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 is not appealable under s.50 of the 1996 Act – Conclusion regarding exclusion of letters patent appeal arrived at in two different ways; one, so to say, on a micro basis by examining the scheme devised by ss. 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under s.6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself – Where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded – Foreign Awards (Recognition and Enforcement) Act, 1961 – s.6 – Letters Patent.

Arbitration and Conciliation Act, 1996 – Part I and Part II of the Act – Difference between – Held: Part I and Part II of the Act are quite different in their object and purpose and the respective schemes.

Arbitration and Conciliation Act, 1996 – ss.37 and 50 – Appellate provision u/s.37 and u/s.50 – Difference between – Held: s.37 in Part I of the Act (analogous to s.39 of the 1940 Act) is not comparable to s.50 in Part II of the Act – s.37 and s.50 are not comparable because they belong to two different

statutory schemes – s.37 containing the provision of appeal is part of a much larger framework that has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration – s.50 on the other hand contains the provision of appeal in a much limited framework, concerned only with the enforcement of New York Convention awards – In one sense, the two sections, though each containing the appellate provision belong to different statutes.

Arbitration and Conciliation Act, 1996 – Part II, Chapter I – Provisions of, compared with the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961.

The question that arose for consideration in the present batch of cases was whether an order, though not appealable under section 50 of the Arbitration and Conciliation Act, 1996, would nevertheless be subject to appeal under the relevant provision of the Letters Patent of the High Court i.e. in other words, whether, even though the Arbitration Act does not envisage or permit an appeal from the order, the party aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction.

Dismissing appeals arising from SLP (C) No.31068 of 2009 and SLP (C) No.4648 of 2010 and allowing Civil appeal no.36 of 2010, the Court

HELD:1. A correct answer to the question under consideration would depend upon how the Arbitration and Conciliation Act, 1996 is to be viewed. Do the provisions of the 1996 Act constitute a complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award? If the answer to the question is in the affirmative then, obviously, all other jurisdictions, including the letters patent jurisdiction of the High Court would stand excluded. [Paras 3, 4] [11-F-G; 12-A-B]

2.1. Before the coming into force of the Arbitration and Conciliation Act, 1996 with effect from August 16, 1996, the law relating to domestic arbitration was contained in the Arbitration Act, 1940, which in turn was brought in place of the Arbitration Act, 1899. Apart from the Arbitration Act 1940, there were two other enactments of the same genre. One called the Arbitration (Protocol and Convention) Act, 1937 (for execution of the Geneva Convention Awards) and the other called the Foreign Awards (Recognition and Enforcement) Act, 1961 (for enforcement of the New York Convention awards). The aforesaid three Acts were replaced by the Arbitration and Conciliation Act, 1996, which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model and is broadly compatible with the "Rules of Arbitration of the International Chamber of Commerce". The Arbitration and Conciliation Act, 1996 that has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961, consolidates and amends the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and defines the law relating to conciliation and provides for matters connected therewith and incidental thereto taking into account the UNCITRAL MODEL law and Rules. [Paras 43, 44, 45] [31-G-H; 32-A-F]

2.2. The 1996 Act is a loosely integrated version of the Arbitration Act, 1940, Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. It actually consolidates amends and puts together three different enactments. But having regard to the difference in the object and purpose and the nature of these three enactments, the provisions relating thereto are kept separately. A mere glance at the 1996 Act is sufficient to show that under its scheme the provisions relating to the three enactments are kept separately from each other. The 1996 Act is

divided into four parts and it has three schedules at its end. Part I has ten chapters that contain provisions governing domestic arbitration and international commercial arbitration. Part II has two chapters; Chapter I contains provisions relating to the New York Convention Awards and Chapter II contains provisions relating to the Geneva Convention Awards. Part III of the Act has provisions concerning conciliation. Part IV has the supplementary provisions such as the power of the High Court to make rules (section 82), provision for removal of difficulties (section 83), and the power to make rules (section 84). At the end there are two repeal and saving sections. Section 85 repeals the three enactments referred to above, subject to the appropriate saving clause and section 86 repeals Ordinance 27 of 1996, the precursor of the Act, subject to the appropriate saving clause. Of the three schedules, the first is related to Part II, Chapter I, i.e., the New York Convention Awards and the second and the third to Chapter II, i.e., the Geneva Convention Awards. [Para 48] [36-C-H; 37-A]

2.3. There is a certain similarity between the provisions of Chapters I and II of Part II but Part I of the Act is vastly different from Chapters I and II of Part II of the Act. This is quite understandable too since Part II deals only with enforcement of foreign awards (Chapter I, of New York Convention Awards and Chapter II, of Geneva Convention Awards) while Part I of the Act deals with the whole gamut of law concerning domestic arbitration and international commercial arbitration. It has, therefore, a very different and much larger framework than the two chapters in Part II of the Act. [Para 49] [37-B-C]

2.4. It is also evident that Part I and Part II of the Act are quite separate and contain provisions that act independently in their respective fields. The opening

words of section 2, i.e. the definition clause in Part I, make it clear that meanings assigned to the terms and expressions defined in that section are for the purpose of that part alone. Section 4 which deals with waiver of right to object is also specific to Part I of the Act. Section 5 dealing with extent of judicial intervention is also specific to Part I of the Act. Section 7 that defines "arbitration agreement" in considerable detail also confines the meaning of the term to Part I of the Act alone. Section 8 deals with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision too is relatable to Part I alone (corresponding provisions are independently made in sections 45 and 54 of Chapter I and II, respectively of Part II). The other provisions in Part I by their very nature shall have no application insofar as the two chapters of Part II are concerned. Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective schemes, it naturally follows that section 37 in Part I (analogous to section 39 of the 1940 Act) is not comparable to section 50 in Part II of the Act. This is not because, as appellant contends section 37 has the words in parentheses "and from no others" which are not to be found in section 50 of the Act. Section 37 and section 50 are not comparable because they belong to two different statutory schemes. Section 37 containing the provision of appeal is part of a much larger framework that has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration. Section 50 on the other hand contains the provision of appeal in a much limited framework, concerned only with the enforcement of New York Convention awards. In one sense, the two sections, though each containing the appellate provision belong to different statutes. [Paras 51, 52] [37-G-H; 38-A-G]

2.5. A comparison of the provisions of Chapter I of

Part II of the 1996 Act and the provisions of the Foreign Awards (Recognition and Enforcement Act), 1961, would show that section 44, the definition clause in the 1996 Act is a verbatim reproduction of section 2 of the previous Act (but for the words "chapter" in place of "Act", "first schedule" in place of "schedule" and the addition of the word "arbitral" before the word "award" in section 44). Section 45 corresponds to section 3 of the previous Act. Section 46 is a verbatim reproduction of section 4(2) except for the substitution of the word "chapter" for "Act". Section 47 is almost a reproduction of section 8 except for the addition of the words "before the court" "in sub-section (1)" and an explanation as to what is meant by "court" in that section. Section 48 corresponds to section 7; section 49 to section 6(1) and section 50 to section 6(2). Apart from the fact that the provisions are arranged in a far more orderly manner, it is to be noticed that the provisions of the 1996 Act are clearly aimed at facilitating and expediting the enforcement of the New York Convention Awards. Section 3 of the 1961 Act dealing with a stay of proceedings in respect of matters to be referred to arbitration was confined in its application to "legal proceedings in any court" and the court had a wider discretion not to stay the proceedings before it. The corresponding provision in section 45 of the present Act has a wider application and it covers an action before any judicial authority. Further, under section 45 the judicial authority has a narrower discretion to refuse to refer the parties to arbitration. Under section 4(1) of the 1961 Act, a foreign award for its enforcement was first deemed to be an award made on a matter referred to arbitration in India. Section 46 of the present Act dispenses with the provision of sub-section (1) of section 4 and resultantly a foreign award is enforceable in its own right. Section 47 is almost a reproduction of section 8 except for the addition of the words "before the court" in sub-section (1) and an explanation as to what

is meant by "court" at the end of the section. Section 49 corresponds to section 6(1) and section 50 to section 6(2). It is however, a comparison of section 6 of the 1961 Act with section 49 of the present Act that provides a direct answer to the question under consideration. Under section 6 of the 1961 Act, the Court on being satisfied that the foreign award was enforceable under the Act, would first order the award to be filed and then proceed to pronounce judgment according to the award. The judgment would lead to a decree against which no appeal would lie except insofar as the decree was in excess of or not in accordance with the award. Section 49 of the present Act makes a radical change in that where the court is satisfied that the foreign award is enforceable, the award itself would be deemed to be a decree of the Court. It, thus, not only omits the procedural formality for the court to pronounce judgment and a decree to follow on that basis but also completely removes the possibility of the decree being in excess of, or not in accordance with the award. Thus, even the limited basis on which an appeal would lie under sub-section (2) of section 6 of the 1961 Act, is taken away. There is, thus, no scope left for an appeal against an order of the court for the enforcement of a foreign award. It is for this reason that section 50(1)(b) provides for an appeal only against an order refusing to enforce a foreign award under section 48. There can be no doubt that under section 6, except on the very limited ground, no appeal including a Letters Patent Appeal was maintainable against the judgment and decree passed by the Court under section 6(1). It would be futile, therefore, to contend that though the present Act even removes the limited basis on which the appeal was earlier maintainable, yet a Letters Patent Appeal would lie notwithstanding the limitations imposed by section 50 of the Act. The scheme of sections 49 and 50 of the 1996 Act is devised specially to exclude even the limited ground on which an appeal was earlier

provided for under section 6 of the 1961 Act. The exclusion of appeal by section 50 is, thus, to be understood in light of the amendment introduced in the previous law by section 49 of the Act. [Paras 55, 56, 57, 58, 59] [39-B-C; 48-F-H; 49-A-E; 50-E-H; 51-A-B]

2.6. There is another way to look at the matter. It is seen that the Arbitration Act 1940, from its inception and right through 2004 (in *P.S. Sathappan's* case) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded. [Paras 60, 72] [51-C; 61-E-H; 62-A]

Orma Impex Pvt. Ltd. v. *Nissai ASB PTE Ltd.* **(1999) 2 SCC 541;** *State of West Bengal v. M/s Gourangalal Chatterjee* **(1993) 3 SCC 1: 1993 (3) SCR 640;** *Union of India* v. *Mohindra Supply* Co. **1962 (3) SCR 497;** *Vinita M. Khanolkar* v. *Pragna M. Pai & Ors.* **(1998) 1 SCC 500: 1997 (5) Suppl. SCR 593;** *National Sewing Thread Co. Ltd.* v. *James Chadwick and Bros. Ltd.* **AIR 1953 SC 357: 1953 SCR 1028;** *Union of India & Ors.* v. *Aradhana Trading Co.* **(2002) 4 SCC 447: 2002 (2) SCR 847;** *Sharda Devi* v. *State of Bihar* **(2002) 3 SCC 705: 2002 (2) SCR 404;** *Basant Kumar* v. *Union of*

India **(1996) 11 SCC 542: 1996 (6) Suppl. SCR 231;** *South Asia Industries (P) Ltd.* v. *S.B. Sarup Singh* **(1965) 2 SCR 756;** *Subal Paul* v. *Malina Paul & Anr.* **(2003) 10 SCC 361: 2003 (1) SCR 1092;** *P.S. Sathappan* v. *Andhra Bank Ltd. & Ors.* **(2004) 11 SCC 672: 2004 (5) Suppl. SCR 188;** *Hurrish Chunder Chowdry v. Kali Sundari Debia* **ILR (1882) 9 Cal. 482 (PC);** *Resham Singh Pyara Singh v. Abdul Sattar* **(1996) 1 SCC 49: 1995 (5) Suppl. SCR 483;** *New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corpn.* **(1997) 3 SCC 462: 1997 (1) SCR 395;** *Chandra Kanta Sinha* v. *Oriental Insurance Co. Ltd. & Ors.* **(2001) 6 SCC 158: 2001 (3) SCR 759;** *Gauri Singh* v. *Ramlochan Singh* **AIR (35) 1948 Patna 430;** *Belli Gowder* v. *Joghi Gowder* **AIR (38) 1951 Madras 683;** *Narbadabai and Ors.* v. *Natverlal Chunilal Bhalakia & Anr.* **AIR 1953 Bombay 386;** *S.N. Srikantia & Co.* v. *Union of India and Anr.* **AIR 1967 Bombay 347 – referred to.**

3. The conclusion regarding the exclusion of a letters patent appeal has thus been arrived at in two different ways; one, so to say, on a micro basis by examining the scheme devised by sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself. It must be held that no letters patent appeal will lie against an order which is not appealable under section 50 of the Arbitration and Conciliation Act, 1996. [Paras 73, 74] [62-B-D]

Case Law Reference:

(1999) 2 SCC 541	**Referred to.**	**Para 8**
1993 (3) SCR 640	**Referred to.**	**Para 9**
1962 (3) SCR 497	**Referred to.**	**Para 9**

1997 (5) Suppl. SCR 593	**Referred to.**	**Para 9**
1953 SCR 1028	**Referred to.**	**Para 9**
2002 (2) SCR 847	**Referred to.**	**Para 10**
2002 (2) SCR 404	**Referred to.**	**Para 18**
1996 (6) Suppl. SCR 231	**Referred to.**	**Para 18**
(1965) 2 SCR 756	**Referred to.**	**Para 18**
2003 (1) SCR 1092	**Referred to.**	**Para 20**
2004 (5) Suppl. SCR 188	**Referred to.**	**Para 22**
ILR (1882) 9 Cal. 482 (PC)	**Referred to.**	**Para 23**
1995 (5) Suppl. SCR 483	**Referred to.**	**Para 26**
1997 (1) SCR 395	**Referred to.**	**Para 26**
2001 (3) SCR 759	**Referred to.**	**Para 26**
AIR (38) 1951 Madras 683	**Referred to.**	**Para 63**
AIR 1953 Bombay 386	**Referred to.**	**Para 64**
AIR 1967 Bombay 347	**Referred to.**	**Para 66**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 11945 of 2010.

From the Judgment & Order dated 11.12.2009 of the High Court of Delhi at New Delhi in OMP No. 29 of 2003.

WITH

SLP (C) Nos. 13625, 13626-13629 and 22318-22321 of 2010, C.A. Nos. 36 of 2010, 5156 and 5157 of 2011.

Dushyant Dave, C.A. Sundaram, Mukul Rohatgi, S.K. Bagaria, Jaideep Gupta, Debal Kr. Banerji, Sangeeta Bharti, Nidhi Minocha (for Subramonium Prasad), Narendra M.

Sharma, Rohini Musa, Abhishek Sharma, Zafar Inayat, Yogesh V. Kotemath, Mallika, Jaiveer Shergill, Praveen Kumar, Siddhartha Dave, Vibha Datta Makhija, Jemtiben AO, E.C. Agrawala, Ramesh Singh, Anne Mathew, Suman Jyoti Khaitan, Rishi Maheshwari, Ashwani Kumar, Sharmila Upadhyay, Gagan Gupta, Suresh A. Shroff & Co., S. Niti Dixit, Darpan Wadhwa, Vidur Bhatia, Pradeep Misra, Roopa Dayal, Taniya Khare, Aradhana Patra, A.T. Patra (for O.P. Khaitan & Co), Kush Chaturvedi, Prerna Priyadarshini, Pinaki Addey, Chiraranjan Addey, Manav Ujla, Bina Gupta, Jayant Kumar Mehta for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted in SLP (C) No.31068 of 2009 and SLP (C) No.4648 of 2010.

2. The common question that arises for consideration by the Court in this batch of cases is whether an order, though not appealable under section 50 of the Arbitration and Conciliation Act, 1996 (hereinafter "1996 Act"), would nevertheless be subject to appeal under the relevant provision of the Letters Patent of the High Court. In other words even though the Arbitration Act does not envisage or permit an appeal from the order, the party aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction.

3. Mr. C.A. Sundaram, senior advocate, however, who led the arguments on behalf of the appellants, would like to frame the question differently. He would ask whether there is any provision in the 1996 Act that can be said to exclude the jurisdiction of the High Court under its Letters Patent either expressly or even impliedly. He would say that the jurisdiction of the High Court under the Letters Patent is an independent jurisdiction and as long as the order qualifies for an appeal under the Letters Patent an appeal from that order would be, undoubtedly, maintainable before the High Court.

4. A correct answer to both the questions would depend upon how the 1996 Act is to be viewed. Do the provisions of the 1996 Act constitute a complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award? If the answer to the question is in the affirmative then, obviously, all other jurisdictions, including the letters patent jurisdiction of the High Court would stand excluded but in case the answer is in the negative then, of course, the contention of Mr. Sundaram must be accepted.

5. The batch presently before the Court originally consisted of nine cases, out of which SLP (C) No.16908 of 2010 ended in compromise between the parties. Of the remaining eight cases, SLP (C) No.13625 of 2010 and SLP (C) No.11945 of 2010 are unrelated and have been wrongly put in this batch. These two SLPs are filed against a common judgment passed by a single judge of the Delhi High Court insofar as though allowing the petitioners' application for enforcement of two foreign awards, the High Court declined to pass any order for payment of interest on the awarded amounts payable to the petitioners. These two cases are, therefore, directed to be de-tagged and listed separately. This leaves behind six cases. At the conclusion of hearing, one of the cases, being SLP (C) No.31067 of 2009 was directed, on the prayer made by the counsel for the petitioner, to be de-linked from the batch and to be listed separately. It, however, appears that the direction was wrongly obtained since that case and another case in the batch, SLP (C) No.31068 of 2009 arise from a common order and SLP (C) No.31067 of 2009 would also be fully governed by this judgment. Be that as it may, the direction for de-linking is already made and, hence, that case will be separately listed and dealt with in due course. Of the remaining five cases four come from the Delhi High Court and one from the Calcutta High Court. In SLP (C) No.4648 of 2010 and SLP (C) No.31068 of 2010, the applications filed by the respective respondents in these cases, for enforcement of the foreign award in their favour

were allowed by orders passed by a single judge of the High Court. Against the orders of the single judge, the petitioners in these SLPs filed appeals before the division bench of the High Court. All the appeals were taken together and dismissed by a common order as not maintainable. The petitioners have come before this Court against the order passed by the division bench only, on the question of maintainability of their appeals. Civil Appeal No.36 of 2010 coming from the Calcutta High Court is opposite of the aforementioned two SLPs coming from the Delhi High Court. In this case, against an order passed by a single judge of the High Court, by which he granted relief for enforcement of a foreign award, an appeal was preferred before the division bench of the High Court. The appeal was admitted but a preliminary objection was raised in regard to its maintainability in view of section 50 of the 1996 Act. The division bench by order dated May 8, 2007 rejected the preliminary objection holding that the appeal was maintainable.

6. In SLP (C) Nos.22318-22321 of 2010 a single judge of the Delhi High Court dismissed the suit filed by the petitioner and allowed the application filed by defendant nos.3-5 referring the parties to arbitration in terms of section 45 of the 1996 Act. The petitioner's appeal before the division bench was dismissed as not maintainable. The SLP (C) Nos. 22318-22321 of 2010 are filed under Article 136 of the Constitution challenging orders passed by both the division bench and the single judge of the High Court.

7. The petitioner in SLP (C) Nos.13626-13629 of 2010 is the respondent in SLP (C) No.13625 of 2010 and SLP (C) No.11945 of 2010 which have been held to be unrelated to the batch. Against the order passed by a single judge of the High Court for enforcement of two foreign awards against it, the petitioner in SLP (C) Nos.13626-13629 of 2010, first preferred an appeal before the division bench of the High Court, but the appeal was dismissed by the division bench as not maintainable. The present SLPs are filed challenging both the

orders passed by the single judge and the division bench.

8. At the outset Mr. C.A. Sundaram, submitted that the proper course would be to refer the matter to a larger bench of three judges. He pointed out that in *Orma Impex Pvt. Ltd.* v. *Nissai ASB PTE Ltd.*, (1999) 2 SCC 541, the same question was earlier referred to a bench of three judges of this Court. The Court, however, did not have the occasion to decide the case because it was withdrawn following a settlement between the parties. Mr. Sundaram submitted that though the case does not survive, the issue arising in it (which is the same as in this batch of cases) continues to be alive and hence, following the referral in *Orma Impex Pvt. Ltd.* (which was in the form of 'Record of Proceedings' and not an order of the Court!), all these cases should be referred for hearing before a bench of three judges of this Court. Mr. Dushyant Dave, learned senior advocate appearing for the respondents, in some of the cases in the batch, strongly opposed Mr. Sundaram's submission and contended that there was no need to refer the cases to any larger bench.

9. In *Orma Impex Pvt. Ltd.*, the Delhi High Court had taken the view that against the order passed by a single judge of the High Court under section 45, refusing to refer parties to arbitration, no further appeal would lie under section 50 of the 1996 Act. In the special leave petition filed against the order of the High Court, a bench of two judges of this Court observed that the High Court had failed to notice section 10 of the Delhi High Court Act, 1996 and clause 10 of the Letters Patent which applies to the Delhi High Court. It further observed that though the view taken by the High Court was supported by a two judge bench decision of this Court in *State of West Bengal v. M/s Gourangalal Chatterjee*, (1993) 3 SCC 1, which in turn had relied upon an earlier decision of the Court in *Union of India* v. *Mohindra Supply* Co., 1962 (3) SCR 497, a contra view was taken by the Court in *Vinita M. Khanolkar* v. *Pragna M. Pai & Ors.*, (1998) 1 SCC 500. There, thus, appeared a conflict of

decisions on the question. In support of the contra view, the division bench also referred to an earlier decision by a three judge bench of this Court in *National Sewing Thread Co. Ltd.* v. *James Chadwick and Bros. Ltd.,* AIR 1953 SC 357.

10. Mr. Dave pointed out that neither the decision in *Vinita M. Khanolkar* nor the decision in *National Sewing Thread Co. Ltd.* was rendered under the provisions of the Arbitration Act; the former was in the context of section 6(3) of the Specific Relief Act, 1963 and the latter under the Trade Marks Act, 1940. He further submitted that after the decisions in *Vinita M. Khanolkar* and the referral of *Orma Impex Pvt. Ltd.*, a three judge bench of this Court in *Union of India & Ors.* v. *Aradhana Trading Co.*, (2002) 4 SCC 447, had the occasion to consider the same question, as arising in this batch of cases, though not under the 1996 Act but under the provisions of the Arbitration Act, 1940 (hereinafter "1940 Act"). In *Aradhana Trading Co.* the Court referred to both the decisions in *Vinita M. Khanolkar* and in *National Sewing Thread Co. Ltd.*; the first it did not follow and the second it distinguished as having been rendered on a different set of provisions. Mr. Dave submitted that, thus, the very foundation on which the referral of *Orma Impex Pvt. Ltd.* was based, no longer held good.

11. On hearing the two sides, we are of the view that in the afore-noted facts and circumstances the referral of *Orma Impex Pvt. Ltd.* cannot be said to constitute a binding precedent, especially as the case that was referred no longer survives. In any event we have heard the two sides at great length and we see no good reason why this matter should be referred to a larger bench and not decided by this Court. We, accordingly, proceed to do so.

12. The question regarding the availability of an appeal under the relevant clause of the Letters Patent has engaged the attention of this Court from time to time under different circumstances and in cases arising under different Acts. We take note of some of the cases here that were brought to our

notice by the two sides.

