion that the above individual is of unsound mind. The possible medical dispenses being psychosis: (The differential diagnosis considered in this case are

1. Paranoid Psychosis (Schizophrenia)
2. Substance induced Psychosis (Alcohol induced)
3. Organic Psychosis /organic mental disorder

(Head injury sequelae & personality changes)

I, therefore, request this Hon'ble Court be kindly arrange for a second opinion by another consultant Psychiatrist in this case and also Psychological assessment by a clinical psychologist."

(Emphasis supplied)

23. The appellant was, in the light of the recommendations made by Dr. B. Srinivasan referred to JIPMAR hospital at Pondicherry, where he remained under the observation of Dr. R. Chandrashekhar, CW2 who happened to be Professor and Head of the Department of Psychiatry in that Hospital. In his deposition before the Court Dr. Chandrashekhar has stated that the appellant was admitted on 30th September, 2002 but escaped from the hospital on 1st October, 2002 in which connection the doctor made a report marked Ex.P1. After examining the relevant record the witness deposed that the appellant did not have any Psychataxia symptoms. In the detailed report proved by the witness and marked Ex.P2 the

medical condition of the appellant is described as under:

"He was well groomed. Rapport was established. No abnormal motoric behavior was present. He was cooperative. His mood appeared euthymic and speech was normal. There was no evidence of formal thought disorder or disorder of possession or thought content. No perceptual disorder was evident. Attention was arousable and concentration well sustained. He was oriented to time, place, person. The immediate recall, recent and remote memory was intact. Abstraction was at functional level. Judgement was preserved. Insight was present."

24. In the final report the doctor has drawn the following pen picture about the appellant's mental health and psycho-diagnostic evaluation.

PSYCHO-DIAGOSTIC EVALUATION:

Patient's perception, memory and intelligence were slightly impaired (Memory Quotient was 70 and performance quotient was 72). Mixed psychotic picture with predominantly affective disturbances was seen. He requires further support and guidance in occupational area.

The examination is suggestive of a life time diagnosis of Psychosis (not otherwise specified) and currently in remission. Patient was on treatment with vitamins and chlorpromazine 100 mg. per day during his stay in the ward. The course in the hospital was uneventful except for the fact that he absconded from the ward on 1.10.2002. *I am of the opinion that the above individual does not currently suffer from any mental symptom, which can interfere with the capability of making his defense.*

Sd/- XXX

(DR. R. CHANDRASHKARAN)

H/D of Psychiatry

Dt. 5th October, 2002. JIPMER,

Pondicherry-6. "

25. What is important is that the depositions of the two doctors examined as court witnesses during the trial deal with the mental health condition of the appellant at the time of the examination by the doctors and not the commission of the offence which is the relevant point of time for claiming the benefit of Section 84 I.P.C. The medical opinion available on record simply deals with the question whether the appellant is suffering from any disease, mental or otherwise that could prevent him from making his defence at the trial. It is true that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. No such evidence has been led in this case. On the contrary expert evidence comprising the deposition and certificates of Dr. Chandrashekhar of JIPMER unequivocally establish that the appellant did not suffer from any medical symptoms that could interfere with his capability of making his defence. There is no evidence suggesting any mental derangement of the appellant at the time of the commission of the crime for neither the wife nor even his mother have in so many words suggested any unsoundness of mind leave alone a mental debility that would prevent him from understanding the nature and consequences of his actions. The doctor, who is alleged to have treated him for insomnia, has also not been examined nor has anyone familiar with the state of his mental health stepped into the witness box to support the plea of insanity. There is no gainsaying that insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned. Non-production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant in that view is noteworthy. Suffice it to say that the plea of insanity taken by the appellant was neither substantiated nor probablised.

26. Mr. Mani, as a last ditch attempt relied upon certain

observations made in Mahazar Ex.P3 in support of the argument that the appellant was indeed insane at the time of commission of the offences. He submitted that the Mahazar referred to certain writings on the inner walls of the appellant's house which suggested that the appellant was insane. A similar argument was advanced even before the Courts below and was rejected for reasons which we find to be fairly sound and acceptable especially when evidence on record establishes that the appellant was an alcoholic, who could scribble any message or request on the walls of his house while under the influence of alcohol. The Courts below were, therefore, justified in holding that the plea of insanity had not been proved and the burden of proof cast upon the appellant under Section 105 of the Evidence Act remained undischarged. The High Court has also correctly held that the mere fact that the appellant had assaulted his wife, mother and child was not ipso facto suggestive of his being an insane person.