13. In *National Sewing Thread Co. Ltd.*, this Court held that the judgment of a learned single judge of the Bombay High Court, on an appeal preferred under section 76 of the Trade Marks Act was subject to appeal under clause 15 of the Letters Patent of that High Court. The Court noted the material part of clause 15 of the Letters Patent of the High Court and section 76 (1) of the Trade Marks Act and observed:

> "The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed S.77 of the Act provides that the High Court can if it likes make rules in the matter. *Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court."*
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> (emphasis supplied)

14. Taking support for its view from the decisions in (i) *National Telephone Co. Ltd.* v. *Postmaster-General*, (1913) AC 546, (ii) *Adaikappa Chettiar* v. *Chandresekhara Thevar*, AIR 1948 PC 12 and (iii) *Secy. of State for India* v. *Chellikani Rama Rao*, AIR 1916 PC 21, the decision in *National Sewing Thread Co. Ltd.* further observed:

> "Section 76, Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as much of the appellate jurisdiction conferred by S.76 it has to exercise that

jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Cl.15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

15. The Court held that there was nothing in the provisions of section 77 of the Trade Marks Act that would debar the High Court from hearing appeals under section 76, *according to the Rules under which all other appeals are heard or from framing Rules for the exercise of that jurisdiction* under section 108, Government of India Act, 1915, for hearing those appeals by single judges or by division benches. It also negated the submission that the judgment of the learned single judge would not be subject to an appeal under clause 15 of the Letters Patent because it was not delivered pursuant to section 108, Government of India Act.

16. In *Vinita M. Khanolkar*, a bench of two judges of this Court held that notwithstanding the bar of sub-section (3), an order passed by a learned single judge of the High Court under section 6 of the Specific Relief Act would nevertheless be subject to appeal under clause 15 of the Letters Patent of the Bombay High Court. In *Vinita M. Khanolkar*, this Court put the power of the High Court under the Letters Patent at the level of constitutional power of the High Court and went on to observe as follows:

"3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent

is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed."

17. As noted above, *Vinita M. Khanolkar*, was considered in a later three judge bench decision in *Aradhana Trading Co*. One may not go so far as to say that *Aradhana Trading Co.* disapproved *Vinita M. Khanolkar* wholly but it surely took the opposite view on the question in the context of section 39 of the Arbitration Act, 1940.

18. In *Sharda Devi* v. *State of Bihar*, (2002) 3 SCC 705, a bench of three judges of this Court examined the question whether a Letters Patent Appeal is maintainable against the judgment and decree of a single judge of the High Court passed in an appeal preferred under section 54 of the Land Acquisition Act, 1894. A bench of two judges before which the case was earlier put up noticed a conflict of decision on the question. In *Baljit Singh* v. *State of Haryana*, bench of two judges of the Court had held that no Letters Patent Appeal is maintainable against the judgment of a single judge of the High Court on an appeal under section 54 of the Land Acquisition Act, whereas in *Basant Kumar* v. *Union of India*, (1996) 11 SCC 542, a bench of three judges, without adverting to the decision in *Baljit Singh*, held that such an appeal is maintainable. The two judge bench, accordingly, referred the case for hearing before a bench of three judges. The three judge bench affirmed the decision in *Basant Kumar*. It noted that the decision in *Baljit Singh* was based on concession made in light of an earlier decision of this Court in *South Asia Industries (P) Ltd.* v. *S.B. Sarup Singh*, (1965) 2 SCR 756. The decision in *South Asia Industries* was in a case under the Delhi Rent Control Act, 1958. In *Sharda Devi*, the Court pointed out that

in *South Asia Industries,* the Court had examined sections 39 and 43 of the Delhi Rent Control Act and held that a combined reading of the two sections showed that an order passed by the High Court in an appeal under section 39 was to be final. It was held that the provision of finality was intended to exclude any further appeal. This decision was, thus, based on interpretation of sections 39 and 43 of the Delhi Rent Control Act. Section 54 of the Land Acquisition Act, has no similarity with sections 39 and 43 of the Delhi Rent Control Act. Hence, the decision in *South Asia Industries* had no relevance to decide the question whether a letters patent appeal is maintainable against the judgment passed by a single judge under section 54 of the Land Acquisition Act. In regard to the Letters Patent jurisdiction of the High Court, this Court in *Sharda Devi* made the following observation in paragraph 9:

> "9. A Letters Patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal would not get excluded *unless the statutory enactment concerned excludes an appeal under the Letters Patent."*

19. Referring to section 54 of the Land Acquisition Act, the Court concluded as follows:

> "14. … Section 26 of the said Act provides that every award shall be a decree and the statement of grounds of every award shall be a judgment. By virtue of the Letters Patent "an appeal" against the judgment of a Single Judge of the High Court would lie to a Division Bench. *Section 54 of the said Act does not exclude an appeal under the Letters Patent.* The word "only" occurring immediately after the non obstante clause in Section 54 refers to the forum of appeal. In other words, it provides that the appeal will be to the High Court and not to any other court e.g. the District Court. The term "an appeal" does not restrict it to only one appeal in the High Court. The term "an appeal" would take within its sweep even a letters patent appeal. The decision of the Division Bench rendered in a letters patent appeal will then be subject to appeal to the Supreme Court. Read in any other manner there would be a conflict between Section 54 and the provision of a Letters Patent. It is settled law that if there is a conflict, attempt should be made to harmoniously construe the provisions."

20. In *Subal Paul* v. *Malina Paul & Anr.*, (2003) 10 SCC 361, a bench of three judges of this Court examined the question whether a letters patent appeal would lie against the judgment of a single judge of a High Court on an appeal filed under section 299 of the Indian Succession Act, 1925. Arguing against the maintainability of a letters patent appeal against the judgment of the single judge it was contended that the rejection of the application for probate by the district judge did not give rise to any decree. Hence, an appeal against such an order would be one under section 104 of the Civil Procedure Code and a further appeal would, therefore, be barred under sub-section (2) of section 104. This Court did not accept the submission. It held that the appeal against an order of the district judge would be under section 299 of the Indian Succession Act. Section 104 of the Code simply recognizes appeals provided under special statutes; it does not create a right of appeal as such. Consequently, it does not bar any further appeal also. As regards the nature of an appeal under the Letters Patent, the decision in *Subal Paul* in paragraphs 21 and 22, observed as follows:

> "21. If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. *Limitation of a right of appeal, in*

the absence of any provision in a statute cannot be readily inferred. It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because the subordinate court exercises its special jurisdiction. In *G.P. Singh's Principles of Statutory Interpretation,* it is stated:

> "The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a *persona designata*, without any words of limitation, then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted."

22. *But an exception to the aforementioned rule is on matters where the special Act sets out a self-contained code, the applicability of the general law procedure would be impliedly excluded.* [See *Upadhyaya Hargovind Devshanker* v. *Dhirendrasinh Virbhadrasinhji Solanki* (1988) 2 SCC 1]"

(emphasis supplied)

21. In paragraph 32 of the judgment, this Court further observed as follows:

> "32. While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted."

22. In *P.S. Sathappan* v. *Andhra Bank Ltd. & Ors.,* (2004) 11 SCC 672, a constitution bench of this Court once again extensively considered the nature of the Letters Patent jurisdiction of the High Court, and the circumstances in which it would be available and those under which it would be ousted. The question that was referred to the Constitution Bench was: what would be "the effect of the provisions of section 104(2) of the Code of Civil Procedure, 1908 (hereinafter "CPC") vis-à-vis clause 15 of the Letters Patent (of the Madras High Court)"? An application for setting aside the court auction-sale was dismissed by the execution court. An appeal against the order came to the High Court and it was dismissed by a single judge. Against the order of the single judge, a letters patent appeal was filed. The question of maintainability of the appeal was examined by a full bench of the High Court and the intra-court appeal to the division bench was held to be not maintainable in view of the provisions of section 104(2) of CPC. A Constitution Bench of this Court, however, reversed the decision of the full bench of the High Court and by a majority of 3:2 held that the letters patent appeal was perfectly maintainable.

23. *P.S. Sathappan* is actually an authority on the interplay of section 104 of the Code of Civil Procedure and the Letters Patent jurisdiction of the High Court. The majority judgment went into the history of the matter and pointed out that under the Civil Procedure Codes of 1877 and 1882 there was a divergence of opinion among the different High Courts on the point whether the finality attached to orders passed under section 588 (corresponding to section 104 of the present Code) precluded any further appeals, including a letters patent appeal. The question, then, came up before the Privy Council in the case of *Hurrish Chunder Chowdry v. Kali Sundari Debia*, ILR (1882) 9 Cal. 482 (PC). But the decision of the Privy Council, rather than settling the issue gave rise to further conflicting decisions by different High Courts in the country. The

Bombay, Calcutta and Madras High Courts held that section 588 did not take away the right of appeal given under the Letters Patent. On the other hand, the Allahabad High Court took a different view and held that a letters patent appeal was barred under section 588 of the Code. In view of this conflict of views, the legislature stepped in and amended the law. It introduced section 4 and section 104 in the Code. Having, thus, put the controversy in the historical perspective, the Court referred to sections 4 and 104 of the Code and made the following observation in paragraph 6 of the judgment:

> "To be immediately noted that now the legislature provides that the provision of this Code *will not affect or limit special law unless specifically excluded.* The legislature also *simultaneously saves, in section 104(1), appeals under "any law for the time being in force". These would include letters patent appeals."*
>
> (emphasis supplied)

24. The above is really the kernel of the decision in *P.S. Sathappan* and the rest of the judgment is only an elucidation of this point.

25. In *P. S. Sathappan* the constitution bench considered in some detail the 1962 decision by a bench of four judges of the Court in *Mohindra Supply Co.* (*supra*) in which the legislative history of section 104 of the Code was traced out in detail and it was shown that by virtue of the saving clause in section 4 and the express language of section 104 that saved an appeal as provided by any other law for the time being in force, a letters patent appeal was not hit by the bar of sub-section (2) of section 104 of the Code. [*Mohindra Supply Co.*, however, was a case under section 39 of the 1940 Act, which did not contain any provision similar to section 4 of the Code and hence, in that case the Court held that the finality attached by sub-section (2) to an order passed under sub-section (1) of section 39 barred any further appeal, including a letters patent

appeal.]

26. In *P.S. Sathappan*, on a consideration of a number of earlier decisions, the Constitution Bench concluded that till 1996, the unanimous view of all courts was that section 104(1) CPC specifically saved letters patent appeals and the bar under section 104(2) did not apply to letters patent appeals. Thereafter, there were two decisions in deviation from the accepted judicial view, one by a bench of two judges of this Court in *Resham Singh Pyara Singh v. Abdul Sattar*, (1996) 1 SCC 49 and the other by a bench of three judges of this Court in *New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corpn., (1997) 3 SCC 462. P.S. Sathappan*, overruled both these decisions and declared that *Resham Singh Pyara Singh* and *New Kenilworth Hotel (P) Ltd.* laid down wrong law. It further pointed out that even after the aforementioned two decisions this Court had continued to hold that a Letters Patent Appeal is not affected by the bar of section 104(2) CPC. In this connection, it referred to *Vinita M. Khanolkar (supra)*, under section 6 of the Specific Relief Act, *Chandra Kanta Sinha* v. *Oriental Insurance Co. Ltd. & Ors.,* (2001) 6 SCC 158, under section 140 of the Motor Vehicles Act, 1988, *Sharda Devi (supra)*, under section 54 of the Land Acquisition Act and *Subal Paul (supra)*, under section 299 of the Indian Succession Act, 1925 and came to the conclusion that the consensus of judicial opinion has been that section 104(1) CPC expressly saves the letters patent appeal and the bar under section 104(2) CPC does not apply to letters patent appeals. In paragraph 22 of the judgment, the Court observed as follows:

> "22…. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the word "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would

be barred."

27. Further, analysing the two sub-sections of section 104(2) along with section 4 CPC, this Court in paragraph 30 of the judgment observed as follows:

> "30.... Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-section (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a letters patent appeal. However, when section 104(1) specifically saves a letters patent appeal then the only way such an appeal could be excluded is by express mention in section 104(2) that a letters patent appeal is also prohibited. . ...."

28. Mr. Sundaram heavily relied upon this decision.

29. The decisions noticed so far lay down certain broad principles that may be stated as follows:

1. Normally, once an appeal reaches the High Court it has to be determined according to the rules of practice and procedure of the High Court and in accordance with the provisions of the charter under which the High Court is constituted and which confers on it power in respect to the method and manner of exercising that power.

2. When a statute merely directs that an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that court.

3. The High Court derives its intra-court appeal jurisdiction under the charter by which it was established and its powers under the Letters Patent were recognized and saved by section 108 of the Government of India Act, 1915, section 223 of the Government of India Act, 1935 and finally, by Article 225 of the Constitution of India. The High Court, therefore, cannot be divested of its Letters Patent jurisdiction unless provided for expressly or by necessary intendment by some special statute.

4. If the pronouncement of the single judge qualifies as a "judgment", in the absence of any bar created by a statute either expressly or by necessary implication, it would be subject to appeal under the relevant clause of the Letters Patent of the High Court.

5. Since section 104(1) CPC specifically saves the letters patent appeal it could only be excluded by an express mention in section 104(2). In the absence of any express mention in section 104(2), the maintainability of a letters patent appeal is saved by virtue of section 104(1).

6. Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. The appellate jurisdiction of a superior court cannot be taken as excluded simply because a subordinate court exercises its special jurisdiction.

7. The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the word "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.

30. These general principles are culled out from the decisions of this Court rendered under section 104 of the CPC

and various other Acts, as noted above. But there is another set of decisions of this Court on the question under consideration rendered in the context of section 39 of the 1940 Act. Section 39 of the erstwhile Act contained the provision of appeal and provided as follows:

> "39. Appealable orders.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:
>
> An order -
>
> (i) superseding an arbitration;
>
> (ii) on an award stated in the form of a special case;
>
> (iii) modifying or correcting an award;
>
> (iv) filing or refusing to file an arbitration agreement;
>
> (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
>
> (vi) setting aside or refusing to set aside an award:
>
> PROVIDED THAT the provisions of this section shall not apply to any order passed by a Small Cause Court.
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."
>
> [Insofar as relevant for the present, section 37 of the 1996 Act, is very similar to section 39 of the previous Act as quoted above.]

31. In *Mohindra Supply Co.*, a bench of four judges of this Court held that a letters patent appeal against an order passed

by a single judge of the High Court on an appeal under section 39(1) of the 1940 Act was barred in terms of sub-section (2) of section 39. This decision is based on the bar against further appeals as contained in sub-section (2) of section 39 of the 1940 Act and, therefore, it may not have a direct bearing on the question presently under consideration.

32. More to the point are two later decisions. In *M/s Gourangalal Chatterjee*, a bench of two judges of this Court held that an order, against which no appeal would lie under section 39(1) of the 1940 Act, could not be taken in appeal before the division bench of the High Court under its Letters Patent. The same view was reaffirmed by a bench of three judges of this Court in *Aradhana Trading Co*.

33. In regard to these two decisions, Mr. Sundaram took the position that both *M/s Gourangalal* Chatterjee and *Aradhana Trading Co.* were rendered on section 39 of the 1940 Act, the equivalent of which is section 37 of the 1996 Act. In view of the two decisions, he conceded that in the event an order was not appealable under section 37(1) of the 1996 Act, it would not be subject to appeal under the Letters Patent of the High Court. He, however, referred to section 50 of the 1996 Act, which is as follows:

> "50. Appealable orders.—(1) An appeal shall lie from the order refusing to—
>
> (a) refer the parties to arbitration under section 45;
>
> (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

34. Mr. Sundaram submitted that section 50, unlike section 39 of the previous Act and section 37 of the current Act does not have the words "(and from no others)" and that, according to him, made all the difference. He contended that the omission of the words in parenthesis was significant and it clearly pointed out that unlike section 37, even though an order was not appealable under section 50, it would be subject to appeal under the Letters Patent of the High Court. At any event the decisions rendered under section 39 of the 1940 would have no application in a case relating to section 50 of the 1996 Act.

35. Mr. Dave, in reply submitted that the words "(and from no other)" occurring in section 39 of the 1940 Act and section 37 of the 1996 Act were actually superfluous and seen, thus, there would be no material difference between the provisions of section 39 of the 1940 Act or section 37 of the 1996 Act and section 50 of the 1996 Act and all the decisions rendered on section 39 of the 1940 Act will apply with full force to cases arising under section 50 of the 1996 Act.

36. The use of round brackets for putting words in parenthesis is not very common in legislation and this reminds us of the painful lament by Meredith, J. of the Patna High Court, who in 1948 dealing with a case said that "the 1940 Act contains examples of bad drafting which it would be hard to beat".

37. According to the New Oxford Dictionary of English, 1998 edition, brackets are used to enclose words or figures *so as to separate them from the context.* The Oxford Advanced Learner's Dictionary, Seventh edition defines "bracket" to mean "either of a pair of marks, ( ) placed around *extra information* in a piece of writing or part of a problem in mathematics". The New Oxford Dictionary of English, 1998 edition gives the meaning and use of parenthesis as:

> "Parenthesis—noun (pl. parentheses) a word, clause, or sentence inserted *as an explanation or afterthought into a passage which is grammatically complete without it,* in writing usually marked off by brackets, dashes, or commas.
>
> - (usu. Parentheses) a pair of round brackets ( ) used to include such a word, clause, or sentence."

38. The Oxford Advanced Learner's Dictionary, Seventh edition, defines the meaning of parenthesis as:

> "a word, sentence, etc. that is added to a speech or piece of writing, especially in order to give extra information. In writing, it is separated from rest of the text using brackets, commas or DASHES."

39. The Complete Plain Words by Sir Ernest Gowers, 1986 revised edition by Sidney Greenbaum and Janet Whitcut, gives the purpose of parenthesis as follows:

> "Parenthesis
>
> The purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort *into a sentence that is logically and grammatically complete without it.* A parenthesis may be marked off by commas, dashes or brackets. The degree of interruption of the main sentence may vary from the almost imperceptible one of explanatory words in apposition, to the violent one of a separate sentence complete in itself."

40. The Merriam Webster Online Dictionary defines parenthesis as follows:

> "1 *a* **:** an amplifying or explanatory word, phrase, or sentence inserted in a passage from which it is usually set off by punctuation *b* **:** a remark or passage that departs from the theme of a discourse **:** digression

2**:** interlude, interval

3**:** one or both of the curved marks ( ) used in writing and printing to enclose a parenthetical expression or to group a symbolic unit in a logical or mathematical expression"

41. The Law Lexicon, The Encyclopaedic Law Dictionary by P. Ramanatha Aiyar, 2000 edition, defines parenthesis as under:

"Parenthesis. a parenthesis is defined to be an explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in course of a longer passage, without being grammatically connected with it. (*Cent. Dist.*)

PARENTHESIS is used to limit, qualify or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets [53 Fed.81 (83); 3C, CA 440]."

42. Having regard to the grammatical use of brackets or parentheses, if the words, "(and from no others)" occurring in section 39 of the 1940 Act or section 37 of the 1996 Act are viewed as 'an explanation or afterthought' or extra information separate from the main context, then, there may be some substance in Mr. Dave's submission that the words in parentheses are surplusage and in essence the provisions of section 39 of the 1940 Act or section 37 of the 1996 Act are the same as section 50 of the 1996 Act. Section 39 of the 1940 Act says no more and no less than what is stipulated in section 50 of the 1996 Act.

43. But there may be a different reason to contend that section 39 of the 1940 Act or its equivalent section 37 of the 1996 Act are fundamentally different from section 50 of the 1996 Act and hence, the decisions rendered under section 39

of the 1940 Act may not have any application to the facts arising under section 50 of the 1996 Act.

44. But for that we need to take a look at the basic scheme of the 1996 Act and its relevant provisions. Before the coming into force of the Arbitration and Conciliation Act, 1996 with effect from August 16, 1996, the law relating to domestic arbitration was contained in the Arbitration Act, 1940, which in turn was brought in place of the Arbitration Act, 1899. Apart from the Arbitration Act 1940, there were two other enactments of the same genre. One called the Arbitration (Protocol and Convention) Act, 1937 (for execution of the Geneva Convention Awards) and the other called the Foreign Awards (Recognition and Enforcement) Act, 1961 (for enforcement of the New York Convention awards).

45. The aforesaid three Acts were replaced by the Arbitration and Conciliation Act, 1996, which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model and is broadly compatible with the "Rules of Arbitration of the International Chamber of Commerce". The Arbitration and Conciliation Act, 1996 that has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961, consolidates and amends the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and defines the law relating to conciliation and provides for matters connected therewith and incidental thereto taking into account the UNCITRAL MODEL law and Rules.

46. The Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996 reads as under:

"Statement of Objects and Reasons

The law of arbitration in India is at present substantially contained in three enactments, namely, The Arbitration Act, 1940, The Arbitration (Protocol and

Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. *An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.*

3. Though the UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration

and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:-

(i) to *comprehensively cover* international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) *to minimise the supervisory role of courts in the arbitral process;*

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) *to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;*

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral

award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

5. The Bill seeks to achieve the above objects."

(emphasis supplied)

47. The Preamble of the Arbitration and Conciliation Act, 1996 is as follows:

"PREAMBLE

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to

conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the *establishment of a unified legal framework* for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

48. The new Act is a loosely integrated version of the Arbitration Act, 1940, Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. It actually consolidates amends and puts together three different enactments. But having regard to the difference in the object and purpose and the nature of these three enactments, the provisions relating thereto are kept separately. A mere glance at the 1996 Act is sufficient to show that under its scheme the provisions relating to the three enactments are kept separately from each other. The 1996 Act is divided into four parts and it has three schedules at its end. Part I has ten chapters that contain provisions governing domestic arbitration and international commercial arbitration. Part II has two chapters; Chapter I contains provisions relating to the New York Convention Awards and Chapter II contains provisions relating to the Geneva Convention Awards. Part III of the Act has provisions concerning conciliation. Part IV has the supplementary provisions such as the power of the High Court to make rules (section 82), provision for removal of difficulties (section 83), and the power to make rules (section 84). At the end there are two repeal and saving sections. Section 85 repeals the three enactments referred to above, subject to the appropriate saving clause and section 86 repeals Ordinance 27 of 1996, the precursor of the Act, subject to the appropriate saving clause. Of the three schedules, the first is related to Part II, Chapter I, i.e., the New York Convention Awards and the

second and the third to Chapter II, i.e., the Geneva Convention Awards.

49. There is a certain similarity between the provisions of Chapters I and II of Part II but Part I of the Act is vastly different from Chapters I and II of Part II of the Act. This is quite understandable too since Part II deals only with enforcement of foreign awards (Chapter I, of New York Convention Awards and Chapter II, of Geneva Convention Awards) while Part I of the Act deals with the whole gamut of law concerning domestic arbitration and international commercial arbitration. It has, therefore, a very different and much larger framework than the two chapters in Part II of the Act.

50. Part I has ten chapters. Chapter I begins with definition clauses in section 2 that defines, amongst other terms and expressions, "arbitration", "arbitration agreement", "arbitral award", etc. Chapter I also contains some "General Provisions" (sections 3-6). Chapter II contains provisions relating to "Arbitration Agreement" (sections 7-9). Chapter III contains provisions relating to "Composition of Arbitral Tribunal" (sections 10-15). Chapter IV deals with the "Jurisdiction of Arbitral Tribunals" (sections 16-17). Chapter V lays down provisions concerning "Conduct of Arbitral Proceedings" (sections 18-27). Chapter VI deals with "Making of Arbitral Award and Termination of Proceedings" (sections 28-33). Chapter VII has only one section, i.e., section 34 that provides "Recourse against Arbitral Award". Chapter VIII deals with "Finality and Enforcement of Arbitral Awards" (sections 35-36). Chapter IX provides for "Appeals" (section 37 which is akin to section 39 of the 1940 Act). Chapter X contains the "Miscellaneous" provisions (sections 38-43).