27. So, also the fact that he had not escaped from the place of occurrence was no reason by itself to declare him to be a person of unsound mind incapable of understanding the nature of the acts committed by him. Experience has shown that different individuals react differently to same or similar situations. Some may escape from the scene of occurrence, others may not while some may even walk to the police station to surrender and report about what they have done. Such post event conduct may be relevant to determine the culpability of the offender in the light of other evidence on record, but the conduct of not fleeing from the spot would not in itself show that the person concerned was insane at the time of the commission of the offence.

28. That brings us to the nature of offence committed by the appellant and the quantum of sentence that would meet the ends of justice. The courts below have found the appellant guilty of murder of baby Abirami and awarded a life sentence to the appellant apart from 10 years rigorous imprisonment for the offence of attempt to murder Dhanalakshmi and imprisonment

of one year under Section 342 of the I.P.C. In the circumstances of the case we see no reason to alter the conviction or sentence under Section 342 of the I.P.C. We also see no reason to interfere with the conviction of the appellant under Section 307 of the I.P.C. except that instead of 10 years rigorous imprisonment of 7 years, should in our view suffice. The conviction of the appellant under Section 302 of the I.P.C. is not, however, justified. We say so for reasons more than one. In the first place there was no pre-meditation in the assault upon the deceased. The evidence on record shows that the family had gone to bed after dinner around 9 p.m. The quarrel between the appellant husband and Dhanalakshmi his wife started around 12 midnight and escalated into an assault on the later around one a.m. That the quarrel was sudden and without any premeditation, is evident from the deposition of the two injured witnesses.

29. Secondly, because in the assault following the quarrel, the appellant used a sharp edged cutting weapon against his wife and mother. Incised wounds sustained by the said two ladies bear testimony to this part of the prosecution case. The deceased Abirami was at this stage of the occurrence, in another room wholly unconnected to the incident.

30. Thirdly, because the appellant had because of the sudden fight with his wife assaulted her in the heat of passion and injured his mother who intervened to save her. The noise and wails of the injured woke up the deceased sleeping in the adjacent room who started crying thereby attracting the appellant's attention towards her.

31. Fourthly, because the assault on the deceased caused only two injuries with a resultant fracture. The injuries were described by the doctor as under:

> "1. Lacerated injury measuring 2 x 0.5 cm. x 0.5 cm. Seen on middle of (R) Eyebrow. Lesion covered with blood clots.
>
> 2. Contusion – faint reddish blue in colour seen on (L) side of face and temporal region of head. 8 cm. x 8 cm. inside. Lesions are antemortem in nature. Faint suggilations fixed on back of trunk."

32. Fifthly, because the appellant did not evidently use the sharp edged weapon for causing injuries to the deceased as he had done in the case of Dhanalakshmi and Valli, PWs 2 and 3 respectively. In the circumstances we are inclined to hold that there was no intention on the part of the appellant to cause the death of the deceased, though looking to the nature of the injuries suffered by the deceased, the appellant must be presumed to have the knowledge that the same were likely to cause death. The fact remains that the appellant committed culpable homicide without premeditation in a sudden fight and in the heat of passion. The fact that the appellant did not use the sharp edged weapon with which he was armed also shows that he did not act in a cruel or unusual manner nor did he take an undue advantage. It is evident from the deposition of Dhanalakshmi, that she did not see the appellant assaulting the deceased. It is, therefore, just possible that a hard blow given to the deceased by his bare hand itself threw the child down from the bed causing the injuries that proved fatal.

33. In the result, we allow this appeal in part, and in modification of the judgments and orders under appeal convict the appellant under section 304 Part-II and sentence him to undergo rigorous imprisonment for a period of ten years. The reduced sentence of seven years rigorous imprisonment awarded to the appellant for the offence of attempt to murder and one year rigorous imprisonment for the offence punishable under Section 342 I.P.C. shall all run concurrently with the sentence awarded under Section 304-Part II. The sentence awarded in default of payment of fine shall stand affirmed. The appellant shall be entitled to the benefit of Section 428 of the Criminal Procedure Code.

B.B.B. Appeal partly allowed.

##NEXT FILE

FUERST DAY LAWSON LTD.

v.

JINDAL EXPORTS LTD.

(SLP (C) No. 11945 of 2010)

JULY 8, 2011

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

Arbitration and Conciliation Act, 1996 – ss.50 and 49 – Whether an order, though not appealable under s.50 of the 1996 Act, would nevertheless be subject to appeal under the relevant provision of the Letters Patent of the High Court – Held: No letters patent appeal will lie against an order which