51. It is also evident that Part I and Part II of the Act are quite separate and contain provisions that act independently in their respective fields. The opening words of section 2, i.e. the definition clause in Part I, make it clear that meanings

assigned to the terms and expressions defined in that section are for the purpose of that part alone. Section 4 which deals with waiver of right to object is also specific to Part I of the Act. Section 5 dealing with extent of judicial intervention is also specific to Part I of the Act. Section 7 that defines "arbitration agreement" in considerable detail also confines the meaning of the term to Part I of the Act alone. Section 8 deals with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision too is relatable to Part I alone (corresponding provisions are independently made in sections 45 and 54 of Chapter I and II, respectively of Part II). The other provisions in Part I by their very nature shall have no application insofar as the two chapters of Part II are concerned.

52. Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective schemes, it naturally follows that section 37 in Part I (analogous to section 39 of the 1940 Act) is not comparable to section 50 in Part II of the Act. This is not because, as Mr. Sundaram contends section 37 has the words in parentheses "and from no others" which are not to be found in section 50 of the Act. Section 37 and section 50 are not comparable because they belong to two different statutory schemes. Section 37 containing the provision of appeal is part of a much larger framework that, as seen above, has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration. Section 50 on the other hand contains the provision of appeal in a much limited framework, concerned only with the enforcement of New York Convention awards. In one sense, the two sections, though each containing the appellate provision belong to different statutes.

53. Having come to this conclusion, it would appear that the decisions rendered by the Court on the interplay between section 39 of the 1940 Act and the Letters Patent jurisdiction of the High Court shall have no application for deciding the

question in hand. But that would be only a superficial view and the decisions rendered under section 39 of the 1940 Act may still give the answer to the question under consideration for a very basic and fundamental reason.

54. However, before going into that it will be useful to take another look at the provisions of Chapter I of Part II of the Act. We have so far seen the provisions of Chapter I of Part II of the Act in comparison with those of Part I of the 1996 Act. It would also be relevant to examine it in comparison with the provisions of its precursor, the Foreign Awards, Recognition and Enforcement Act, 1961 and to see how far the earlier Act is consolidated, amended and harmonised and designed for universal application.

55. The provisions of Chapter I of Part II of the 1996 Act along with the provisions of the Foreign Awards, Recognition and Enforcement Act, 1961, insofar as relevant for the present are placed below in a tabular form:

THE FOREIGN AWARDS (RECOGNITION AND ENFORCEMENT) ACT, 1961	**PART II** **ENFORCEMENT OF CERTAIN FOREIGN AWARDS** ***CHAPTER* I** **NEW YORK CONVENTION AWARDS**
2. Definition.—In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships, whether	44. Definition.—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered

contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -	as commercial under the law in force in India, made on or after the 11th day of October, 1960 –
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and	(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
(b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.	(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.
3. Stay of proceedings in respect of matters to be referred to arbitration.—Notwithstanding anything contained in the Arbitration Act, 1940 (10 of 1940), or in the Code of Civil Procedure, 1908 (5 of 1908), if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him	45. Power of judicial authority to refer parties to arbitration.— Notwithstanding anything contained in Part I or in the

commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.	Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of bring performed.
4. Effect of foreign awards.—(1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India.	46. When foreign award binding.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be
(2) Any foreign award which	would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.
5. Filing of foreign award in court.—(1) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court.	47. Evidence.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court –
(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.	(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) the original agreement for arbitration or a duly certified copy thereof; and (c) such evidence as may be necessary to prove that the award is a foreign award.
(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time	(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall

specified why the award should not be filed.

6. Enforcement of foreign award.—(1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

7. Conditions for enforcement of foreign awards.— (1) A foreign award may not be enforced under this Act-

(a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that-

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the

produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.—In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is

said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or

(ii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement: Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to

invoked, only if that party furnishes to the court proof that –

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matter

arbitration may be enforced; or (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or (b) if the court dealing with the case is satisfied that- (i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (ii) the enforcement of	submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (2) Enforcement of an arbitral award may also be refused if the Court finds that – (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

the award will be contrary to public policy. (2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security. 8. Evidence.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) the original agreement for arbitration or a duly certified copy thereof;	(b) the enforcement of the award would be contrary to the public policy of India. *Explanation*.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. (3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. 49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under

and (c) such evidence as may be necessary to prove that the award is a foreign award. (2) If the award or agreement requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. 9. Saving.—Nothing in this Act shall- (a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or (b) apply to any award made on an arbitration agreement governed by the law of India. 10. Repeal.—The Arbitration	this Chapter, the award shall be deemed to be a decree of that Court. 50. Appealable orders.—(1) An appeal shall lie from the order refusing to – (a) refer the parties to arbitration under section 45; (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order. (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. 51. Saving.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

(Protocol and Convention) Act, 1937 (6 of 1937), shall cease to have effect in relation to foreign awards to which this Act applies. 11. Rule making power of the High Court.—The High Court may make rules consistent with this Act as to- (a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto; (b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and (c) generally, all proceedings in court under this Act.	52. Chapter II not to apply.—Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

56. A comparison of the two sets of provisions would show that section 44, the definition clause in the 1996 Act is a verbatim reproduction of section 2 of the previous Act (but for the words “chapter” in place of “Act”, “first schedule” in place of “schedule” and the addition of the word “arbitral” before the word “award” in section 44). Section 45 corresponds to section 3 of the previous Act. Section 46 is a verbatim reproduction of section 4(2) except for the substitution of the word “chapter” for “Act”. Section 47 is almost a reproduction of section 8 except for the addition of the words “before the court” “in sub-section (1)” and an explanation as to what is meant by “court” in that section. Section 48 corresponds to section 7; section 49 to section 6(1) and section 50 to section

6(2). Apart from the fact that the provisions are arranged in a far more orderly manner, it is to be noticed that the provisions of the 1996 Act are clearly aimed at facilitating and expediting the enforcement of the New York Convention Awards. Section 3 of the 1961 Act dealing with a stay of proceedings in respect of matters to be referred to arbitration was confined in its application to "legal proceedings in any court" and the court had a wider discretion not to stay the proceedings before it. The corresponding provision in section 45 of the present Act has a wider application and it covers an action before any judicial authority. Further, under section 45 the judicial authority has a narrower discretion to refuse to refer the parties to arbitration. Under section 4(1) of the 1961 Act, a foreign award for its enforcement was first deemed to be an award made on a matter referred to arbitration in India. Section 46 of the present Act dispenses with the provision of sub-section (1) of section 4 and resultantly a foreign award is enforceable in its own right. Section 47 is almost a reproduction of section 8 except for the addition of the words "before the court" in sub-section (1) and an explanation as to what is meant by "court" at the end of the section. Section 49 corresponds to section 6(1) and section 50 to section 6(2). It is however, a comparison of section 6 of the 1961 Act with section 49 of the present Act that would be of interest to us and that provides a direct answer to the question under consideration. As the comparison of the two sections is of some importance, the two sections are once again reproduced here:

The Foreign Awards (Recognition and Enforcement) Act, 1961

"6. Enforcement of foreign award.—(1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow,

and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

The Arbitration and Conciliation Act, 1996

"49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

57. Under section 6 of the 1961 Act, the Court on being satisfied that the foreign award was enforceable under the Act, would first order the award to be filed and then *proceed to pronounce judgment according to the award.* The judgment would lead to a decree against which no appeal would lie *except insofar as the decree was in excess of or not in accordance with the award.*

58. Section 49 of the present Act makes a radical change in that where the court is satisfied that the foreign award is enforceable, the award itself would be deemed to be a decree of the Court. It, thus, not only omits the procedural formality for the court to pronounce judgment and a decree to follow on that basis *but also completely removes the possibility of the decree being in excess of, or not in accordance with the award. Thus, even the limited basis on which an appeal would lie under sub-section (2) of section 6 of the 1961 Act, is taken away.* There is, thus, no scope left for an appeal against an order of the court for the enforcement of a foreign award. It is for this reason that section 50(1)(b) provides for an appeal only against an order refusing to enforce a foreign award under section 48.

59. There can be no doubt that under section 6, except on the very limited ground, no appeal including a Letters Patent Appeal was maintainable against the judgment and decree passed by the Court under section 6(1). It would be futile,

therefore, to contend that though the present Act even removes the limited basis on which the appeal was earlier maintainable, yet a Letters Patent Appeal would lie notwithstanding the limitations imposed by section 50 of the Act. The scheme of sections 49 and 50 of the 1996 Act is devised specially to exclude even the limited ground on which an appeal was earlier provided for under section 6 of the 1961 Act. The exclusion of appeal by section 50 is, thus, to be understood in light of the amendment introduced in the previous law by section 49 of the Act.

60. There is another way to look at the matter. It will be illuminating to see how the courts viewed the Arbitration Act, 1940 shortly after it was enacted and even while the previous law, the Arbitration Act, 1899 coupled with the Schedule 2 of the Code of Civil Procedure was still fresh in the courts' mind. In *Gauri Singh* v. *Ramlochan Singh*, AIR (35) 1948 Patna 430, the plaintiff had filed a suit for an order for filing an arbitration award and preparing a decree of the court on that basis. The award was in writing and it was also registered on the admission of the arbitrators but the award was made not on the basis of any arbitration agreement in writing but on an oral reference. Before the division bench of the Patna High Court, the question arose regarding the maintainability of the suit. Agarwala, C.J. in a brief order held that Chapter II of the Act would only apply when the agreement was in writing. In other words, the existence of an "arbitration agreement" i.e. an agreement in writing, was the foundation of the court's jurisdiction to direct the arbitrators, under section 14(2), to cause the award to be filed in court. But Meredith, J. examined the matter in greater detail. He considered the question, whether the Act of 1940 was exhaustive or whether it related only to awards following arbitration agreements within the meaning of the Act. The case of the plaintiff was that there was an oral reference to arbitration. Such an oral reference was perfectly valid and so was the award upon it. But it did not

come within the scope of the Act. The award could, therefore, be enforced by an ordinary suit under the Code of Civil Procedure. Rejecting the submission, in paragraphs 20, 21 and 22 of the judgment, Meredith, J. observed as follows:

> "20. ….. It may be regarded as settled that, so far as Sch.2, Civil P.C., and the Arbitration Act of 1899 were concerned, an award based upon an oral submission or reference to arbitration was not touched, but was perfectly legal and valid, and the award could be enforced by suit, though not by the special procedure under the provisions of the Civil P.C., or the 1899 Act. That Act was regarded as not exhaustive even in the limited areas where it was applicable. …..
>
> 21. This view was also taken by the Madras High Court in *Ponnamma* v. *Marappudi Kotamma* [19 A.I.R. 1932 Mad. 745], and also in our own High Court in *Ramautar Sah* v. *Langat Singh*, A.I.R. 1931 Pat. 92. The view there taken was that there is nothing in law which requires a submission of the dispute between the parties to arbitration to be in writing. A parole submission is a legal submission to arbitration.
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> 22. Has the position been altered by the Act of 1940? In my opinion it has. The Act of 1899 was described as "An Act to amend the law relating to arbitration", but the Act of 1940 is headed as "An Act to consolidate and amend the law relating to arbitration", and the preamble says "whereas it is expedient to consolidate and amend the law relating to arbitration in British India". It is an Act to consolidate the arbitration law. This suggests that it is intended to be comprehensive and exhaustive. ……"

61. Making reference to sections 47, 26 and 30 of the 1940 Act, in paragraph 26 of the judgment, His Lordship concluded as follows:

"26. I think I am justified in holding, in view of these provisions, that the Act was intended to be exhaustive of the law and procedure relating to arbitration. I cannot imagine that the words "arbitrations" and "awards" could have been used in such specific provisions without more, specially having regard to the definition of award, if it was intended to leave it open to the parties to an award based upon an oral submission to proceed to enforce it or set it aside by proceedings by way of suit altogether outside the Act. Let us take it then that the Act intended that there should be no such proceedings."

62. In paragraph 33, he further said:

"If then, as I have held, the Act is intended to be exhaustive, and contains no provisions for the enforcement of an award based upon an oral submission, the only possible conclusion is that the Legislature intended that such an award should not be enforceable *at all, and that no such suit should lie."*

63. In *Belli Gowder* v. *Joghi Gowder*, AIR (38) 1951 Madras 683, Viswanatha Sastri, J. took the same view on a case very similar in facts to the case in the Patna decision. In paragraph 2 of the judgment, Sastri, J. observed as follows:

"2. The first point argued by the applt's learned advocate is that the suit is one to enforce an award given on oral reference or submission to arbitration and is not maintainable by reason of the provisions of the Arbitration Act, 1940. It is common ground that there was no written submission to the panchayatdars. Prior to the enactment of the Arbitration Act of 1940 it had been held by this and other H. Cts that there was nothing in the Arbitration Act of 1899 or in Sec. 89 and schedule 2 of the C. P. C. of 1908 rendering an oral agreement to refer to arbitration invalid. A parole submission was held to be a legal submission to arbitration and an award passed on an oral

reference was held to be valid and enforceable by a suit though not by the special procedure prescribed by Sch 2, C. P. C. or the Arbitration Act of 1899….

…. The question whether it was intended merely to make awards on oral submissions unenforceable under the procedure of the Arbitration Act or to make them invalid and unenforceable altogether, would depend to a large extent on whether the Act is exhaustive of the law of arbitration. I am inclined to think that it is. I therefore hold that an award passed on oral submission can neither be filed and made a rule of Ct under the Act, nor enforced apart from the Act. The same opinion has been expressed in *'Gauri Singh v. Ramlochan Singh',* AIR (35) 1948 Pat 430: (29 PLT 105)."

64. In *Narbadabai and Ors.* v. *Natverlal Chunilal Bhalakia & Anr.*, AIR 1953 Bombay 386, a division bench of the Bombay High Court went a step further and held that an arbitration award could only be enforced in terms of section 17 of the Arbitration Act and a suit filed for enforcement of an award was not maintainable. Chagla, C.J. speaking for the court, in paragraph 5 of the judgment, held and observed as follows:

"5. Whatever the law on the subject may have been prior to the Indian Arbitration Act 10 of 1940, it is clear that when this Act was passed, it provided a self-contained law with regard to arbitration. The Act was both a consolidating and amending law. The main object of the Act was to expedite and simplify arbitration proceedings and to obtain finality; and in our opinion when we look at the various provisions of the Arbitration Act, it is clear that no suit can be maintained to enforce an award made by arbitrators and an award can be enforced only by the manner and according to the procedure laid down in the Arbitration Act itself. Section 14 deals with signing and filing of the award. Section 15 deals with the power of the Court to modify the

award in cases set out in that section and Section 16 deals with the power of the Court to remit the award. Then we come to S.17 and that provides that

> "Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award."

Therefore, Section 17 lays down the procedure by which a decree can be obtained on an award. The Act gives the right to the parties to challenge the award by applying for setting aside the award after the award is filed under Section 14, but if that right is not availed of or if the application is dismissed and the Court has not remitted the award, then the Court has to pronounce judgment according to the award, and upon the judgment so pronounced a decree has to follow. Mr. Desai does not dispute, as indeed he cannot, that when the award was published by the arbitrators, he could have followed the procedure laid down in the Arbitration Act and could have applied for judgment under Section 17. But Mr. Desai contends that Section 17 does not preclude a party from filing a suit to enforce the award. Mr. Desai says that Section 17 gives a party a summary remedy to obtain judgment upon the award but that summary remedy does not bar a suit. …"

65. He, then, considered sections 31 and 32 of the Act and came to hold as follows:

> "6…. Mr. Desai is undoubtedly right that before the Act of 1940 the view was taken that an award did not lose its efficacy merely because it was not filed and no action was taken on it by proceedings under the arbitration law. But the question is whether that view is possible after the Arbitration Act came into force and the Legislature enacted S.32. Therefore, with respect, we agree with the view taken by the Madras High Court in –*'Moolchand v. Rashid Jamshed Sons & Co.',* [('46) AIR 1946 Mad. 346] and the view taken by the Patna High Court in— *'Ramchander Singh v. Munshi Mian* [('42) AIR 1942 Bom 101]., & the view taken by the Punjab High Court in – *'Radha Kishen v. Ganga Ram* [('51) AIR 1951 Punj 121].
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> 7. The result, therefore, is that the plaintiff cannot maintain this action to enforce the award. ….. Therefore, if we are right in the view we take as to the interpretation of Section 32, then it is clear that Shah J. with respect, had no jurisdiction to try a suit which in substance and in effect was a suit to enforce an award. The result, therefore, is that the suit must fail on the preliminary ground that the suit is not maintainable, the suit being one to enforce an award duly given by arbitrators appointed by the parties and also because the award deals with the very disputes which are the subject-matter of the suit. …."

66. In *S.N. Srikantia & Co.* v. *Union of India and Anr.*, AIR 1967 Bombay 347, the question that arose for consideration was whether a court has the power to grant interest on the principal sum adjudged by an award from the date of the award till payment. The plaintiff in the case claimed that the court should award interest in the principal sum adjudged by the award at a certain rate from the date of the award till the date of the decree, and further interest on the said principal sum at another rate from the date of the decree till payment. The plaintiff's claim was resisted on the plea that under section 29 of the 1940 Act, interest on the principal sum adjudged by an

award could not be granted from the date of the award till the passing of the decree. It was contended on behalf of the plaintiff that section 29 was merely an enabling provision but that cannot stand in the way of the court in awarding interest for the prior period, namely, from the date of the award onwards till the passing of the decree. Tulzapurkar, J., (as his Lordship then was) referred to the earlier decisions of the Bombay High Court in *Narbadabai* and relying upon the decisions of Patna High Court in *Gauri Singh* and Madras High Court in *Belli Gowder* held an observed as follows:

> "I may mention that a contention was raised in that case that though Section 17 of the Act laid down the procedure by which a decree could be obtained on an award that Section gave a summary remedy to a party to an award for a judgment upon an award, but that such summary remedy did not bar a suit to enforce an award. This contention was negatived by this Court and it was held that for enforcing an award the procedure laid down in the Act itself could alone be availed of by a party to the award. It is no doubt true that Section 32 of the Act was referred to, which expressly barred suits "for a decision upon the existence, effect or validity of an award" and it was held that the expression "effect of the award" was wide enough, to cover a suit to enforce an award. At the same time this Court did take the view that since the Act was a self-contained Code with regard to arbitration and was exhaustive, an award could be enforced only by the manner and according to the procedure laid down in section 17 of the Act. In my view, these decisions and particularly, the decisions of the Patna High Court and the Madras High Court clearly indicate the corollary which follows upon an Act being regarded as exhaustive viz.. that it carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. In

> my view, Section 29 of the Act also is exhaustive of the whole law upon the subject of "interest on awards" and since the said section enables the court to award interest on the principal sum adjudged by an award from the date of the decree onwards, it must be held that it carries with it the negative import that it shall not be permissible to the Court to award interest on the principal sum adjudged by an award for any period prior to the date of the passing of the decree."

67. We have so far seen the decisions of the High Courts holding that a suit for enforcement of an arbitration award made on an oral reference was not maintainable, an arbitral award could only be enforced in terms section 17 of the Arbitration Act and a suit for the enforcement of an arbitral award was not maintainable, and third, that no interest could be awarded on the amount adjudged in the award beyond the provisions of section 29 of the Arbitration Act.

68. We now come back to the decision of this Court in *Mohindra Supply Co.* in which the issue was about the maintainability of an appeal, particularly, a letters patent appeal. It is seen above that, in *Mohindra Supply Co.* the court held that a letters patent appeal was not maintainable in view of section (2) of section 39 of the 1940 Act. To that extent, the decision may not have any bearing on the present controversy. But, in that decision observations of great significance were made in regard to the nature of the 1940 Act. It was observed (SCR page 500):

> "The proceedings relating to arbitration are, since the enactment of the Indian Arbitration Act X of 1940, governed by the provisions of that Act. The Act is a consolidating and amending statute. It repealed the Arbitration Act of 1899, Schedule 2 of the Code of Civil Procedure and also cls. (a) to (f) of s. 104(1) of the Code of Civil Procedure which provided for appeals from orders

in arbitration proceedings. The Act set up machinery for all contractual arbitrations and its provisions, subject to certain exceptions, apply also to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that, other enactment were an arbitration agreement, except in so far as the Arbitration Act is inconsistent with that other enactment or with any rules made thereunder. …. …"

69. It was further observed and held (SCR page 506):

"But it was urged that the interpretation of s.39 should not be divorced from the setting of legislative history, and if regard be had to the legislative history and the dictum of the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* [(1882) L.R.10 I.A. 4, 17] which has been universally followed, in considering the extent of the right of appeal under the Letters Patent, the Court would not be justified in restricting the right of appeal which was exercisable till 1940 by litigants against decisions of single Judges of High Courts in arbitration matters from orders passed in appeals. In considering the argument whether the right of appeal which was previously exercisable by litigants against decisions of single Judges of the High Courts in appeals from orders passed in arbitration proceedings was intended to be taken away by s. 39(2) of the Indian Arbitration Act, the Court must proceed to interpret the words of the statute without any predisposition towards the state of the law before the Arbitration Act was enacted. *The Arbitration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration….."*

70. And (SCR pages 512-513):

"Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act

of 1899) was contained in the Code of Civil Procedure and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by s. 588 and in the Code of 1908 by s.104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and s. 104(1) clauses (a) to (f) of the Code of Civil Procedure 1908 and the Arbitration Act of 1899. By s. 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-s.2 and the clause in s.104 of the Code of 1908 which preserved the special jurisdiction under any other law was incorporated in s. 39. The section was enacted in a form which was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but that was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved."

"There is in the Arbitration Act no provision similar to s. 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in s. 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of s. 39(1) and (2) of the Arbitration Act."

"Under the Code of 1908, the right to appeal under the

> Letters Patent was saved both by s. 4 and the clause contained in s. 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore be exercised against orders in arbitration proceedings only under s. 39, and no appeal (except an appeal to this Court) will lie from an appellate order."

71. *Mohindra Supply Co.* was last referred in a constitution bench decision of this Court in *P.S. Sathappan*, and the way the constitution bench understood and interpreted *Mohindra Supply Co.* would be clear from the following paragraph 10 of the judgment:

> "10.....The provisions in the Letters Patent providing for appeal, in so far as they related to orders passed in Arbitration proceedings, were held to be subject to the provisions of Section 39(1) and (2) of the Arbitration Act, *as the same is a self-contained code relating to arbitration."*

72. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in *P.S. Sathappan*) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the

applicability of the general law procedure would be impliedly excluded.

73. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself.

74. In light of the discussions made above, it must be held that no letters patent appeal will lie against an order which is not appealable under section 50 of the Arbitration and Conciliation Act, 1996.

75. In the result, Civil Appeal No.36 of 2010 is allowed and the division bench order dated May 8, 2007, holding that the letters patent appeal is maintainable, is set aside. Appeals arising from SLP (C) No.31068 of 2009 and SLP (C) No.4648 of 2010 are dismissed.

76. SLP (C) Nos.13626-13629 of 2010 and SLP (C) Nos.22318-22321 of 2010 are dismissed insofar as they seek to challenge the orders of the division bench holding that the letters patent appeals were not maintainable. These two SLPs may now be listed only in regard to the challenge to the orders passed by the single judge.

77. There will be no order as to costs.

B.B.B. Matter disposed of.

RAM JETHMALANI & ORS.
v.
UNION OF INDIA & ORS.
(I.A. 8 of 2011 in WP No. 176 of 2009)

SEPTEMBER 23, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

CONSTITUION OF INDIA, 1950:

Article 142 read with O. 47 r. 6 of Supreme Court Rules, 1966 – Unaccounted moneys of Indian citizens in foreign banks – Order dated 4.7.2011passed by Supreme Court directing the High Level Committee constituted by Central Government to be appointed as Special Investigation Team including Director, Research and Analysis Wing therein and to be headed by two retired Judges of Supreme Court as its Chairman and Vice-Chairman – I.A. filed by Union of India seeking modification of the order dated 4.7.2011 – Maintainability of – In view of difference of opinion regarding maintainability of the I.A., the matter referred to larger Bench – Supreme Court Rules, 1966 – O. 47, r.6.

Saurav Chaudhary v. Union of India **2004 (2) Suppl. SCR 611 = (2004) 5 SCC 618;** *Raja Soap Factory & Ors. v. S.P. Shantharaj & Ors.* **(1965) 2 SCR 800;** *A. R. Antulay v. R. S. Nayak & Anr.* **1988 (1) Suppl. SCR 1 = (1988) 2 SCC 602;** *S. Nagaraj & Ors. v. State of Karnataka & Anr.* **1993 (2) Suppl. SCR 1 = (1993) Supp. (4) SCC 595;** *Manganese Ore (India) Ltd. v. Chandi Lal Saha* **1990 (2) Suppl. SCR 533 =;** *Ram Chandra Singh v. Savitri Devi & Ors.* **2004 (12) SCC 713;** *Delhi Administration v. Gurdip Singh Uban & Ors.* **2000 (2) Suppl. SCR 496 = 2000 (7) SCC 296;** *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* **2004 (2) Suppl. SCR 571 = 2004 (5) SCC 353;** *A. P. SRTC & Ors.*

v. Abdul Kareem **2007 (1) SCR 888 = 2007 (2) SCC 466 – referred to**

S. *Nagaraj & Ors. v. State of Karnataka & Anr.* **1993 (2) Suppl. SCR 1 = 1993 (Supp.4) SCC 595;** *A. R. Antulay v. R. S. Nayak & Anr.* **1988 (1) Suppl. SCR 1 = 1988 (2) SCC 602 – held inapplicable.**

Case Law Reference:

In the order of Hon'ble Altamas Kabir, J

2004 (2) Suppl. SCR 611	**referred to**	**Para 8**
(1965) 2 SCR 800	**referred to**	**Para 9**
1988 (1) Suppl. SCR 1	**referred to**	**Para 11**
1993 (2) Suppl. SCR 1	**referred to**	**Para 13**
1990 (2) Suppl. SCR 533	**referred to**	**Para 16**

In the order of Hon'ble S. S. Nijjar,J

2004 (12) SCC 713	**referred to**	**Para 9**
2000 (2) Suppl. SCR 496	**referred to**	**Para 10**
2004 (2) Suppl. SCR 571	**referred to**	**Para 15**
2007 (1) SCR 888	**referred to**	**Para 17**
1993 (2) Suppl. SCR 1	**held inapplicable**	**Para 18**
1988 (1) Suppl. SCR 1	**held inapplicable**	**Para 22**

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

Goolam E. Vahanvati, AG, H.P. Raval, ASG, J.S. Attri, and Anil B. Divan, Lata Krishnamurthy, R.N. Karanjawala, Manik Karanajawala, Sandeep Kapur, Ravi Sharma, Pranav Deish, S. Patnaik, Arjun Mahajan (for Karanjawala & Co.) Meenakshi

Arora and Samir Ali Khan, Devadatt Kamath, Anoopam N. Prasad, Naila Jung, Nishanth Patil, Arijit Prasad, T.A. Khan, B.V. Balaram Das, Ashok Kumar Gupta I, H.S. Parihar, Asha Gopalan Nair (AOR), K.J. John & Co., Arti Singh, Pratap Venugopal, Namrata Sood, Sadhna Sandhu, Anil Katiyar, Aniradha Mutatkar, Anagha S. Desai, K.J. John & Co. Santosh Paul, Arti Singh, Arvind Gupta, Rajiv Nanda and Sushma Suri for appearing parties.

The following orders of the Court was delivered

O R D E R

ALTAMAS KABIR, J. 1. Writ Petition (Civil) No.176 of 2009 was filed by Shri Ram Jethmalani and five others against the Union of India, the Reserve Bank of India, the Securities Exchange Board of India, the Director, Directorate of Enforcement and the Chairman, Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, against the purported inaction of the Government to arrange for recovery of large sums of money deposited by Indian citizens in foreign banks and, in particular, in Swiss Banks. In that context the Petitioners, inter alia, prayed for the following reliefs :-

"(a) that this Hon'ble Court may be pleased to issue notice to all the Respondents calling upon them to disclose all the facts which have come to their knowledge so far pertaining to the aforementioned issues and the steps taken by them in this regard;

(b) to make orders from time to time to ensure that the outcome of the investigations are not suppressed or even unduly delayed;

(c) the suitable directions be issued to the Respondent No.1 to apply to the Foreign Banks, more particularly the UBS Bank for freezing the amounts in the said foreign banks, particularly, the UBS Bank

which as stated above is holding, inter alia, the Khan and Tapurias' assets."

2. On 4th July, 2011, on I.A. No.1 of 2009 in the Writ Petition several directions were given. In fact, the said order was divided into three parts. The first part of the order dealt with the alleged failure of the Central Government to recover the large sums of money kept in such foreign banks and in tax havens having strong secrecy laws with regard to deposits made by individuals. The second part dealt with the unlawful activities allegedly funded out of such deposits and accounts which were a threat to the security and integrity of India. The amounts deposited in such tax havens in respect of one Shri Hassan Ali Khan and Shri Kashinath Tapuria and his wife Chandrika Tapuria were alleged to be in billions of dollars in UBS Bank in Zurich alone. Income Tax demands were made to Shri Hassan Ali Khan for Rs.40,000 crores and a similar demand was served on the Tapurias amounting to Rs.20,580 crores. On being convinced that, in the absence of any known source of income, the large sums of money involved in the various transactions by Hassan Ali Khan and the Tapurias were the proceeds of crime, which required a thorough investigation, this Court felt the necessity of appointing a Special Investigation Team to act on behalf and at the behest of the directions of this Court. It was noted by this Court that the issues involved were complex and would require expertise and knowledge of different departments and the coordination of efforts between various agencies and departments. It was also recorded that on behalf of the Union of India, it had been submitted that a High Level Committee had recently been formed under the initiative of the Department of Revenue in the Ministry of Finance, composed of :

(i) Secretary, Department of Revenue, as the Chairman;

(ii) Deputy Governor, Reserve Bank of India;

(iii) Director (IB);

(iv) Director, Enforcement;

(v) Director, CBI;

(vi) Chairman, CBDT;

(vii) DG, Narcotics Control Bureau;

(viii) DG, Revenue Intelligence;

(ix) Director, Financial Intelligence Unit; and

(x) JS(FT & TR-I), CBDT.

with powers to co-pt, as necessary, representatives not below the rank of Joint Secretary such as the Home Secretary, Foreign Secretary, Defence Secretary and the Secretary, Cabinet Secretariat. It was further recorded that the Union of India had claimed that such a multidisciplinar group and committee would enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias and would also be able to take appropriate steps to bring back the monies deposited in foreign banks. In the light of such submission made on behalf of Union of India and citing the judgments of this Court in (1) *Vineet Narain Vs. Union of India* [(1996) 2 SCC 199],(2) *NHRC Vs. State of Gujarat* [(2004) 8 SCC 610], (3) *Sanjiv Kumar Vs. State of Haryana* [(2005) 5 SCC 517] and (4) Centre for *PIL Vs. Union of India* [(2011) 1 SCC 560], this Court completed the second part of the order by directing as follows :-

49. In light of the above we herewith order:

(i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor,

Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii)DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate effect as a special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court: (a) Hon'ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of responsibilities described above, also lie

the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the

necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad.

(viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

3. The third part of the order deals with the disclosure of various documents referred to by the Union of India in relation to the names and particulars of various bank accounts of Indian citizens in the Principality of Liechtenstein, a small landlocked sovereign nation-state in Europe, which is generally acknowledged as a tax haven.

4. The third part of the order is not of relevance at this stage, since an application, being IA No.8 of 2011, has been filed by the Union of India in the Writ Petition, purporting to be an application under Article 142 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966, seeking modification of the aforesaid order dated 4th July, 2011.

5. Before the Application could be moved by the learned Attorney General, Mr. Anil B. Divan, learned Senior Advocate appearing for the Writ Petitioners, took a preliminary objection that the interlocutory application was not maintainable on several counts. It was firstly urged that in effect, in the guise of an application for modification, the Respondents/Applicants were wanting either a re-hearing and/or review of the order passed on 4th July, 2011, disposing of I.A.No.1 of 2009. Mr. Divan pointed out that it was the Government itself which had set up a High Level Committee consisting of senior officers of

different departments to take steps for retrieving the black money which had been deposited in banks in tax havens all over the world and, in particular, in Swiss Banks and it did not, therefore, lie in the mouth of the Government to take a different stand when the same Committee had been converted into a Special Investigation Team with two former Judges of the Supreme Court to monitor the progress of the recovery proceedings.

6. Mr. Divan also contended that the formation of a Special Investigation Team to monitor the investigation is not a new concept and has been resorted to on different occasions in order that justice is done between the parties and the rule of law is not obstructed either by the investigating agency or otherwise. Mr. Divan urged that once the matter had been decided on merits and a direction had been given for the formation of a Special Investigation Team composed of the very officers who had been appointed as members of the High Level Committee for the very same purpose, the Government is not justified in objecting to the investigation being monitored by such Committee headed by two retired Judges of the Supreme Court with impeccable credentials. Mr. Divan submitted that the contention of the Respondents in I.A. No.8 of 2011 was as if by appointing a Special Investigation Team, the Supreme Court had taken over the executive powers of the Union. It was submitted that although a case against the accused was pending since 2007, no attempt had been made to interrogate the accused in regard to the allegations made against them.

7. Mr. Divan submitted that possibly other fora were available to the Respondents, but the present I.A. would not provide any remedy to the Respondents. Mr. Divan urged that it was on account of the complete inertia of the investigating authority that in spite of huge sums of unaccounted money deposited in tax havens abroad, little or no action was taken to proceed with the investigation or even to interrogate the persons accused of having been involved in money laundering

and acting against the interests of the country and its citizens. Mr. Divan submitted that the remedy available to the Respondents lay in a review petition under the provisions of Order 47 of the Supreme Court Rules, 1966, and not by an interlocutory application and that too in a disposed of matter.

8. Mr. Shekhar Naphade, learned Senior Advocate who appeared for the Petitioner in Writ Petition (Civil) No.136 of 2011, supported the submissions made by Mr. Anil Divan with regard to the maintainability of the Interlocutory Application No.8 of 2011 filed by the Union of India. It was contended that neither the provisions of Article 142 of the Constitution nor Order 47 Rule 6 of the Supreme Court Rules were attracted in the facts of this case, inasmuch as, the said provisions conferred power and not jurisdiction on this Court in respect of a matter which was pending before it. Mr. Naphade submitted that Article 142 very clearly vested the Supreme Court with jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any case or matter pending before it. Mr. Naphade also contended that, as had been held by this Court, in *Saurav Chaudhary Vs. Union of India* [(2004) 5 SCC 618], this Court could exercise its jurisdiction under Article 142 of the Constitution at the time of rendition of the judgment and not thereafter. It was further observed that once judgment had been delivered by the Court, it could not recall the same and could only exercise its power of review in case it intended to take a different view from the one rendered in the main judgment. Mr. Naphade also urged that even the provisions of Order 47 Rule 6 of the Supreme Court Rules were of no assistance to the Union of India. It was submitted that the Rules framed under Article 145(1) of the Constitution only empowered the Supreme Court to frame Rules to regulate its practice and procedure and does not take in its sweep the power to create a new jurisdiction to entertain a cause or matter.

9. Reference was also made to the decision of this Court in *Raja Soap Factory & Ors. Vs. S.P. Shantharaj & Ors.*[(1965)

2 SCR 800], wherein it was observed that by jurisdiction what is meant is the extent of power which is conferred upon a Court by its Constitution to try a matter or a cause. Such power is not capable of being enlarged because an extraordinary situation requires the Court to exercise it.

10. Mr. Naphade submitted that by virtue of this application, the Union of India was seeking to review a final order passed by this Court, treating the same to be an application for recalling the order. Mr. Naphade repeated and reiterated his submissions that the application filed on behalf of the Union of India and its authorities was not maintainable and could only be dismissed.

11. Replying to the submissions made by Mr. Divan and Mr. Naphade, the learned Attorney General submitted that in earlier cases also this question had been raised and considered by this Court. Referring to the decision of a Bench of Seven Judges in the case of *A.R. Antulay Vs. R.S. Nayak & Anr.* [(1988) 2 SCC 602], the learned Attorney General submitted that by a majority judgment this Court held that directions, if given in violation of the principles of natural justice, if subsequently questioned in another appeal instead of by way of a Review Petition under Article 137, the same could be set aside by another Bench of the Court ex debito justitiae in exercise of its inherent powers. The majority amongst the Judges held that the want of jurisdiction could be addressed solely by a superior Court and, in practice, no decision could be reviewed collaterally by any inferior Court, but the superior Court could always correct its error either by way of a petition or ex debito justitiae. In fact, it was also observed that in certain situations, the Supreme Court could always invoke its power of review in exercise of its inherent jurisdiction in any proceeding pending before it, without insisting on the formalities of a review application. The learned Attorney General submitted that by appointing two retired Judges of the Supreme Court, Justice B.P. Jeevan Reddy as the Chairman

and Justice M.B. Shah as the Vice-Chairman, and directing that the Special Investigation Team would function under their guidance and directions, would amount to interference with the executive authority of the different officials representing different sections of the administration which would lead to a chaotic situation. The direction given to include the Director, Research & Analysis Wing, was also improper, since the said authority functioned under strict rules of secrecy, which could be jeopardized if its Director were to be included in the Special Investigation Team.

12. The learned Attorney General submitted that, in the event there was any doubt as to whether the powers of the Supreme Court under Article 142 of the Constitution could be invoked for doing complete justice in a matter which was not pending before it, the present application could always be treated as a Review Petition under Article 137 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966. The learned Attorney General submitted that in view of the magnitude of the transactions involved and that too without any accounting of the monies used, this Court should cut across technicalities and consider the matter pragmatically. The learned Attorney General submitted that the present application may, therefore, be treated as a Review Petition under Article 137 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966 and be proceeded with accordingly, notwithstanding the objection taken on behalf of the Petitioners in regard to the different procedure to be adopted in respect of a review application. It was also submitted that as indicated in *A.R. Antulay's* case (supra), the Supreme Court can grant relief in exercise of its inherent powers as the guardian of the Constitution.

13. Reference was also made by the learned Attorney General to the decision of this Court in *S. Nagaraj & Ors. Vs. State of Karnataka & Anr.* [(1993) Supp. (4) SCC 595], which was heard along with several other cases by a Bench of three

Judges. In the said cases an order had been passed on oral mentioning which ultimately resulted in several contempt petitions being filed. Two of the Hon'ble Judges, after considering the anomalous circumstances which had resulted from the passing of the order on oral mentioning, held that justice is a virtue which transcends all barriers and neither the rules of procedure nor technicalities of law can stand in its way. It was further observed that the order of the Court should not be prejudicial to anyone and if the Court found that the order was passed under a mistake and it would not have exercised the jurisdiction, but for the erroneous assumption which in fact did not exist, and its perpetration would result in miscarriage of justice, then it would not on any principle be precluded from rectifying the order. Mistake is accepted as a valid reason to recall an order. Their Lordships emphasized the fact that rectification of an order stems from the fundamental principles that justice is above all. It is exercised to remove the error and not for disturbing finality. In the judgment it was also observed that the Supreme Court has the inherent power to make such orders as may be necessary for the interest of justice or to prevent the abuse of process of Court. The Court is, therefore, not precluded from recalling or reviewing its own order, if it is satisfied that it is necessary to do so for the sake of justice. It was pointed out that even the learned third Judge held that while the Government was mainly responsible for the unfortunate state of affairs that should not desist the Supreme Court from revising or reviewing the said orders which had serious consequences. The learned third Judge also observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders will have serious consequences.

14. On a careful consideration of the submissions made on behalf of the respective parties in regard to the maintainability of I.A. No.8 of 2011 filed on behalf of the Union of India, wherein, inter alia, a prayer has been made to modify

the order dated 4th July, 2011 and to delete the directions relating to the Special Investigation Team in paragraphs 49 and 50 of the said order, it appears that the I.A. is maintainable. In view of the preliminary objection relating to the maintainability of the interlocutory application filed on behalf of the Union of India, the said issue regarding the maintainability of I.A. No.8 of 2011 has been taken up first.

15. From the arguments advanced on behalf of the respective parties, it appears at first blush that Mr. Anil B. Divan is technically correct in submitting that since there was no matter pending before this Court, the provisions of Article 142 of the Constitution would not be attracted and that even the inherent powers of this Court preserved under Order 47 Rule 6 of the Rules framed by the Supreme Court in exercise of its powers under Article 145 of the Constitution would not be applicable. However, this Court has preserved its inherent powers to make such orders as may be necessary for the ends of justice in Order 47 Rule 6 of the Supreme Court Rules, 1966, framed under Article 145 of the Constitution. As has been held in *A.R. Antulay's* case (supra) and in *S. Nagaraj's* case (supra), such a power was not only in herentin the Supreme Court, but the Supreme Court was also entitled to and under an obligation to do justice to exercise such powers as the guardian of the Constitution. Justice transcends all barriers and neither rules of procedure nor technicalities can stand in its way, particularly if its implementation would result ininjustice. In addition to the decision rendered by this Court in *A.R. Antulay's* case (supra) and in *S. Nagaraj's* case (supra), reference may also be made to another equally important pronouncement of this Court in *Vineet Narain's* case (supra), wherein the concept of continuing mandamus was introduced in order to maintain the credibility of the investigation being conducted.

16. Reference may also be made to the decision of this Court in *Manganese Ore (India) Ltd. Vs. Chandi Lal Saha* [(1991) Supp. 2 SCC 465], wherein this Court extended the

benefit of its judgment to persons who were not even in appeal before it.

17. Even if the present application was to be dismissed as being not maintainable under Article 142 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966, it would not preclude the Applicants from filing an application for review under Article 137 of the Constitution. As the very working of the Special Investigation Team appointed under the order of 4th July, 2011, is in question, it is necessary to cut across the technical tapes sought to be invoked on behalf of the Petitioners and hold that in view of the inherent powers vested in the Supreme Court of India, preserved in Order 47 Rule 6 of the Supreme Court Rules, 1966, and having regard to the fact that the Supreme Court is the guardian of the Constitution, I.A. No.8 of 2011, even in its present form is maintainable in the facts and circumstances of the case, which include threats to the security of the country.

18. The objections raised by Mr. Anil B. Divan and supported by Mr. Shekhar Naphade, regarding the maintainability of I.A. No.8 of 2011, are, therefore, rejected and the said application may therefore be proceeded with for hearing.

O R D E R

SURINDER SINGH NIJJAR, J. 1. I have had the opportunity, and the benefit of reading, in draft, the learned opinion of Hon'ble Mr. Justice Altamas Kabir. However, with all humility and with due respect, I would not be able to concur with the view taken by my Learned Brother. My Learned Brother has rejected the preliminary objections raised by Mr. Anil Divan and Mr. Shekhar Naphade, appearing for the writ petitioners and directed the application to proceed for hearing. In my opinion, the application is not maintainable for a number of reasons.

2. The application clearly states that the order passed by

this Court in I.A. No. 1 on 4th July, 2011 impinges upon the doctrine of separation of powers. The application thereafter sets out the facts leading to the filing of the writ petition invoking Article 32 of the Constitution of India. The application sets out the prayers made in the writ petition. Thereafter, it is stated that the writ petition, as originally filed, did not contain any prayer for appointment of a Special Investigation Team. The application also points out that in the counter affidavit filed on behalf of the Union of India, it had been clearly stated that the Central Government had been alive to the need to be able to retrieve information about the alleged money lying deposited in the foreign accounts and highlighting steps taken by it in his behalf. It further points out that it was on account of such an initiative, tax haven countries, including countries like Switzerland, made solemn attempts to enter into effective tax information exchange agreements with various countries. The application proceeds to delineate the steps taken and the strategy formulated to eradicate the menace of "Black Money". It states that the Government had joined the global crusade against Black Money. It had decided to create an appropriate legislative framework by incorporating various tax evasion measures in existing Acts. Thereafter, the application gives the details of the proposed new legislation for unearthing Black Money. After enumerating all the efforts made by the Government at national and international level, it is stated that above all the Government has constituted a Committee on 27th May, 2011 under the Chairman, C.B.D.T. to examine ways to strengthen laws to stop the generation of Black Money in the country, its legal transfer abroad and its recovery. The Committee also examined various other issues which are enumerated in the application. The application further proceeds to tabulate the efforts to create further legislative and administrative framework to obtain information about illicit money of Indian citizens already parked outside the country. Thereafter, the application sets out the efforts already made and the results thereof. On the basis of that, it is stated that the Government has achieved substantial

success not only in getting information on illicit money parked outside the country but also in stopping the transfer of illicit money outside the country. Thereafter, the details are given of the illicit money detected.

3. It is stated that in the order dated 4th July, 2011, these efforts have neither been adverted to nor evaluated before rendering the finding in Paragraph 46 of the judgment.

4. The application thereafter sets out various efforts made in the matter of investigation of the case of Hasan Ali Khan and Kashinath Tapuriah. The application thereafter reproduces the directions sought in I.A. No.1 of 2009, which was filed on 8th September, 2009. Thereafter, it is submitted that even in this application, no prayer was made for appointment of a Special Investigation Team [SIT]. It is further submitted that such a prayer ought not to have been granted on the basis of written submissions of the learned counsel for the petitioners in the absence of requisite pleadings in the writ petition or in the absence of a formal prayer. The application further proceeds to state that it is filed invoking the inherent power of this Court under Article 142(1) of the Constitution of India for doing complete justice in any case or matter pending before it.

5. In the grounds of the application, it is stated that this Court while exercising its jurisdiction would not be pleased to attain to itself, the task entrusted to the executive. It is emphatically submitted in the application that the order is without jurisdiction since the constitution of the High Level Committee is within the realm of a decision on policy matters. It is also submitted that formation of a SIT headed by two former Judges of this Court not only impinges on the policy decision of the Government but also impinges upon the doctrine of separation of powers. This, according to the application, would be beyond the jurisdiction conferred on this Court under Article 32 of the Constitution of India, which can be exercised for the enforcement of the rights conferred by Part III and for no other purpose. It is further submitted that the judgment proceeds on

admissions, concessions, submissions and acknowledgments attributed to the counsel appearing for the Union of India. It is pointed out that such concessions and admissions do not appear to have been made. On the basis of the facts pleaded, the prayer is made for modification of the order dated 4th July, 2011 and deletion of the directions relating to SIT in Paragraphs 49 and 50. Since the directions given in these paragraphs have been reproduced verbatim by His Lordship, Justice Kabir, the same are not necessary to be reproduced herein again.

6. The aforesaid facts have been stated merely to indicate that the application would not be maintainable, in its present form, as in substance, it is more in the nature of a Memorandum of Appeal. In my opinion, the application seeks to reopen the whole matter on merits which would not be permissible in an application for modification. Therefore, in my opinion, the application deserves to be dismissed at the threshold.

7. As the submissions made by the learned counsel for the parties have been succinctly noticed by my Learned Brother Altamas Kabir, J. in His Lordship's order, the same need not be repeated herein.

8. In my opinion, an application for clarification/ modification touching the merits of the matter is not maintainable. The Court can consider the matter, if at all, only upon a review application on limited grounds. In considering the application for review, the procedure laid down under Order XL of the Supreme Court Rules, 1966 read with Article 137 would have to be followed. Review of a judgment is a serious matter and is, therefore, governed by constitutional and statutory provisions. This view of mine will find support from a number of earlier decisions of this Court. It would, at this stage, be appropriate to make a reference to some of the observations made.

9. In the case of *Ram Chandra Singh Vs. S avitri Devi &*

Ors.[1] this Court considered the issue as to whether an application for clarification/modification would be maintainable in the face of the provisions contained in Article 137 and Order XL Rule 1 of Supreme Court Rules. Upon consideration of the entire issue, it was observed as follows:-

> "It is now well settled that an application for clarification or modification touching the merit of the matter would not be maintainable. A Court can rehear the matter upon review of its judgment but, therefore, the procedure laid down in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966 as also Article 137 of the Constitution are required to be complied with as review of a judgment is governed by the constitutional as well as statutory provisions. .... "The prayer of the applicant is that apart from the corrections which are required to be made in the judgment, as noticed hereinbefore, the merit of the matter may also be considered, inter alia, with reference to the pleadings of the parties. Such a course of action, in our opinion, is not contemplated in law. If there exist errors apparent on the face of the record, an application for review would be maintainable but an application for clarification and/or modification cannot be entertained unless it is shown that the same is necessary in the interest of justice. An application which is in effect and substance an application for review cannot be entertained dehors the statutory embargo contained in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966."

10. I am of the considered opinion that the present application would be an abuse of the process of the Court as it seeks to camouflage an application for Review as an application for modification. In my opinion, such a course ought not to be encouraged. It would be relevant to notice the

1. 2004 (12) SCC 713

observations made by this Court in paragraph 16 of the judgment in the case of *Delhi Administration Vs. Gurdip Singh Uban & Ors.*[2] .

> "16. At the outset, we have to refer to the practice of filing review applications in large numbers in undeserving cases without properly examining whether the cases strictly come within the narrow confines of Rule XL of the Supreme Court Rules. In several cases, it has become almost everyday experience that review applications are filed mechanically as a matter of routine and the grounds for review are a mere reproduction of the grounds of special leave and there is no indication as to which ground strictly falls within the narrow limits of Rule XL of the Rules. We seriously deprecate this practice. If parties file review petitions indiscriminately, the time of the Court is unnecessarily wasted, even it be in chambers where the review petitions are listed. Greater care, seriousness and restraint is needed in filing review applications."

11. In my opinion, ten years down the line, the situation is even worst than what is depicted by the aforesaid observations. Now we are facing an almost daily practice of having to consider applications for "modification and clarification".

12. In the aforesaid judgment, this Court also considered the nature and scope of the jurisdiction to review its own order/ judgment. Since the application herein has been described as an application for "modification", it would be necessary to notice the observations made by this Court in Paragraph 17 and 18 of the judgment. The observations of this Court are as under:-

> "17. We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned

2. 2000 (7) SCC 296

Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

Order XL Rule 3 states as follows:

"3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party...."

In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open Court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in Sone Lal v. State of U.P deprecating a similar practice.)

18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers."

13. These observations leave no manner of doubt that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. It is clearly indicated that in those circumstances the Court could either reject the application straight away or permit withdrawal with leave to file a review application to be listed initially in chambers.

14. Examined on the touch stone of the observations made above, I am of the considered opinion that the application herein though described as an application for modification is in substance more in the nature of a Memorandum of Appeal. At best, it could be said to be in substance an Application for Review. It certainly does not lie within the very narrow limits within which this Court would entertain an application for modification.

15. In yet another case of *Zahira Habibullah Sheikh & Anr. Vs. S tate of Gujarat & Ors.*[3] this Court, faced with a similar situation, had this to say :

"The petition is in essence and substance seeking for a review under the guise of making an application for direction and modification apparently being fully aware of the normal procedure that such applications for review are not, unless the Court directs, listed for open hearing in Court, at the initial stage at least, before ordering notice to the other side and could be summarily rejected, if found to be of no prima facie merit. The move adopted in itself

3. (2004 (5) SCC 353.

is unjustified, and could not be countenanced also either by way of review or in the form of the present application as well. The nature of relief sought, and the reasons assigned are such that even under the pretext of filing a review such an exercise cannot be undertaken, virtually for rehearing and alteration of the judgment because it is not to the liking of the party, when there is no apparent error on record whatsoever to call for even a review. The said move is clearly misconceived and nothing but sheer abuse of process, which of late is found to be on the increase, more for selfish reasons than to further or strengthen the cause of justice. The device thus adopted, being otherwise an impermissible move by mere change in nomenclature of the applications does not change the basic nature of the petition. Wishful thinking virtually based on surmises too, at any rate is no justification to adopt such undesirable practices. If at all, it should be for weighty and substantial reasons and not to exhibit the might or weight or even the affluence of the party concerned or those who represent such parties when they happen to be public authorities and institutions.

16. This Court approved the observations made in the case of *Gurdip Singh Uban* (supra) and observed that what cannot be done directly cannot be permitted to be done indirectly. The Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance a clever move for review.

17. These observations were reiterated in the case of *A.P. SRTC & Ors. Vs. Abdul Kareem*[4]. This Court observed that the petition was in essence and substance seeking for a review under the guise of making an application for direction and modification apparently being fully aware of the normal procedure that such applications for review are not, unless the Court directs, listed for open hearing in Court, at the initial stage

4. 2007 (2) SCC 466.

at least, before ordering notice to the other side and could be summarily rejected, if found to be of no prima facie merit. The Court further observed that such a move ought not to be countenanced. The move was clearly misconceived and nothing but sheer abuse of process, which of late is found to be on the increase, more for selfish reasons than to further or strengthen the cause of justice.

18. To be fair, it must be noticed that the learned Attorney General appearing for the Union of India had relied on a number of judgments in support of his submissions that the Court would have inherent powers to modify its own order/judgment. The primary judgment relied upon by the learned Attorney General is in the case of *S. Nagaraj & Ors. Vs. State of Karnataka & Anr.*[5]. I am of the considered opinion that the aforesaid judgment would be of no assistance to the submissions made by the learned Attorney General. The aforesaid judgment was rendered in the background of very peculiar facts. It would appear that this Court had passed an order having far reaching consequences and pre-judicially affecting the rights of other groups of employees under Articles 14 and 16 of the Constitution of India. The order had permitted backdoor entry of thousands of stipendiary graduates because of the negligence of the State in putting correct facts before the Court. The Government seemed to have woken up after considerable damage had already been done and moved an application for modification/clarification of the order dated 30th October, 1991. The learned Attorney General placed strong reliance on the observations made by this Court in Paragraph 18, 19 and 36 of the judgment in support of the submission that the Court should not decline to review its orders when it is brought to the notice of the Court that it would be in the interest of justice to modify the same. In order to appreciate the submission of learned Attorney General, it would be appropriate to notice the observations made by this Court in Paragraphs 18, 19 and 36 of the judgment, which are as under:-

5. 1993 (Supp. 4) SCC 595.

"18. Justice is a virtue which transcends all barriers.

Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

19. Review literally and even judicially means reexamination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved

out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai* the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *Rajunder Narain Rae v. Bijai Govind Singh* that an order made by the Court was final and could not be altered:

> "... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

> "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable

> injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice.

36. There is yet another circumstance. The question is, whether this Court should enforce the 1982 Rules as amended in 1987. The 1987 amendments have the effect of smuggling in thousands of persons into Government service by a back-door — without complying with the

requirements of Articles 14 and 16. One can understand the rules as framed in 1982, but it is extremely difficult to appreciate or understand the reasons for which the 1987 amendment was brought in. The question, to repeat, is whether this Court should extend its arm — its discretionary power under Articles 136 and 32, as the case may be, to implement such unconstitutional rules and help these persons to gain a back-door entry into Government service — that too at the highest level in group 'C' services straightaway. It is true that no one has questioned the 1987 amendments. The petitioners do not question them because they are advantageous to them; they want them to be implemented. The Government cannot and does not question them because it has itself made them. The parties who are affected namely the persons awaiting employment under the Government probably do not even know what is happening. But where an unconstitutional provision of such vast impact is brought to the notice of this Court and it is asked to enforce it, it is the constitutional duty of this Court to refuse to do so. I am, therefore, of the firm opinion that this Court should refuse to make any orders directing implementation of the rules as amended in 1987. The proper direction would be to direct the absorption of the S.Gs. in accordance with the 1982 Rules as originally framed (i.e., without reference to the 1987 amendments) and to the extent provided therein. Of course those S.Gs. who have been absorbed already into group 'C' service in accordance with the said rules will remain unaffected since disturbing them, without notice to them and in view of all the circumstances of this case, may not be advisable. All those S.Gs. who have not so far been absorbed in group 'C' service shall continue in the present status, drawing Rs 960 per month. They will be entitled for absorption in group 'C' posts only in accordance with the 1982 Rules, without reference to the 1987

amendments."

Relying on these observations, learned Attorney General, submits that the Court should regardless of any technical objections proceed to hear the present application without insisting that the applicant should seek its relief in an application for review.

19. I am of the considered opinion that the facts and circumstances highlighted in the present application would not enable the applicant to satisfy the conditions under which this Court exercised its inherent jurisdiction in the *S. Nagaraj's* case (supra). A perusal of the judgment would clearly show that the Court was anxious to "even the balance". On the one side, there were orders of the Court passed on vague and incomplete affidavit, creating rights and hopes in favour of five thousand stipendiary graduates to be absorbed as First Division Assistant, and on the other hand, there were others, the likely injustice to whom had been highlighted in the affidavit filed by the Government and in the writ petition filed by different sections of the employees. The Court in fact emphasised the principle of finality of orders and binding nature of directions issued by the Court which could only be overridden, if there is injustice inherent in the situation (see Page 615, Para 14 e & f). A little later in the judgment, in Paragraph 16, the Court observed as follows:-

> "16. "Mere eligibility was not sufficient unless availability of posts was also established. In absence of posts and due to equitable considerations arising in favour of other employees the practical difficulty in appointing all the five thousand stipendiary graduates as First Division Assistants appears to be insurmountable. Even so we have no hesitation in saying that we would have refused to modify our order dated October 30, 1991 at the instance of the Government but the Court c annot be unjust to other employees." (emphasis supplied)

20. These observations make it abundantly clear that the Court was dealing with a particularly unsavory situation created by the Government which had led to insurmountable difficulties and possible injustice to both the stipendiary Magistrates and other employees. The Court, therefore, observed that but for this unique situation, it would have refused to modify the order dated 30th October, 1991. In Paragraph 18, the Court makes it clear that the order was passed under a mistake. The Court would not have exercised its jurisdiction but for the erroneous assumption, which in fact did not exist. In Paragraph 36, again, it is reiterated by the Court that it would be the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice and certain of its orders were based on wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences.

21. In my opinion, in the present case, there is no question of mistaken facts, being presented by anyone to the Court. The application also fails to indicate any miscarriage of justice or injustice which would be caused to any particular class. The other authorities cited by the learned Attorney General followed the judgment in *S. Nagaraj's* case (supra) and would not advance the cause of the applicant or Union of India any further.

22. The judgment in *Gurdip Singh Uban's* case (supra) rather supports the writ petitioner as noticed in the earlier part of this order. The learned Attorney General further submitted that this Court would be fully justified in passing the orders in exercise of its inherent jurisdiction under Article 142 of the Constitution of India. It can always correct its non errors brought to its notice either by way of a review petition or ex debito justitiae. In support of the submission, the learned Attorney general has relied on judgment of this Court in the case of *A.R. Antulay Vs. R .S. Nayak & Anr.*[6]

23. In my opinion, the aforesaid judgment was also

6. 1988 (2) SCC 602

delivered in view of the peculiar circumstances of the case. The Court therein set out the circumstances in which this Court can pass the appropriate orders unhindered by technical rules. The observations made in paragraph 48, which are of relevance, are as under :

> "48. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner."

24. In my opinion, the aforesaid observations would not be applicable in the facts and circumstances of the present case. The application herein is not moved by an individual, who had been deprived of his fundamental rights by an order dated 4th July, 2011. The application is filed by the Union of India challenging the order on various legal and factual issues. In *Antulay's* case (supra), one of the grounds taken was that the directions have been issued by the Court without following the principle of audi alteram partem. In the present case, the directions had been issued after hearing the learned counsel for the parties at length and on numerous dates. These directions, in my opinion, cannot be recalled in an application seeking only modification of the order. At this stage, it would also not be possible to treat the present application for modification as an application for review.

25. In view of the above, with utmost respect, it would not be possible to agree with the order passed by Hon'ble Mr. Justice Altamas Kabir. In my opinion, the applicant Union of India has failed to make out a case to enable this Court to treat the modification application as application for review and proceed to hear the same in open Court. In my opinion, the present application is wholly misconceived. It is, therefore, dismissed. Union of India is, however, at liberty to take recourse to any other legal remedy that may be available to it.

O R D E R

Since we have differed in our views regarding the maintainability of I.A. No.8 of 2011 filed in W.P. No.176 of 2009, let the matter be placed before Hon'ble the Chief Justice of India, for reference to a third Judge.

R.P. Matter referred to Larger Bench.

THOTA VENKATESWARLU

v.

STATE OF A.P. TR. PRINCL. SEC. & ANR.

(SLP (Crl.) No. 7640 of 2008)

SEPTEMBER 02, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]

Code of Criminal Procedure, 1973:

s. 188 proviso –Offence committed outside India by citizen of India – Previous sanction of Central Government for inquiring into or trying such offences in India – Requirement of – Held: Upto the stage of taking cognizance, no previous sanction is required from the Central Government in terms of the proviso to s. 188 – However, the trial cannot proceed beyond the cognizance stage without the previous sanction of the Central Government.

s. 188 – Offence committed outside India – Petitioner-husband and respondent No.2-wife married in India – At the time of marriage, cash and gold given by father of respondent No. 2 to the petitioner – Petitioner left for abroad-Botswana and respondent No. 2 joined him one month later – Respondent No.2 allegedly ill-treated by the petitioner as also demand for dowry raised by the petitioner, and his immediate relatives by way of phone calls – Respondent No. 2 addressed a complaint to the police in India – Registration of complaint u/ss. 498-A and 506 IPC and ss. 3 and 4 of the Dowry Prohibition Act, 1986 – Charge-sheet filed against the petitioner and his close relatives-co-accused – Cognizance taken by Magistrate – Petition filed by the petitioner and co-accused seeking quashing of the same – High Court quashed proceedings against the co-accused, however dismissed the petition filed by the petitioner – On appeal, held: Alleged

offences u/ss. 3 and 4 of the Dowry Prohibition Act occurred within the territorial jurisdiction of the criminal courts in India and could, therefore, be tried by the courts in India without obtaining the previous sanction of the Central Government – Magistrate may proceed with the trial relating to offences – However, in respect of offences alleged to have been committed outside India, the Magistrate shall not proceed with the trial without the sanction of the Central Government as envisaged in the proviso to s. 188 – Penal Code, 1860 – ss. 498-A and 506 – Dowry Prohibition Act, 1986 – ss. 3 and 4.

Petitioner-husband and respondent No.2-wife got married in India. At the time of marriage, father of respondent No. 2 gave cash and gold to the petitioner and his relatives (accused Nos. 1 to 4). The petitioner left for abroad-Botswana and respondent No. 2 joined him one month later. It is alleged that while in Botswana, the petitioner ill-treated respondent No.2 as also raised dowry demands. The petitioner's immediate relatives also raised dowry demands by way of phone calls. Respondent No. 2 addressed a complaint to the police in India from Bostwana. The case was registered u/ss. 498-A and 506 IPC and ss. 3 and 4 of the Dowry Prohibition Act, 1986. The charge-sheet was filed against the petitioner and his close relatives. The Magistrate took cognizance of the case and ordered issuance of summons against the accused. The petitioner and accused Nos. 2 to 4 filed a criminal petition seeking quashing of the cognizance taken by the Magistrate u/s. 482 Cr.P.C. The High Court allowed the criminal petition filed by accused Nos. 2 to 4, however, dismissed the one filed by the petitioner. Therefore, the petitioner filed the instant Special Leave Petition.

The question which arose for consideration in the instant case was whether in respect of a series of offences arising out of the same transaction, some of which were committed within India and some outside

India, such offences could be tried together, without the previous sanction of the Central Government, as envisaged in the proviso to Section 188 Cr.P.C.

Disposing of the Special Leave Petition, the Court

HELD: 1.1 From the complaint made by respondent No.2, it is clear that the cases relating to alleged offences under Section 498-A and 506 I.P.C. had been committed outside India in Botswana, where the petitioner and respondent No.2 were residing. At best it may be said that the alleged offences under Sections 3 and 4 of the Dowry Prohibition Act occurred within the territorial jurisdiction of the criminal courts in India and could, therefore, be tried by the courts in India without having to obtain the previous sanction of the Central Government. [Para 9] [102-G-H; 103-A-B]

1.2 The language of Section 188 Cr.P.C. is quite clear that when an offence is committed outside India by a citizen of India, he may be dealt with in respect of such offences as if they had been committed in India. The proviso, however, indicates that such offences could be inquired into or tried only after having obtained the previous sanction of the Central Government. The proviso to Section 188 is a fetter on the powers of the investigating authority to inquire into or try any offence mentioned in the earlier part of the Section, except with the previous sanction of the Central Government. The fetters, however, are imposed only when the stage of trial is reached, which clearly indicates that no sanction in terms of Section 188 is required till commencement of the trial. It is only after the decision to try the offender in India was felt necessary that the previous sanction of the Central Government would be required before the trial could commence. Accordingly, upto the stage of taking cognizance, no previous sanction would be required from the Central Government in terms of the proviso to

Section 188 Cr.P.C. However, the trial cannot proceed beyond the cognizance stage without the previous sanction of the Central Government. The Magistrate is, therefore, free to proceed against the accused in respect of offences having been committed in India and to complete the trial and pass judgment therein, without being inhibited by the other alleged offences for which sanction would be required. [Paras 10 and 11] [103-C-H; 104-A-D]

1.3 The provisions of the Penal Code, 1860 have been extended to offences committed by any citizen of India in any place within and beyond India by virtue of Section 4 thereof. Accordingly, offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the Penal Code, 1860 subject to the limitation imposed under the proviso to Section 188 Cr.P.C. [Para 12] [104-E]

1.4 While there is no reason to interfere with the High Court's decision to reject the petitioner's prayer for quashing of the proceedings in the complaint case it is also clear that the Magistrate may proceed with the trial relating to the offences alleged to have been committed in India. However, in respect of offences alleged to have been committed outside India, the Magistrate shall not proceed with the trial without the sanction of the Central Government as envisaged in the proviso to Section 188 Cr.P.C. [Para 13] [104-F-G]

Ajay Aggarwal vs. Union of India and Ors. **(1993) 3 SCC 609: 1993 (3) SCR 543 – referred to.**

Case Law Reference:

1993 (3) SCR 543	**Referred to**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 7640 of 2008.

From the Judgment & Order dated 27.08.2008 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Petition No. 3629 of 2008.

G.V.R. Choudary, K. Shivraj Choudhuri, A. Chandra Sekhar for the Petitioner.

D. Mahesh Babu, Sawita, D. Bharathi Reddy, P. Venkat Reddy, Anil Kumar Tandale for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This Special Leave Petition is directed against the judgment and order dated 27th August, 2008, passed by the High Court of Andhra Pradesh at Hyderabad in Criminal Petition No.3629 of 2008 dismissing the Petition filed by the Petitioner under Section 482 Criminal Procedure Code ('Cr.P.C.' for short) for quashing the proceedings in Complaint Case No.307 of 2007 pending before the Additional Munsif Magistrate, Addanki. This case raises certain interesting questions of law and to appreciate the same, some of the facts are required to be reproduced.

2. The Petitioner, Thota Venkateswarlu, was married to the Respondent No.2, Parvathareddy Suneetha, on 27th November, 2005, as per Hindu traditions and customs in the Sitharama Police Kalyana Mandapam, Ongole, Prakasam District, Andhra Pradesh. At the time of marriage 12 lakhs in cash, 45 sovereigns of gold and 50,000/-as Adapaduchu Katnam is alleged to have been given to the Accused Nos.1 to 4, who are the husband, the mother-in-law and other relatives of the husband. According to the Respondent No.2, the Petitioner left India for Botswana in January 2006 without taking her along with him. However, in February, 2006, the Respondent No.2 went to Botswana to join the Petitioner. While in Botswana, the Respondent No.2 is alleged to have been severely ill-treated by the Petitioner and apart from the above, various demands were also made including a demand for additional dowry of 5

lakhs. On account of such physical and mental torture not only by the Petitioner/husband, but also by his immediate relatives, who continued to demand additional dowry by way of phone calls from India, the Respondent No.2 addressed a complaint to the Superintendent of Police, Ongole, Prakasam District, Andhra Pradesh, from Botswana and the same was registered as Case (Crl.) No.25 of 2007 under Sections 498-A and 506 Indian Penal Code ('I.P.C.' for short) together with Sections 3 and 4 of the Dowry Prohibition Act, 1986, by the Station House Officer, Medarametla Police Station, on the instructions of the Superintendent of Police, Prakasam District. Upon investigation into the complaint filed by the Respondent No.2, the Inspector of Police, Medarametla, filed a charge-sheet in CC No.307 of 2007 in the Court of the Additional Munsif Magistrate, Addanki, Prakasam District, under Sections 498-A and 506 I.P.C. and Sections 3 and 4 of the Dowry Prohibition Act against the Petitioner and his father, mother and sister, who were named as Accused Nos.2, 3 and 4. The learned Magistrate took cognizance of the aforesaid case and by his order dated 19th February, 2007, ordered issuance of summons against the accused.

3. The cognizance taken by the learned Magistrate was questioned by the Petitioner and the other coaccused before the Andhra Pradesh High Court in Criminal Petition Nos.3629 and 2746 of 2008 respectively and a prayer was made for quashing of the same under Section 482 of the Code of Criminal Procedure. The High Court by its order dated 27th August, 2008, allowed Criminal Petition No.2746 of 2008 filed by the Accused Nos.2 to 4 and quashed the proceedings against them. However, Criminal Petition No.3629 of 2008 filed by the Petitioner herein was dismissed. The present Special Leave Petition is directed against the said order of the High Court rejecting the Petitioner's petition under Section 482 Cr.P.C. and declining to quash Complaint Case No.307 of 2007 initiated against him.

4. The submissions made by the learned counsel for the Petitioner before this Court have raised certain important questions which warrant the attention of this Court.

5. It has been submitted on behalf of the Petitioner that as will appear from the complaint made by the Respondent No.2 to the Superintendent of Police, Ongole, Prakasam District, Andhra Pradesh on 22nd March, 2007, no grounds had been made out therein to continue with the proceedings in India, having regard to the provisions of Section 188 Cr.P.C., which provides as follows :

"188. Offence committed outside India – When an offence is committed outside India-

(a) by a citizen of India, whether on thehigh seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India.

he may be dealt with in respect of such offence as if it had been committed at anyplace within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

6. Learned counsel urged that Section 188 Cr.P.C. recognizes that when an offence is committed outside India by a citizen of India, he would have to be dealt with as if such offence had been committed in any place within India at which he may be found. Learned counsel, however, laid stress on the proviso which indicates that no such offence could be inquired into or tried in India except with the previous sanction of the Central Government [Emphasis Supplied]. Learned counsel

submitted that in respect of an offence committed outside India, the same could not be proceeded with without previous sanction of the Central Government and that, accordingly, even if any of the offences was allegedly committed inside India, trial in respect of the same could continue, but the trial in respect of the offences committed outside India could not be continued, without the previous sanction of the Central Government.

7. On behalf of the Respondents it was urged that a part of the alleged offences relating to the Dowry Prohibition Act did appear to have arisen in India, even at the initial stage when various articles, including large sums of cash and jewellery were given in dowry by the father of the Respondent No.2. It was submitted that since a part of the cause of action had arisen in India on account of alleged offences under Sections 3 and 4 of the Dowry Prohibition Act, 1968, the learned Magistrate trying the said complaint could also try the other offences alleged to have been committed outside India along with the said offences. Reliance was placed on the decision of this Court in *Ajay Aggarwal vs. Union of India & Ors.* [(1993) 3 SCC 609], wherein it had been held that obtaining the previous sanction of the Central Government was not a condition precedent for taking cognizance of offences, since sanction could be obtained before trial begins.

8. The question which we have been called upon to consider in this case is whether in respect of a series of offences arising out of the same transaction, some of which were committed within India and some outside India, such offences could be tried together, without the previous sanction of the Central Government, as envisaged in the proviso to Section 188 Cr.P.C.

9. From the complaint made by the Respondent No.2 in the present case, it is clear that the cases relating to alleged offences under Section 498-A and 506 I.P.C. had been committed outside India in Botswana, where the Petitioner and the Respondent No.2 were residing. At best it may be said that

the alleged offences under Sections 3 and 4 of the Dowry Prohibition Act occurred within the territorial jurisdiction of the Criminal Courts in India and could, therefore, be tried by the Courts in India without having to obtain the previous sanction of the Central Government. However, we are still left with the question as to whether in cases where the offences are alleged to have been committed outside India, any previous sanction is required to be taken by the prosecuting agency, before the trial can commence.

10. The language of Section 188 Cr.P.C. is quite clear that when an offence is committed outside India by a citizen of India, he may be dealt with in respect of such offences as if they had been committed in India. The proviso, however, indicates that such offences could be inquired into or tried only after having obtained the previous sanction of the Central Government. As mentioned hereinbefore, in *Ajay Aggarwal's* case (supra), it was held that sanction under Section 188 Cr.P.C. is not a condition precedent for taking cognizance of an offence and, if need be, it could be obtained before the trial begins. Even in his concurring judgment, R.M. Sahai, J., observed as follows :

> "29. Language of the section is plain and simple. It operates where an offence is committed by a citizen of India outside the country. Requirements are, therefore, one — commission of an offence; second — by an Indian citizen; and third — that it should have been committed outside the country."

Although the decision in *Ajay Aggarwal's* case (supra) was rendered in the background of a conspiracy alleged to have been hatched by the accused, the ratio of the decision is confined to what has been observed hereinabove in the interpretation of Section 188 Cr.P.C. The proviso to Section 188, which has been extracted hereinbefore, is a fetter on the powers of the investigating authority to inquire into or try any ˇoffence mentioned in the earlier part of the Section, except with the previous sanction of the Central Government. The

fetters, however, are imposed only when the stage of trial is reached, which clearly indicates that no sanction in terms of Section 188 is required till commencement of the trial. It is only after the decision to try the offender in India was felt necessary that the previous sanction of the Central Government would be required before the trial could commence.

11. Accordingly, upto the stage of taking cognizance, no previous sanction would be required from the Central Government in terms of the proviso to Section 188 Cr.P.C. However, the trial cannot proceed beyond the cognizance stage without the previous sanction of the Central Government. The Magistrate is, therefore, free to proceed against the accused in respect of offences having been committed in India and to complete the trial and pass judgment therein, without being inhibited by the other alleged offences for which sanction would be required.

12. It may also be indicated that the provisions of the Indian Penal Code have been extended to offences committed by any citizen of India in any place within and beyond India by virtue of Section 4 thereof. Accordingly, offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the Indian Penal Code, subject to the limitation imposed under the proviso to Section 188 Cr.P.C.

13. Having regard to the above, while we see no reason to interfere with the High Court's decision to reject the petitioner's prayer for quashing of the proceedings in Complaint Case No.307 of 2007, we also make it clear that the learned Magistrate may proceed with the trial relating to the offences alleged to have been committed in India. However, in respect of offences alleged to have been committed outside India, the learned Magistrate shall not proceed with the trial without the sanction of the Central Government as envisaged in the proviso to Section 188 Cr.P.C.

14. The Special Leave Petition is disposed of accordingly.

N.J. SLP disposed of.

STATE OF U.P.
v.
ALOK VERMA
(SLP (Crl.) No. 6718 of 2011)

SEPTEMBER 02, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Sentence/Sentencing – Death sentence – Accused committed murder of wife and four children as also caused injuries to another daughter with knife and axe taking help of a hired person – Conviction by courts below on basis of the circumstantial evidence as also evidence of the surviving daughter-eye witness to the incident – Death sentence awarded by the trial court modified to life sentence by High Court – On appeal, held: On facts, the said act was a ghastly and brutal act – It falls in the category of rarest of rare cases in which death sentence should have been given – Reasoning of the High Court reducing the award of death sentence to life sentence is strange – Thus, notice issued to the accused as to why the life sentence awarded to him by the High Court should not be enhanced to death sentence.

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 6718 of 2011.

From the Judgment & Order dated 7.8.2009 of the High Court of Judicature at Allahabad in Captial Jail Appeal No. 6352 of 2008 and Reference No. 8 of 2008.

Pramod Swarup, Pareena Swarup, Pradeep Misra for the Petitioner.

The following Order of the Court was delivered

O R D E R

Heard Mr. Pramod Swarup, learned senior counsel appearing for the petitioner-State of U.P.

The allegations against the respondent accused, which have been found true by the courts below, are that the respondent murdered his wife and four children (three sons and one daughter) and caused injuries to another daughter with knife and axe taking the help of a hired person. This is because his wife protested against his indulgence in gambling, taking liquor and crimes like kidnapping. He had earlier to undergo imprisonment for one year in a case of kidnapping. His wife tried to persuade him not to commit these illegal acts and get reformed, but instead he would often beat her, and ultimately he committed these ghastly and brutal crimes of murdering his wife and four children, who are aged about 10, 8, 5 and 2 years respectively. The surviving daughter Priyanka is an eye witness and that apart there is convincing circumstantial evidence also on the basis of which the respondent has been convicted by the courts below.

The injuries on the deceased Shikha, wife of the accused-respondent are as follows :-

1. Multiple incised wounds over face and forehead size 1 cm x 0.5 cm to 3 cm x 0.5 cm bone deep.

2. Incised wound 4 cm x 1 cm trachea deep on front of neck below hyoid bone. On dissection the underlying large vessels, tracheas and nerves were cut.

3. Incised wound 4 cm x 1 cm size muscle deep on back of root of neck.

4. Incised wound 4 cm x .5 cm muscle deep on top of (Rt.) shoulder.

5. Incised wound of 3 cm x 0.5 cm muscle deep on back of and middle of (Rt.) upper arm.

The injuries on the deceased Chhoutey, aged about 5 years, son of the accused respondent are as follows:-

1. Incised wound of 3 cm x 1 cm size skull deep till upper cavity of skull. This wound was 2 cm above the right eyebrow on the right side of the skull. Skull bone was broken. Thereafter, it was found that brain and brain membrane was also cut and blood mix fluid was present in the cavity of skull.

2. Incised wound 3 cm x 1 cm size bone deep which was above the right eye brow on the right side of the forehead.

3. Incised wound 2 cm x 1 cm size just above the injury No 2.

4. Incised wound 2 cm x 1 cm size muscle deep in the middle of the front of the neck.

5. Contusion 8 cm x 6 cm size upon the skull.

The injuries on Rahul, aged about 10 years, son of the deceased and the accused respondent, are as follows :-

1. Contusion of 8 cm x 3 cm size on the front of the neck.

2. Incised wound 5 cm x 1 cm breathing duct deep in the front of the neck. This injury was very close to the injury No.1 On dissection, blood vessels, nerves, muscles and breathing duct etc. were found to be cut.

3. Incised wound 4 cm x 1 cm skull deep. This injury was 3 cm above the left eye, on the left side of the

skull bone of skull, brain and brain membrane were found to be cut. Blood mix fluid was found to present in the cavity of skull.

4. Incised wound 3 cm x 1 cm muscle deep 12 cm above the middle of forehead in the front of skull.

5. Incised wound 2.5 cm x 1 cm muscle deep behind the right ear.

The injuries on Uttam Kumar, aged about 8 years, son of the deceased and the accused respondent are as follows :-

1. Incised wound 3 cm x 1 cm bone deep in the upper part of the body.

2. Incised wound 3 cm x 1 cm x deep bone in the middle of the forehead.

3. Incised wound 2 cm x 1 cm x skull deep outside the left eye on the left side of the face. The bone, muscle, blood vessels, brain and brain membrane were found to be cut. The fluid with blood was filled in cavity of brain.

4. Incised wound 3 cm x 1 cm bone deep, this wound was close to the outer sides of the right eye.

5. Incised wound 2.5 cm x 1 cm x breathing duct deep on the front of the neck.

6. 12 cm x 3 cm size wound till nose contusion on the neck.

The injuries on Kumari Anjali, aged about 2 years, daughter of the deceased and accused respondent, are as follows :-

1. 4 cm x 1.5 cm incised wound x deep till cavity of skull, 4 cm above the right eye brow on the right

side of the skull. Under the injury, bone, brain and brain membrane under the injury were found to be cut. Blood mixed fluid was found in the cavity of brain.

2. 2 cm x 1 cm incised wound deep till cavity of skull above the left eyebrow on the left side of forehead. Under the injury, bone, brain and brain membrane were found to be cut.

3. Incised wound 2 cm x 0.5 cm muscle deep below the chin.

4. 2 cm x 0.5 muscle deep incised wound on the level of the thyroid cartilage in the front of the neck.

Apart from the deceased, the injuries on the injured eye witness Priyanka, who was aged about six years when the incident took place, are as follows :-

1. Towards right on the face in the front of the ear contusion with red colour 6 cm x 45 cm.

2. On right eye and lower eyelid contusion 4.5 cm x 4 cm.

3. Towards left on the face, below the eye contusion with red colour 2 cm x 1.0 cm.

4. Right ear was bleeding and blood clot was present.

These injuries show the brutal manner in which the deceased were killed, and injuries caused to Priyanka. Apparently the throats of the deceased were cut with a knife and their heads smashed with an axe.

It has come in evidence that the accused had taken a house on rent and his wife Shikha (deceased) along with her children were living in that house. On 07.07.2005 when the

brother of Shikha (the complainant) came to the said house he found the door closed. He opened the door and found the dead bodies and also his injured niece Priyanka who told him about the incident.

A blood stained axe was found in the room, while the knife which was also used in committing these horrible crimes had been concealed by the accused. The shirt of the accused was blood stained. The accused took the police to the sand where he had concealed a polythene bag containing the knife which wa used which was blood stained, and some other items, in luding the blood stained shirt. ıWe cannot imagine a more g astly act and, we are, prima facie, of the opinion that t is falls in the category of rarest of rare cases in which death sentence should have been given. The trial court, no doubt, awarded death sentence to the respondent, but the High Court reduced it to life sentence by observing :-

"...But on the other side, it is to be considered as to what were the circumstances under which the said murders were caused. Accused Alok Verma was postgraduate in Sociology, having failed in getting a job. It seems that due to financial crisis, he entered into the criminal world, due to which he had to go to jail. He had been away from his wife and children for a long time, and in these circumstances, he became pessimistic and began to suspect his wife's character. Advice of his wife to stay away from criminal activities he could not accept. In absence of alternative, in such circumstances, his wife's threat to disclose all of his wrong acts made the situation worse and resulted in occurrence of the incident which does not appear to be committed under any preplan nor for any benefit, but has been caused due to hopelessness and doubts about the character of the wife wherein he was doubting that the children were not his. In the above circumstances considering the decision of the Hon'ble Supreme Court in *Prakash Dhawal Khairnath (Patil) Vs.*

State of Maharashtra and State of Maharashtra Vs. Sandeep @ Babloo Prasad Khairnath (Patil) 2002 Supreme Court Cases (Criminal) 281 the conclusion arrived is that the present case is not fit for death penalty."

Prima facie, we find the reasoning of the High Court to be strange. Merely because a person is in financial crisis does not mean that he is at liberty to commit ghastly and gruesome murders. It appears that the wife of the accused was of a noble character who tried to reform him, but the accused rather than being reformed committed these monstrous crimes. We fail to understand how the High Court could reduce the death sentence in these circumstances.

The celebrated Judge of the Allahabad High Court Justice Mehmood quoted the following Urdu couplet in one of his judgments while deciding a murder appeal :-

"Jo Chup Rahegi Zuban-e-khanjar,

Lahu pukarega asteen ka"

Issue notice to the respondent as to why the life sentence awarded to him by the High Court should not be enhanced to death sentence.

Issue notice also on the application for condonation of delay.

N.J. Matter pending

SRI CHANDU KHAMARU
v.
SMT. NAYAN MALIK & ORS.
(Civil Appeal No. 7572 of 2011)

SEPTEMBER 2, 2011

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

ELECTRICITY ACT, 2003:

s. 67(2) r/w ss. 42(1) and 43(1) – Duty of distribution licensee to supply electricity on request – Supply of electricity to the house of appellant disconnected on the ground that the passage through which the electric line was taken belonged to respondents – Claim of respondents disputed by the appellant — Held: The appellant has a statutory right to apply for and obtain supply of electricity from the distribution licensee and the latter has a corresponding statutory obligation to supply electricity to the appellant – Distribution licensee directed to find out an alternate way to supply electricity to the house of appellant; otherwise, to follow the provisions of sub-s. (2) of s. 67 for carrying out the work for supply of electricity to the house of the appellant.

The appellant, the owner of a house situated on Dag No. 408, after unsuccessfully approaching the distribution licensee for supply of electricity to his house, filed a writ petition before the High Court. In compliance of the directions in the writ petition the distribution licensee gave an electric connection and started supplying electricity to the house of the appellant. Respondent nos. 1 to 3, claiming themselves to be the owners of the houses situated on Dag nos. 406, 407 and 409, filed a writ petition stating that the distribution licensee had provided electricity to the house of the appellant by an electric line taken through a passage located on Dag nos. 406, 407

and 409 which belonged to them and not to the appellant; and prayed for a writ prohibiting the distribution licensee to give electric connection to the appellant through the passage situated on their land. The writ petition was allowed; and the appeal filed by the appellant was dismissed by the Division Bench of the High Court holding that Civil Suit No. 83 of 2004 between the parties in respect of the passage in question was pending between the parties and until the said dispute was resolved, the distribution licensee could not supply electricity to the house of the appellant.

Allowing the appeal, the Court

HELD: 1.1. The provisions of sub-s. (1) of s. 42 and sub-s. (1) of s. 43 of the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee. The Act has also made provisions to enable the distribution licensee to carry out works for the purpose of supplying electricity to the owners or the occupiers of premises in his area of supply. [s.67] [para 7-8] [117-B-E]

1.2. In the instant case, respondent Nos. 1 to 3 do not object to the supply of electricity by the distribution licensee to the appellant as it will be clear from the averments made in writ petition No.345 of 2005 filed by them before the High Court but they object to the line for supply of electricity being drawn through the passage in Dag Nos. 406, 407 and 409 which they claim to be theirs. The further grievance of respondent Nos.1, 2 and 3 is that

they were not made parties in the earlier Writ Petition No.18220 of 2004 filed by the appellant in which the High Court directed the distribution licensee to effect supply of electricity to the house of the appellant. The case of the appellant, on the other hand, is that this passage is not a private passage of respondent Nos. 1 to 3 but is a common passage and, therefore, an electric line can be drawn through this common passage. This dispute will have to be resolved in Civil Suit No.83 of 2004 pending in the Court of Civil Judge (Junior Division), or in any other suit, but pending resolution of this dispute between the parties, the appellant cannot be denied supply of electricity to his house. [para 10] [120-G-H; 121-A-C]

1.3. The order of the Single Judge as well as the impugned order of the Division Bench of the High Court are, therefore, set aside and the writ petition of respondent nos.1 to 3 is disposed of with the direction that the distribution licensee will find out whether there is any other way in which electric line can be drawn for supply of electricity to the house of the appellant, other than the disputed passage in Dag Nos.406, 407 and 409. If there is no other way to supply electricity to the house of the appellant, the distribution licensee will follow the provisions of sub-s. (2) of s.67 of the Electricity Act, 2003 for carrying out the work for supply of electricity to the house of the appellant. [para 11] [121-D-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7572 of 2011.

From the Judgment & Order dated 9.5.2008 of the High Court of Calcutta in MAT No. 514 of 2006.

Sudhir Kumar Gupta, Anurag Pandey, Manish Gupta for the Appellant.

Pijush K. Roy, Sunil Kumar Verma Mihir, Sanjeev Kumar (for Kahitan & Co.) for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Delay condoned in filing rejoinder affidavit. Leave granted.

2. This is an appeal by way of special leave against the impugned judgment and order dated 09.05.2008 of the Calcutta High Court in MAT No.514 of 2006.

3. The facts briefly are that the appellant owns a house in Dag No.408, Khatiyan No.1212, Mauja Panchpara P.S. Sankrail, District Howrah, West Bengal. The house of the appellant was not being supplied with electricity whereas the house located on Dag No.409, Khatiyan No.1212, was being supplied with electricity by the Calcutta Electricity Board Supply Corporation Ltd. (hereinafter referred to as 'the distribution licensee'). The appellant approached the distribution licensee for supply of electricity but when the distribution licensee did not give an electricity connection for his house, he filed Writ Petition No.18220 of 2004 in the Calcutta High Court and by order dated 23.09.2004, learned Single Judge of the High Court disposed of the Writ Petition by directing the distribution licensee to effect supply of electricity to the house of the appellant within six weeks from the date of compliance of all the formalities by the appellant. Pursuant to the order dated 23.09.2004, the distribution licensee gave an electric connection and started supplying electricity to the house of the appellant.

4. On 10.01.2005, however, the respondent Nos. 1 to 3 filed Writ Petition No.345 of 2005 claiming that they were owners of the house situated on Dag Nos.406, 407 and 409, Khatiyan No.1212, Mouza-Panchpara, P.S. Sankrail, District, Howrah. Respondent Nos. 1 to 3 stated in the Writ Petition that the distribution licensee has provided electricity to the house of the appellant by an electric line taken through a

passage located on Dag Nos.406, 407 and 409 which belongs to them and not the appellant. In this Writ Petition, respondent Nos. 1 to 3 prayed inter alia for a writ prohibiting the distribution licensee to give electric connection in favour of the appellant through the passage situated on Dag Nos.406, 407 and 409. By order dated 13.02.2006, the learned Single Judge of the High Court allowed the Writ Petition and directed the distribution licensee to disconnect the supply of electricity given to the appellant for using the land (Dag Nos.406, 407 and 409). The reason given by the learned Single Judge in order dated 13.02.2006 is that the appellant was not entitled to get supply through the land in Dag Nos.406, 407 and 409 until he established his right over the land in the civil court.

5. Aggrieved, the appellant filed an appeal being MAT No.514 of 2006 before the Division Bench of the Calcutta High Court but by the impugned order dated 09.05.2008, the Division Bench dismissed the appeal. The Division Bench took note of the fact that Civil Suit No.83 of 2004 filed by the appellant in the Court of Civil Judge (Junior Division), Howrah, in respect of the land was pending. The Division Bench held in the impugned order that until the private dispute between the appellant and respondent Nos. 1 to 3 was resolved in the civil court, the distribution licensee could not supply electricity to the house of the appellant through the disputed land.

6. Sub-section (1) of Section 42 and sub-section (1) of Section 43 of the Electricity Act, 2003 are quoted hereinbelow:

> *"42. Duties of distribution licensees and open access*-(1) It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act."
>
> *"43. Duty to supply on request*-(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises,

give supply of electricity to such premises, within one month after receipt of the application requiring such supply"

7. It will be clear from sub-section (1) of Section 42 that every distribution licensee has a duty to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act. Sub-section (1) of Section 43 provides that every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply. These provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee.

8. The Electricity Act, 2003 has also made provisions to enable the distribution licensee to carry out works for the purpose of supplying electricity to the owners or the occupiers of premises in his area of supply. Section 67 of the Electricity Act, 2003 is quoted hereinbelow:

"67. Provision as to opening up of streets, railways, etc.- (1) A licensee may, from time-to-time but subject always to the terms and conditions of his licence, within his area of supply or transmission or when permitted by the terms of his licence to lay down or place electric supply lines without the area of supply, without that area carry out works such as-

(a) to open and break up the soil and pavement of any street, railway or tram-way;

(b) to open and break up any sewer, drain or tunnel in or

under any street, railway or tramway;

(c) to alter the position of any line or works or pipes, other than a main sewer pipe;

(d) to lay down and place electric lines, electrical plant and other works;

(e) to repair, alter or remove the same;

(f) to do all other acts necessary for transmission or supply of electricity.

(2) The Appropriate Government may, by rules made by it in this behalf, specify,-

(a) the cases and circumstances in which the consent in writing of the appropriate Government, local authority owner or occupier, as the case may be, shall be required for carrying out works;

(b) the authority which may grant permission in the circumstances where the owner or occupier objects to the carrying out of works;

(c) the nature and period of notice to be given by the licensee before carrying out works;

(d) the procedure and manner of consideration of objections and suggestions received in accordance with the notice referred to in clause (c);

(e) the determination and payment of compensation or rent to the persons affected by works under this section;

(f) the repairs and works to be carried out when emergency exists;

(g) the right of the owner or occupier to carry out certain works under this section and the payment of expenses therefor;

(h) the procedure for carrying out other works near

sewers, pipes or other electric lines or works;

(i) the procedure for alteration of the position of pipes, electric lines, electrical plant, telegraph lines, sewer lines, tunnels, drains, etc.;

(j) the procedure for fencing, guarding, lighting and other safety measures relating to works on streets, railways, tramways, sewers, drains or tunnels and immediate reinstatement thereof;

(k) the avoidance of public nuisance, environmental damage and unnecessary damage to the public and private property by such works;

(l) the procedure for undertaking works which are not reparable by the Appropriate Government, licensee or local authority;

(m) the manner of deposit of amount required for restoration of any railways, tramways, waterways, etc;

(n) the manner of restoration of property affected by such works and maintenance thereof;

(o) the procedure for deposit of compensation payable by the licensee and furnishing of security; and

(p) such other matters as are incidental or consequential to the construction and maintenance of works under this section.

(3) A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him.

(4) Where any difference or dispute including amount of

compensation under sub-section (3) arises under this section, the matter shall be determined by the Appropriate Commission.

(5) The Appropriate Commission, while determining any difference of dispute arising under this section in addition to any compensation under sub-section (3), may impose a penalty not exceeding the amount of compensation payable under that sub-section."

9. Thus, sub-section(1) of Section 67 of the Electricity Act, 2003 provides that the licensee may, from time to time, but subject always to the terms and conditions of his licensee, within the area of supply carry out the works mentioned in clauses (a) to (f) therein. It is provided in clause (d) of sub-section (1) of Section 67 that the licensee may lay down and place electric lines, electrical plant and other works. Sub-section (2) of Section 67 of the Electricity Act, 2003 further provides that the appropriate Government may, by rules made by it in that behalf, specify the various matters mentioned in clauses (a) to (p) thereof. Under clause (a) of sub-section (2) of Section 67, the appropriate Government may, by rules, specify the cases and circumstances in which the consent in writing of the appropriate Government, local authority, owner or occupier, as the case may be, shall be required for carrying out works. Under clause (b) of sub-section (2) of Section 67, the appropriate Government may, by rules, specify the authority which may grant permission in the circumstances where the owner or the occupier objects to the carrying out of works.

10. We may now apply the aforesaid provisions of Electricity Act, 2003 to the facts of the present case. The appellant has a statutory right to apply for and obtain supply of electricity from the distribution licensee and the distribution licensee has a corresponding statutory obligation to supply electricity to the appellant. Respondent Nos. 1 to 3 also do not object to the supply of electricity by the distribution licensee to the appellant as it will be clear from the averments made in writ

petition No.345 of 2005 filed by them before the High Court but they object to the line for supply of electricity being drawn through the passage in Dag Nos.406, 407 and 409 which they claim to be theirs. The further grievance of the respondent Nos.1, 2 and 3 is that they were not made parties in the earlier Writ Petition No.18220 of 2004 filed by the appellant in which the High Court directed the distribution licensee to effect supply of electricity to the house of the appellant. The case of the appellant, on the other hand, is that this passage is not a private passage of respondent Nos. 1 to 3 but is a common passage and therefore an electric line can be drawn through this common passage. This dispute will have to be resolved in Civil Suit No.83 of 2004 pending in the Court of Civil Judge (Junior Division), Howrah, or in any other suit, but pending resolution of this dispute between the parties, the appellant cannot be denied supply of electricity to his house.

11. We, therefore, set aside the order of the learned Single Judge as well as the impugned order of the Division Bench and dispose of the Writ Petition of respondent nos.1 to 3 with the direction that the distribution licensee will find out whether there is any other way in which electric line can be drawn for supply of electricity to the house of the appellant, other than the disputed passage in Dag Nos.406, 407 and 409. If there is no other way to supply electricity to the house of the appellant, the distribution licensee will follow the provisions of sub-section (2) of Section 67 of the Electricity Act, 2003 for carrying out the work for supply of electricity to the house of the appellant. This exercise will be completed within a period of six months from today and till the supply of electricity to the house of the appellant is effected through some other way, supply of electricity to the house of the appellant will not be disconnected. The appeal is allowed to the extent indicated in this judgment. No costs.

R.P. Appeal allowed.

PIRTHI
v.
MOHAN SINGH & ORS.
(Civil Appeal No. 6391 of 2003)

SEPTEMBER 2, 2011

[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

PUNJAB PRE-EMPTION ACT, 1913:

s.. 15 (as amended by Haryana Amendment Act 10 of 1995) – Right of pre-emption – Suit for pre-emption filed by co-sharer – During pendency of the suit s. 15 amended in 1995 – Suit dismissed by trial court – Judgment upheld by first appellate court and High Court –Held: Haryana Amendment Act 10 of 1995 is not a declaratory Act and, therefore, it has no retrospective operation – The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance – Since the Amendment Act came into force during the pendency of the suit, in the instant case, in the absence of "right of pre-emption" on the date of passing of the decree by the court of the first instance, all the three courts below including the High Court rightly dismissed the suit of the plaintiff.

The instant appeal arose out of the concurrent judgments of the three courts below, including the High Court, dismissing the suit for possession by way of pre-emption filed by the co-sharer plaintiff-appellant, as during the pendency of the suit before the trial court, s.15 of the Punjab Pre-emption Act, 1913 was substituted by the Haryana Amendment Act 10 of 1995 to the effect that right of pre-emption in respect of agricultural land would vest in the tenant who holds under tenancy of the vendor(s).

Dismissing the appeal, the Court

HELD: 1. It is true that the suit, in the instant case, was filed prior to the amendment in the Punjab Pre-emption Act, 1913. The Pre-emption law has been amended and notified by Gazette Notification dated 17.05.1995. Section 15 as amended provides that the right of pre-emption in respect of sale of agricultural land and village immoveable property shall vest in the tenant who holds under tenancy of the vendor(s) the land or property sold or a part thereof. This change in the law affects all pre-emption cases based upon the co-sharership. In view of this change in the law, a co-sharer has no right to bring a suit for possession by way of pre-emption. [para 5] [127-D-F]

1.2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must continue to possess that right till the date of the decree. If he loses that right before the passing of the decree, decree for pre-emption cannot be granted even though he may have had such right on the date of the suit. [para 8] [128-D-E]

1.3. The Constitution Bench in *Shyam Sunder's* **case* has observed that the Amending Act 10/1995 is not a declaratory Act and, therefore, it has no retrospective operation. [para 17] [134-E]**

** Shyam Sunder and Others vs. Ram Kumar and Another,* **(2001) 8 SCC 24 – followed.**

Didar Singh vs. Ishar Singh **(2001) 8 SCC 52 ;** *Bhagwan Das (dead) by LRS. and Others vs. Chet Ram,* **1971 (1) SCC 12; and** *Rikhi Ram and Another vs. Ram Kumar and Others,* **(1975) 2 SCC 318 – relied on.**

Ramjilal vs. Ghisa Ram **(1996) 7 SCC 507 – stood overruled in** *Shyam Sunder's* **Case.**

1.4. In a suit for pre-emption, the pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance. In the case on hand, the amendment Act came into force with effect from 17.05.1995 and the suit had been laid on 31.10.1992. On the date of institution of the suit, the plaintiff/pre-emptor had a right to claim "right of pre-emption". However, during the pendency of the suit, since the amendment Act came into force, deleting the right of pre-emption and in the absence of such right on the date of passing of the decree by the court of first instance, both the courts below have correctly appreciated the effect of the amendment and the High Court also rightly dismissed the second appeal holding that the plaintiff had lost the character of a co-owner during the pendency of the suit by virtue of the amendment Act. [para 17] [135-B-E]

1.5. In view of the interpretation of the Constitution Bench in respect of substituted s.15 introduced by the Haryana Amendment Act, 1995 in the Parent Act i.e. the Punjab Pre-emption Act, this Court concurs with the view expressed by all the three courts below including the High Court. [para 18] [135-F]

Case Law Reference:

2001 (1) Suppl. SCR 115	**followed**	**para 6**
1971 (2) SCR 640	**relied on**	**para 7**
(1975) 2 SCC 318	**relied on**	**para 8**
(2001) 8 SCC 52	**relied on**	**para 11**
(1996) 7 SCC 507	**stood overruled**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6391 of 2003.

From the Judgment & Order dated 7.3.2002 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 136 of 2011.

Mahabir Singh, Rakesh Dahiya, Nikhil Jain, Gagan Deep Sharma and Sunil Kumar Jain for the Appellant.

Pramod Dayal for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 07.03.2002 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No. 136 of 2001 whereby the High Court dismissed the appeal filed by the appellant herein.

2. *Brief facts:*

(a) The appellant-plaintiff and respondent No.5 – whose name has been deleted from the array of parties by this Court's order dated 08.08.2003, filed a suit for possession by way of pre-emption being Civil Suit No. 107/92/93 against respondent Nos. 1-4 herein (Defendants) before the Civil Judge (Jr. Division), Bahadurgarh, Haryana claiming themselves to be co-sharers with the vendor - Shiv Lal-defendant No.3 (respondent No.3 herein-since deceased, his legal representatives are on record), who sold away his half share of the suit land comprised in Khewat No. 22 (min.), Khasra Nos. 47 and 48, Khasra No. 1043 measuring 3 bighas, 3 biswas pukhta 1058 (2-11) and Khewat No. 28 (min.), Khasra Nos. 54-55. Khasra No. 5496/1693 (2-16) 5497/1693(1-5) total measuring 10 Bighas 8 Biswas to defendant Nos. 1 & 2 (respondent Nos. 1 & 2 herein) by sale deed dated 08.06.1992 for a consideration of Rs.1,40,000/- and for declaring the lease deed No. 326 dated 07.05.1992 illegal, null and void and unwarranted by law. Defandant Nos. 1 & 2 are brothers and defendant No. 4 (respondent No.4 herein) is their

mother.

(b) When the case was fixed for service of the remaining defendants, defendant Nos. 1 & 4 filed an application for dismissing the suit of the plaintiffs being not maintainable on the ground that after passing of the Punjab Pre-emption (Haryana Amendment) Act, 10 of 1995, (hereinafter referered to as "the Act") the right of pre-emption on the basis of co-sharership is not available to them. The Civil Judge (Jr. Division), by judgment dated 09.02.1996, accepting the application filed by the defendants dismissed the suit filed by the plaintiffs.

(c) Aggrieved by the said judgment, the plaintiffs filed an appeal being Civil Appeal No. 23 of 1996 before the Additional District Judge, Jhajjar. By order dated 18.07.2000, the Additional District Judge dismissed the appeal filed by the plaintiffs.

(d) Challenging the order passed by the Additional District Judge, Pirthi-plaintiff No.1 (appellant herein) filed regular second appeal being RSA No. 136 of 2001 before the High Court of Punjab & Haryana at Chandigarh. The High Court, by impugned judgment dated 07.03.2002, holding that the plaintiff/appellant had lost the character of a co-owner during the pendency of the suit, dismissed the appeal. Against the said judgment, the appellant-plaintiff has filed this appeal by way of special leave petition before this Court.

3. Heard Mr. Mahabir Singh, learned senior counsel for the appellant and Mr. Pramod Dayal, learned counsel for respondent Nos. 2 & 4. Despite service of notice, respondent Nos.1 and 3 have not chosen to appear in-person or through counsel.

Discussion:

4. t is the case of the respondents/defendants that superior

right of pre-emption on the basis of co-sharership is not available to plaintiffs now. After passing of the Act, this right has been restricted only to the tenants and the plaintiffs have no locus-standi to file and pursue their suit as they are not claiming the right as tenants. It is the claim of the appellant/plaintiff that the suit in question was instituted prior to the amendment in the Punjab Pre-emption Act, 1913 hence the amendment in the Act is not applicable to the present case. The trial Court accepted the objection of the defendants as to the maintainability of the suit and dismissed the same as not maintainable which was affirmed by the lower appellate Court. The same view has been reiterated by the High Court by dismissing the second appeal.

5. It is true that the suit, in the present case, was filed prior to the amendment in the Punjab Pre-emption Act, 1913. Section 15 of the Pre-emption law has been amended and notified vide Gazette Notification dated 17.05.1995 which reads as under:

> *"15. Right of Pre-emption to vest in tenant* – The right of pre-emption in respect of sale of agricultural land and village immovable property shall vest in the tenant who holds under tenancy of the vendor/vendors the land or property sold or a part thereof."

This change in the law affects all pre-emption cases based upon the co-sharership. In view of this change in the law, a co-sharer has no right to bring a suit for possession by way of pre-emption, hence the application filed by the defendants for dismissing the suit of the plaintiffs being not maintainable had been accepted by the trial Court and suit of the plaintiff came to be dismissed. This was affirmed by the lower appellate Court and finally by the High Court which order is under challenge in this appeal.

6. While ordering notice on the special leave petition, even as early as on 02.09.2002, it was specifically mentioned that

as to why the case be not decided in the light of a Constitution Bench judgment in *Shyam Sunder and Others vs. Ram Kumar and Another,* (2001) 8 SCC 24.

7. In *Bhagwan Das (dead) by LRS. and Others vs. Chet Ram,* 1971 (1) SCC 12, a three-Judge Bench of this Court, while considering right of pre-emption has held that pre-emptor's right should subsist till institution of suit for pre-emption and passing of decree. It was further held that the rule that a pre-emptor must maintain his qualification to pre-empt up to the date of decree was recognized as well settled.

8. In *Rikhi Ram and Another vs. Ram Kumar and Others,* (1975) 2 SCC 318, again, a three-Judge Bench of this Court, while considering right of pre-emption under the Punjab Pre-emption Act, 1913, after adverting to the principles laid down in *Bhagwan Das* (supra) and considering Section 15(1) of the Punjab Pre-emption Act held that under the general law of pre-emption, it is firmly established that the decisive date as regards the right of pre-emptor to pre-empt the sale was the date of the decree. In other words, the pre-emptor who claims the right to pre-empt the sale on the date of the sale must continue to possess that right till the date of the decree. If he loses that right before the passing of the decree, decree for pre-emption cannot be granted even though he may have had such right on the date of the suit.

9. Now, let us consider the decision of the Constitution Bench i.e. *Shyam Sunder* (supra) and its applicability to the case on hand. Both the above decisions being *Bhagwan Das* (supra) and *Rikhi Ram* (supra) were relied on by the Constitution Bench.

10. The very same Haryana Amendment Act, 10 of 1995, which introduced Section 15, was considered by a Constitution Bench in *Shyam Sunder* (supra). The question posed before the Constitution Bench was:

"What is the effect of substituted Section 15 introduced by the Haryana Amendment Act, 1995 (hereinafter referred to as 'the amending Act, 1995') in the parent Act i.e. the Punjab Pre-emption Act (hereinafter referred to as 'the parent Act') as applicable to the State of Haryana whereby the right of a co-sharer to pre-empt a sale has been taken away during the pendency of an appeal filed against a judgment of the High Court affirming the decree passed by the trial Court in a pre-emption suit?"

11. When in the case of *Shyam Sunder* (supra), the main appeal, i.e., Civil Appeal No. 4680 of 1993 came up for hearing before a Bench of this Court, the Bench, on the question of the effect of the amendment made in 1995 in the parent Act, found that there is conflict in the view taken in the decisions of two three-Judge Benches of this Court, which are Didar Singh vs. Ishar Singh (2001) 8 SCC 52 wherein it was held that in a suit for pre-emption, the pre-emptor must prove his right to pre-empt up to the date of decree of the first court and any loss of right or subsequent change in law after the date of adjudication of the suit and during pendency of appeal would not affect the decree of the first court and *Ramjilal vs. Ghisa Ram* (1996) 7 SCC 507 wherein it was laid down that appeal being continuation of the suit, the right to claim pre-emption must be available on the date when the decree is made and is finally to be affirmed or needs to be modified at the time of disposal of the appeal therefrom, and since the amending Act came into force during pendency of appeal, the right and remedy of the plaintiff stood extinguished and as a result the suit must fail. In order to resolve the conflict between the aforesaid two decisions rendered by two different Benches, the Bench referred the appeal for decision by a Bench of five Judges. It is in this way, the matter was heard by the Constitution Bench.

12. 1The Constitution Bench noted the facts which have given rise to Civil Appeal No. 4680 of 1993. The defendant-appellants herein purchased land measuring 54 kanals,

situated in Village Rithal Phogat, being 1/2 share of the land of Khewat Nos. 204, 205 and 206, measuring 108 kanals for a sum of Rs 84,000/- from vendors viz. Bharpai, Chhoto and Pyari — daughters of Bhagwana vide sale deed dated 17-07-1985. The plaintiff-respondents herein claimed preferential right to pre-empt the sale in favour of the defendant-appellants on the ground that they are co-sharers by means of a civil suit laid before the Sub-Judge, Ist Class, Gohana. In the said suit, issues were framed and the trial court decided all the issues in favour of the plaintiff-respondents and consequently on 30-5-1990 the suit was decreed. The respondents after passing of the decree by the court of first instance deposited the purchase money as required under Order 20 Rule 14 CPC. The appeal preferred by the appellants before the first appellate court and the second appeal before the High Court were dismissed and the decree of the trial court was affirmed. The appellants thereafter preferred this appeal by way of special leave petition. During pendency of the appeal, Section 15(1)(b) of the parent Act, on the basis of which the suit was filed by the plaintiff-respondents, was amended and was substituted by new Section 15 whereby the right of a co-sharer to pre-empt a sale was taken away. The substituted Section 15 of the Act has been quoted earlier.

13. Since several decisions have been cited, the Constitution Bench categorized those decisions and referred them as first, second and third categories of decisions. The first category of decisions are those wherein the view of law expressed is that in a suit for pre-emption, the pre-emptor must possess his right to pre-empt right from the date of sale till the date of decree of the first court, and loss of that right after the date of decree either by own act, or an act beyond his control or by any subsequent change in legislation which is prospective in operation during pendency of the appeal filed against the decree of the court of first instance would not affect the right of the pre-emptor. The second category of decisions deals with the cases where right of a pre-emptor was taken away after

the date of decree of the first court and during pendency of the appeal by statutory enactment which had retroactive operation. In such cases, it was held that the appellate court is competent to take into account legislative changes which are retrospective and accordingly affect the rights of the parties to the litigation. The decisions in the third category of cases are those where it has been held that appeal being a continuation of the suit, the right to pre-empt a sale must be available on the date when the decree is made and is finally to be affirmed or needs to be modified at the time of disposal of appeal and in case of loss of right by legislative changes during pendency of appeal, the suit for pre-emption must fail. After analyzing various decisions referred to in the first category, the Constitution Bench formulated the following legal principles:

> "1. The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance only.
>
> 2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.
>
> 3. A pre-emptor who has a right to pre-empt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect his right or maintainability of the suit for pre-emption.
>
> 4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for pre-emption by the court of first instance, such

> right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation."

14. The legal position that emerges on review of the second category of decisions is that the appeal being a continuation of the suit, the appellate court is required to give effect to any change in law which has retrospective effect. In para 15, the Constitution Bench has held that the legal principle that emerges out of the aforesaid decisions is that an appeal being a continuation of the suit, the right to pre-empt must be available on the date when the decree is made and is finally to be affirmed or needs to be modified at the time of disposal of the appeal and where right and remedy of the plaintiff has been taken away statutorily during pendency of appeal, the suit must fail.

15. The following discussion and conclusion in para 28 are relevant:

> "… ….. In *Shanti Devi v. Hukum Chand,* (1996) 5 SCC 768, this Court had occasion to interpret the substituted Section 15 with which we are concerned and held that on a plain reading of Section 15, it is clear that it has been introduced prospectively and there is no question of such section affecting in any manner the judgment and decree passed in the suit for pre-emption affirmed by the High Court in the second appeal. We are respectfully in agreement with the view expressed in the said decision and hold that the substituted Section 15 in the absence of anything in it to show that it is retrospective, does not affect the right of the parties which accrued to them on the date of the suit or on the date of passing of the decree by the court of first instance. We are also of the view that the present appeals are unaffected by change in law insofar it related to determination of the substantive rights of the parties and the same are required to be decided in the

light of the law of pre-emption as it existed on the date of passing of the decree."

16. After analyzing all the decisions cited therein, the Constitution Bench has concluded thus:

"44. From the aforesaid decisions, the legal principle that emerges is that the function of a declaratory or explanatory Act is to supply an obvious omission or to clear up doubts as to meaning of the previous Act and such an Act comes into effect from the date of passing of the previous Act. Learned counsel for the appellants strongly relied upon a decision of a two-Judge Bench of this Court in Mithilesh Kumari v. Prem Behari Khare in support of his argument. In the said decision, it was held by this Court that the Benami Transactions (Prohibition) Act, 1988 being a declaratory Act, the provisions of Section 4 of the Act have retroactive operation. The reliance on this decision by the appellants' counsel is totally misplaced as this decision was overruled in R. Rajagopal Reddy v. Padmini Chandrasekharan wherein it was held that the Act was not passed to clear any doubt that existed as to the common law or the meaning of effect of any statute and it was, therefore, not a declaratory Act.

45. We have already quoted substituted Section 15 of the amending Act but do not find that the amending Act either expressly or by necessary implication intended to supply an omission or to clear up a doubt as to the meaning of the previous Section 15 of the parent Act. The previous Section 15 of the parent Act was precise, plain and simple. There was no ambiguity in it. The meaning of the words used in Section 15 of the parent Act was never in doubt and there was no omission in its phraseology which was required to be supplied by the amending Act. Moreover, the amending Act either expressly or by implication was not intended to be retroactive and for that

reason we hold that amending Act 10 of 1995 is not a declaratory Act and, therefore, it has no retrospective operation.

46. For the aforestated reasons, we approve the view of law taken in Didar Singh v. Ishar Singh and further hold that the decision in the case of *Ramjilal v. Ghisa Ram* does not lay down the correct view of law.

47. The result of the aforesaid discussion is that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act.

48. In view of what has been stated above, these appeals fail and accordingly are dismissed, but there shall be no order as to costs."

17. From the above discussion, particularly, in para 45, the Constitution Bench observed that the Amending Act 10/1995 is not a declaratory Act and, therefore, it has no retrospective operation. In para 46, the Constitution Bench has approved the view of law taken in *Didar Singh* (supra) and further held that the decision in the case of *Ramjilal* (supra) does not lay down the correct view of law. No doubt, in the penultimate para 47, the Constitution Bench has concluded that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act. It is clear that the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act. On the other hand, as discussed and concluded in para 46, the dictum laid down in Didar Singh (supra) has been approved. In Didar Singh (supra), it was held that in a suit for pre-emption, pre-

emptor must prove his right to pre-empt up to the date of the decree of the first court and any loss of right or subsequent change in law after the date of adjudication of the suit and pre-tendency of appeal would not affect the decree of the first court. The said view has been approved by the Constitution Bench. In other words, in a suit for pre-emption, the pre-emptor must prove his right to pre-empt up to the date of decree of the first court. To put it clear, the pre-emptor must have the right to pre-empt on the date of sale on the date of filing of the suit and on the date of passing of the decree by the court of the first instance [Emphasis supplied]. In the case on hand, the amendment Act came into force with effect from 17.05.1995 and suit had been laid on 31.10.1992. In other words, on the date of institution of the suit, the plaintiff/pre-emptor had a right to claim "right of pre-emption". However, during the pendency of the suit, since the amendment Act came into force, deleting the right of pre-emption and in the absence of such right on the date of passing of the decree by the court of first instance, we are of the view that both the courts below have correctly appreciated the effect of the amendment and the High Court also rightly dismissed the second appeal holding that the plaintiff had lost the character of a co-owner during the pendency of the suit by virtue of the amendment Act.

18. In view of the above discussion and the interpretation of the Constitution Bench in respect of substituted Section 15 introduced by the Haryana Amendment Act, 1995 in the Parent Act i.e. the Punjab Pre-emption Act, we concur with the view expressed by all the three courts including the High Court. Consequently, the appeal fails and the same is dismissed. No order as to costs.

R.P. Appeal dismissed.

SAMAR BAHADUR SINGH
v.
STATE OF U.P. & ORS.
(Civil Appeal No. 7643 of 2011)

SEPTEMBER 05, 2011

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

Service Law – Dismissal – Departmental proceedings – Punishment – Proportionality of – Appellant, a Constable in the Provincial Armed Constabulary (P.A.C.), was found unauthorizedly absent from the Battalion Headquarter – On the same date he also became allegedly involved in a criminal case relating to forcible grabbing of liquor bottle from a wine shop – Appellant was acquitted in the criminal case – However, in the departmental proceedings initiated against the appellant, the Inquiry Officer found him guilty and consequently, Respondents dismissed him from service – Order of dismissal upheld by appellate authority, Service Tribunal as also High Court – Justification of – Held: On facts, justified – Acquittal of appellant in the criminal case had no bearing or relevance to the facts of the departmental proceedings as the standard of proof in both the cases are totally different – In a criminal case, the prosecution has to prove the criminal case beyond all reasonable doubt whereas in departmental proceedings, the department has to prove only preponderance of probabilities – In the present case, the department was able to prove the case against appellant on the standard of preponderance of probabilities – Allegations against the appellant were proved in the departmental proceedings by cogent materials on record – Appellant belongs to a disciplinary force and the members of such a force are required to maintain discipline and to act in a befitting manner in public – Instead of that, he was found under

the influence of liquor and then indulged himself in an offence – The punishment of dismissal from service cannot be said to be shocking to conscience and, therefore, does not call for any interference – Penal Code, 1860 – s.392.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7643 of 2011.

From the Judgment & Order dated 13.2.2004 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 40500 of 1997.

Yatish Mohan, Vinita Y. Mohan, Vishwajit Singh for the Appellant.

Pramod Swarup, Ameet Singh, Manoj Kr. Dwivedi, Pareena Swarup, G.V. Rao for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Delay in filing rejoinder is condoned .

2. Leave granted.

3. This appeal is directed against the judgment and order dated 13.02.2004 passed by the Division Bench of the Allahabad High Court dismissing the writ petition filed by the appellant against the judgment and order passed by the State Public Service Tribunal, U.P., which upheld the order of dismissal passed against the appellant by the respondents on 11.02.1993.

4. The appellant herein was employed as a Constable in the Provincial Armed Constabulary (hereinafter referred to as 'P.A.C.')on 15.11.1978. He was posted in IV Bn. P.A.C., Allahabad. On 27.10.1991, he was unauthorisedly absent from the Battalion Headquarter and on that day in the evening he

along with one of his friends grabbed one bottle of liquor from the wine shop forcibly and also threatened them. With regard to the aforesaid incident, a criminal case was also registered on the basis of a complaint filed by the salesman of the wine shop, Sh. Rajan Lal. The appellant was also medically examined during the course of which he was found to be under the influence of liquor. The Doctor has opined that he had consumed alcohol, but was not intoxicated.

5. The appellant was placed under suspension and a departmental proceeding was initiated against him. A memorandum of charges was issued to the appellant as against which he filed his reply. In the said departmental inquiry instituted against the appellant, an Inquiry Officer was appointed who conducted the inquiry and on completion of the said inquiry, submitted his report finding the appellant guilty of the charges framed against him.

6. Consequent upon filing of the aforesaid inquiry report, the Disciplinary Authority, after complying with all the formalities dismissed the appellant from service by issuing an order dated 11.02.1993.

7. Being aggrieved by the said order, the appellant filed an appeal which was considered by the Appellate Authority and by order dated 30.06.1993, the aforesaid appeal was dismissed.

8. The appellant being aggrieved filed a petition before the tribunal which was also dismissed. Consequently, the appellant filed the aforesaid writ petition, which was dismissed and therefore, he filed the present appeal, on which we have heard the learned counsel appearing for the parties.

9. Counsel appearing for the appellant has submitted before us that a criminal case was also instituted for the aforesaid incident in which he was acquitted and therefore, in the departmental proceeding also which was initiated he should

also have been acquitted and the same should have been allowed to be ended in his favour. He further submits that in any case it has come in evidence that the appellant was advised to take medicine which he had taken and, therefore, there was some smell of liquor from the medicine when a medical check-up was done. Relying on the same, counsel submits that the entire charge is concocted and therefore, he is required to be held not guilty of the charge. The next submission of the counsel appearing for the appellant is that the punishment given to the appellant is disproportionate to the charges levelled against him.

10. We have considered all the aforesaid submissions in the light of the records that are available with us. The medical report which is placed on record indicates that the appellant had consumed alcohol, but he was not intoxicated. The appellant was missing from the headquarters on 27.10.1991 from the morning and he was caught in the case registered under Section 392 I.P.C. in the evening. The appellant wishes to make a defence that he was advised to take medicine but the prescription which is placed in the departmental proceedings does not indicate that any medicine was prescribed in that prescription. The appellant was arrested in the criminal case in connection with stealing of a bottle of foreign liquor and even during that time he had consumed alcohol prior to the incident. These facts have been brought out in the inquiry proceedings initiated against him in which the appellant did not participate. Therefore, whatever allegations have been brought against him, have been proved by placing cogent materials on record, which go unrebutted due to his absence in the proceedings. We also find that the appellant has been charged on the ground of negligence, deriliction of duty and consuming liquor. The aforesaid facts are found proved in the departmental proceedings.

11. Acquittal in the criminal case shall have no bearing or relevance to the facts of the departmental proceedings as the

standard of proof in both the cases are totally different. In a criminal case, the prosecution has to prove the criminal case beyond all reasonable doubt whereas in a departmental proceedings, the department has to prove only preponderance of probabilities. In the present case, we find that the department has been able to prove the case on the standard of preponderance of probabilities. Therefore, the submissions of the counsel appearing for the appellant are found to be without any merit.

12. Now, the issue is whether punishment awarded to the appellant is disproportionate to the offence alleged. The appellant belongs to a disciplinary force and the members of such a force is required to maintain discipline and to act in a befitting manner in public. Instead of that, he was found under the influence of liquor and then indulged himself in an offence. Be that as it may, we are not inclined to interfere with the satisfaction arrived at by the disciplinary authority that in the present case punishment of dismissal from service is called for. The punishment awarded, in our considered opinion, cannot be said to be shocking to our conscience and, therefore, the aforesaid punishment awarded does not call for any interference.

13. In that view of the mater, we find no merit in this appeal, which is dismissed, but leaving the parties to bear their own costs.

B.B.B. Appeal dismissed.

MIG CRICKET CLUB
v.
ABHINAV SAHAKAR EDUCATION SOCIETY AND ORS.
(Civil appeal No. 2047 of 2007)

SEPTEMBER 5, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Maharashtra Regional and Town Planning Act, 1966: ss.31(1), 37(2) – Sanction to draft development plan – Held: Development Plan existing prior to the coming into force of the Act shall be deemed to be a sanctioned Development Plan u/s.31(1) of Act – In the instant case, the Development Plan existing prior to the commencement of the Act showed the area in question as reserved for "playground" which was modified to "school and cultural society" by State Government in exercise of its power u/s.37(2) and earmarked for the "school and cultural centre" by notification dated 25th April, 1985 – Such a course was permissible under law – Notification dated 24th April, 1992 provided that State Government in exercise of powers conferred u/s.31(1) had modified the user of land to "playground" – This was not the modification of the Development Plan but sanction of the same in exercise of power u/s.31(1) of the Act – High Court misdirected itself by considering notification dated 10th April, 1985 to be the sanction of the Development plan u/s.37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which rendered its order illegal.

Administrative Law: Judicial review – Change in user of land by State Government – Scope of judicial review – Held: User of the land is to be decided by the authority empowered to take such a decision and the Court in exercise of its power of judicial review would not interfere with the same unless the

change in the user is found to be arbitrary – Town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available – Town planning.

Interpretation of statutes: Legal fiction – Held: When a legal fiction is created, it shall be given full effect – Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions – Legal fiction tends to treat an imaginary state of affairs as real and entails the natural corollaries of that state of affairs.

The case of respondent no.1 was that it was granted lease of a portion of land for a period of 99 years by Maharashtra Housing and Area Development Authority (MHADA) and Bombay Housing and Area Development Board (BHADB) with the consent of Municipal Corporation of Greater Bombay (Corporation). When respondent no.1 proposed to construct a school building thereon, it noticed that area in question was reserved for a playground in the draft development plan. Respondent no.1 brought this fact to the notice of MHADA and BHADB and in response respondent no.1 was asked to get the user of land changed in accordance with law. Meanwhile, the Maharashtra Regional and Town Planning Act, 1966 came into force on 20.12.1966. In February, 1984, the Corporation passed a resolution sanctioning user of said plot for the purpose of constructing school. By notification dated 25.4.1985, the said land was earmarked for the school and cultural centre in the development plan of the area. During the period 1985-86, the appellant-club approached the State Government for change of user of the said plot for "cricket playground". The attempts were made to convince respondent no.1 to shift the school to another plot as the plot in question was required by the appellant for its playground. Respondent no.1 did not accept the proposal and by letter dated 10.11.1986 sought

permission to erect a compound wall on account of the threats given by the appellant. Respondent no.1 submitted the development plan to the State Government. However, contrary to the expectations of respondent no.1, notification dated 24.4.1992 was published in the Gazette on 7.5.1992 which revealed that the State Government in exercise of powers conferred under Section 31(1) of the Act had modified the user of the land in question and instead of land being shown reserved for "school and cultural centre", it was shown as a "playground". Respondent no.1 filed a writ petition challenging the notification and further for a direction to the respondents to restore the reservation of plot for "school and cultural centre". The High Court quashed the notification dated 24.4.1992 holding that it was issued without consideration of the notification dated 10.4.1985 which rendered the same illegal. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. A plain reading of Section 35 of the Maharashtra Regional Town Planning Act shows that the Development plan sanctioned by the State Government before the commencement of the Act, shall be deemed to be a final Development plan sanctioned under the Act. Making of Development plan requires consideration of various inputs and for that, several bodies have to be consulted and various steps as provided in the Act are required to be taken. Naturally it would take some time. A town cannot exist without a Development plan, otherwise it would lead to chaos. No Development plan was made under the Act which came into force on 20th of December, 1966 and hence the legislature created a legal fiction by enacting Section 35 of the Act. It provided for assuming a fact i.e. existence of a Development plan, which was, in fact, not made in accordance with the

provisions of the Act. When a legal fiction is created, it shall be given full effect. Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions. Legal fiction tends to treat an imaginary state of affairs as real and entails the natural corollaries of that state of affairs. Hence, the Development plan, existing prior to the coming into force of the Act, shall be deemed to be a sanctioned Development plan under Section 31(1) of the Act. Section 31(1) confers power on the State Government to sanction the draft Development plan submitted to it for the whole area or separately for any part thereof either without modification or subject to such modifications as it may consider proper. Under the scheme of the Act, a minor modification of the Development plan by the State government in exercise of powers conferred is provided under Section 37(2) of the Act. [Paras 11, 12] [153-F-H; 154-A-D; 155-C-D]

1.2. Bearing in mind the scheme of the Act, the Development plan sanctioned by the State Government before commencement of the Act, has become final Development plan under the Act. The Development plan existing prior to the commencement of the Act shows that the area in question was reserved for "playground" which was modified to "school and cultural society" in exercise of power under Section 37(2) of the Act and earmarked for the "school and cultural centre" by notification dated 25th April, 1985. Such a course was permissible under law. It was the plea of Respondent No.1 that the Corporation informed it that in the proposed Development plan the area in question has been shown as "cricket club and playground". Had notification dated 25th April, 1985 been a sanction of final Development plan, the area in question ought not to have figured in the draft Development plan submitted to the State Government. The draft plan submitted to the State

Government was considered by it and the Development plan dated 24th April, 1992 was sanctioned. This was not the modification of the Development plan but sanction of the same in exercise of the power under Section 31(1) of the Act. The High Court misdirected itself by considering the notification dated 10th April, 1985 to be the sanction of the Development plan under Section 37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which has rendered its order illegal. It is trite that the validity of the order does not depend upon the section mentioned in the order. Wrong provision mentioned in the order itself does not invalidate the order, if it is found that order could be validly passed under any other provision. However in a case, like the instant one, contrary to what was mentioned in the notifications the Court cannot say that such powers were not exercised to render the notification illegal if in fact such power exists. [Para 13] [156-C-H; 157-A-B]

2. It is well settled that the user of the land is to be decided by the authority empowered to take such a decision and this Court in exercise of its power of judicial review would not interfere with the same unless the change in the user is found to be arbitrary. The process involves consideration of competing claims and requirements of the inhabitants in present and future so as to make their lives happy, healthy and comfortable. Town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available. In the facts of the instant case, the power was been exercised in accordance with law and there is no arbitrariness in the same. [Para 14] [157-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2047 of 2007.

From the Judgment & Order dated 05.09.2005 of the High Court of Bombay in Writ Petition No. 1561 of 1992.

WITH

Conmt. Pet. (C) No. 43 of 2007.

Shyam Divan, Atul Y. Chitale, R.P. Bhatt, Jay Savla, S. Ghanekar, Rajesh Kothari, Renuka Sahu, Meenakshi Ogra, Vaishali Thorat, Karan Thorat, A.S. Bhasme, Pankaj Mishra, Nishtha Kumar, Suchitra Atul Chitale, Sanjay Kharde (for Asha Gopalan Nair) Mahima C. Shroff, Chirag M. Shroff, Vinay Navare, Keshav Ranjan (for Abha R. Sharma) for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Respondent No. 3, MIG Cricket Club has preferred this appeal by special leave, aggrieved by the judgment of the Division Bench of the Bombay High Court dated 5th of September, 2005 passed in Writ Petition No. 1561 of 1992 whereby it had allowed the writ petition and quashed the notification dated 24th of April, 1992, published 7th in the Gazette on of May, 1992 and further directed the respondents of the writ petition to restore the reservation of plot for “school and cultural centre”.

2. According to the writ petitioner – Respondent No. 1 Abhinav Sahkar Education Society, a Society registered under the Societies Registration Act, 1860 (hereinafter referred to as the “writ petitioner”) it was allotted a portion of plot of land admeasuring 7224 sq. yards, bearing Survey No. 341 situated at MIG Colony, Gandhi Nagar, Bandra (East) in the city of Mumbai. Respondent No. 4, Maharashtra Housing and Area Development Authority (hereinafter referred to as “MHADA”) and Respondent No. 5, Bombay Housing and Area Development Board (hereinafter referred to as “BHADB”) with the consent of Respondent No. 3, Municipal Corporation of

Greater Bombay (hereinafter referred to as the "Corporation") under a resolution of February, 1965 granted lease for a period of 99 years to the writ petitioner on a premium equivalent to the price fixed and payable annually by way of installments. According to the writ petitioner, however, on measurement of the plot, the area was found to be 7301.25 sq. yards and when it proposed to construct a school building thereon, it came to its notice that the area in question has been reserved for a playground in the draft development plan. Writ Petitioner brought this fact to the notice of MHADA and BHADB by letter dated 8th of May, 1968 and in answer thereto the writ petitioner Society was asked to get the user of the land changed in accordance with law. Meanwhile, according to the writ petitioner, the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the "Act") had come into force on 20th of December, 1966.

3. Further case of the writ petitioner is that by letter dated 15th of November, 1978 the Secretary to the Government of Maharashtra in the Department of Housing and the Chief Executive Officer and Vice-President of MHADA in a letter addressed to the Secretary of Urban Development Department requested for modification of the draft development plan showing "school purpose" for the user of the said plot. By letter dated 1st of January, 1979, the Senior Town Planner of the Bombay Metropolitan Regional Development Authority directed the writ petitioner to furnish certain details and plans. According to the writ petitioner he duly complied with the direction. It has been further averred that by letter dated 12th of November, 1979 addressed to the Personal Assistant to the Minister for Education, his intervention was sought for the necessary change in the user of the land for the purpose of school. By letter dated 10th of August, 1983, the Under Secretary to the Urban Development Department of the State Government informed the writ petitioner that instruction has been issued to the Corporation for change of the user of the plot in question for school purposes. In February 1984, according to the writ

petitioner, the Corporation passed a resolution sanctioning user of the said plot for the purpose of a school. Ultimately in exercise of the powers under Section 37(2) of the Act, a notification dated 10th of April, 1985 came to be issued and published in the Government Gazette on 25th of April, 1985. By the said notification the land admeasuring 6103.33 sq. meters out of Survey No. 341 (Part) was excluded from the site reserved for the playground and the land so released was earmarked for the "school and cultural centre" in the development plan of the area. The change of the user of the said plot was also confirmed to the writ petitioner by the Executive Engineer, Town Planning (Division Plan) by the Corporation by letter dated 15th of April, 1985.

4. It is the allegation of the writ petitioner that during the period 1985-1986 it came to its notice that Respondent No. 3 of the writ petition i.e. MIG Cricket Club (the appellant herein) had also approached the State Government for change of the user of the said plot for "cricket playground". It is the case of the writ petitioner that attempts were made to convince it to shift the school to another plot as the plot in question was required by the MIG Cricket Club (hereinafter referred to as "the Club") for its playground. Petitioner did not yield to the pressure and by letter dated 10th of November, 1986 sought permission to erect a compound wall on account of the threats given by the Club. The Corporation by its communication dated 24th of November, 1986 gave the permission sought for and informed the writ petitioner to submit development plan to the State Government. According to the writ petitioner, the Corporation informed it that in the proposed development plan submitted to the Government, by mistake it has shown the plot in question as "cricket club and playground". In the aforesaid premises petitioner was asked to approach the State Government to get the mistake rectified. As directed, the petitioner 8th by letter dated of November, 1986 approached the State Government for rectification of the mistake and the same was acknowledged by the Corporation stating that appropriate

action would be taken in this regard. However, to its surprise the petitioner came across the notification dated24th of April, 1992 published in the Gazette on 7th of May, 1992 which revealed that State Government in exercise of the powers conferred under Section 31(1) of the Act, had modified the user of the land in question and instead of land being shown reserved for "school and cultural centre" it was shown as a "playground".

5. Aggrieved by the same, the petitioner preferred the writ petition inter alia challenging the aforesaid notification and further for a direction to the respondents of the writ petition to restore the reservation of plot for "school and cultural centre".

6. Respondents in the writ petition including the Club, the appellant herein, contested the writ petition and according to them the notification dated 10th of April, 1985 was a minor modification in relation to a specific plot of land of a development plan sanctioned by the State Government before the commencement of the Act. It was further pointed out that the draft development plan for the entire area was already prepared on 16th October, 1984 and after hearing the necessary objections and suggestion the revised draft development plan was submitted on 29th of April, 1986 by the Corporation with necessary modification to the State Government. The same was finalized and the impugned notification dated 24th of April, 1992 was issued and published on 7th of May, 1992, whereby the land in question was shown as reserved for the purpose of "playground". It has further been averred by the respondents that the interest of the petitioner was also safeguarded by reserving a plot towards the eastern side of the plot in question for the "school and cultural centre". According to the respondents such finalization of the plan was done after hearing all the interested parties. It is the allegation of the respondents that the school opened by the petitioner was permanently closed since 1990 and on account of the failure on the part of the petitioner to pay the premiums payable to

MHADA, the allotment in favour of the petitioner is liable to be cancelled. Respondents have further averred that the land in question was delivered to the Corporation which in turn leased the same to the Club since September, 1974.

7. In view of the pleadings of the parties the question which fell for consideration before the High Court was whether the notification dated 24th of April, 1992 issued in exercise of the powers under Section 31(1) of the Act was legal, valid and complied with the provisions of the Act.

8. The High Court on appraisal of the materials came to the conclusion that the notification dated 10th of April, 1985 purportedly issued in exercise of the powers under Section 37(2) of the Act was in fact issued in exercise of the power under Section 31(2) of the Act. While doing so the High Court observed as follows:

> "The very fact that the draft development plan was prepared and placed for objections and suggestions from the members of the public on 30th April, 1984 and thereafter, by the notification dated 10th April, 1985 the respondents had finalized the reservation of the land in question to be for school and cultural centre, even though the notification on the face of it refers to the exercise of powers under Section 37(2) of the said Act, for all the legal purposes, it will have to be construed as having been issued in exercise of powers under Section 31 of the said Act in relation to the area in question. It is pertinent to note that there is no dispute on the point that subsequent to the draft development plan was prepared on 30th April, 1984, there was no finalization of the said plan in terms of Section 31 of the said Act otherwise than the notification of 10th April, 1985. Being so, there was no occasion for the respondents on 10th April, 1985 to exercise the powers under Section 37(2) which clearly speaks of modification in the final development plan."

As regards notification dated 24th of April, 1992 said to have been issued in exercise of the power under Section 31(1) of the Act, the High Court observed that in fact the State Government exercised the power under Section 37(2) of the Act. In this connection, the High Court observed as follows:

> "……..Once it was known to the respondents that the draft plan was prepared on 30th April, 1984 and was subjected to the objections and suggestions from the members of the public and thereafter, on 10th April, 1985, a part of such area was finalized and notified, mere reference in the notification to Section 37(2) of the said Act could not be construed to mean that the powers had been, in fact, exercised under Section 37(2). It will have to be construed as having been exercised under Section 31(1) of the said Act, and for the same reason, it was necessary for the respondents to explain as to how and why the said notification dated 10th April, 1985 could not be considered or was not necessary to be construed while issuing the notification dated 24th April, 1992."

Ultimately, the High Court held that the impugned notification dated 24th of April, 1992 had been issued without consideration of the notification dated 10th of April, 1985 which renders the same illegal. While holding so the High Court observed as follows:

> "……The impugned notification is of dated 24th April, 1992. Being so, once it is held that the impugned notification has not been issued in compliance with the provisions of law and the decision making process in that regard does not disclose the opportunity to the petitioner of being heard in the matter and the consideration of the notification dated 10th April, 1985 and application of mind by the concerned authorities before issuing the impugned notification, for the reasons stated above, therefore, the impugned notification is liable to be quashed and set aside

> to the extent it relates to the plot in question. Consequently, the respondents will have to be also directed to restore the reservation of the plot in question in accordance with the notification dated 10th April, 1985."

Accordingly the High Court allowed the writ petition, quashed the impugned notification and granted the relief sought for by the writ petitioner.

9. Mr. Shyam Divan, Senior Advocate appearing on behalf of the appellant contends that the High Court erred in holding that the notification dated 10th April, 1985 is, in fact, final development plan in relation to the area in question as contemplated under Section 31(1) of the Act. He points out that under Section 35 of the Act a development plan sanctioned by the State Government before commencement of the Act shall be deemed to be final development plan sanctioned under the Act. According to him, the notification dated 10th April, 1985 modified the deemed final development plan which was in existence prior to the coming into force of the Act. Under the deemed development plan, according to Mr. Divan, the area in question was shown as "playground" and hence, the modification in the final development plan can be done in exercise of the power conferred under Section 37(2) of the Act. In fact, while issuing the notification dated 10th April, 1985, such a power was exercised which would be apparent from the notification and the site reserved for "playground" was earmarked for the "school and cultural centre". Mr. Divan further points out that the draft development plan submitted on 29th April, 1986 was sanctioned as development plan under Section 31(1) of the Act by notification dated 24th April, 1992 and the notification itself shows that it was sanctioned under Section 31(1) of the Act. According to him, the High Court erroneously held that this notification, in fact, was issued under Section 37(2) of the Act. In sum and substance, according to Mr. Divan, the notifications dated 10th April, 1984 and 24th April, 1992 show that it were issued in exercise of the powers under

Section 37(2) and Section 31(1) of the Act, but the High Court misdirected itself and held the same to have been issued under Sections 31(1) and 37(2) of the Act respectively.

10. Ms. Vaishali Thorat, however, appearing on behalf of Respondent No.1 submits that the notification dated 10th April, 1985 was a final development plan sanctioned under Section 31(1) of the Act and without considering the same it has been modified by the impugned notification dated 24th April, 1992 in exercise of the power under Section 37(2) of the Act which renders the same illegal in the eye of law. She further points out that non-consideration of the notification dated 10th April, 1985, while issuing the notification dated 24th April, 1992 vitiates the impugned notification.

11. Rival submissions necessitate examination of the scheme of the Act. Section 35 of the Act which is relevant for the purpose, reads as follows:

> **"35. Development plans sanctioned by State Government before commencement of this Act :**
>
> If any Planning Authority has prepared a Development plan which has been sanctioned by the State Government before the commencement of this Act, then such Development plan shall be deemed to be a final Development plan sanctioned under this Act."

From a plain reading of the aforesaid provision, it is evident that the Development plan sanctioned by the State Government before the commencement of the Act, shall be deemed to be a final Development plan sanctioned under the Act. Making of Development plan requires consideration of various inputs and for that several bodies have to be consulted and various steps as provided in the Act are required to be taken. Naturally it would take some time. A town cannot exist without a Development plan, otherwise it would lead to chaos. No Development plan was made under the Act which came into

force on 20th of December, 1966 and hence the legislature created a legal fiction by enacting Section 35 of the Act. It provided for assuming a fact i.e. existence of a Development plan, which was, in fact, not made in accordance with the provisions of the Act. It has to be borne in mind that when a legal fiction is created it shall be given full effect. Generally legal fiction is created to advance public policy and preserve the rights of certain individuals and institutions. Legal fiction tends to treat an imaginary state of affairs as real and entails the natural corollaries of that state of affairs. Hence, the Development plan, existing prior to the coming into force of the Act, shall be deemed to be a sanctioned Development plan under Section 31(1) of the Act.

12. Section 31(1) of the Act inter alia provides for sanction of the draft Development plan, the same reads as follows:

> **"31. Sanction to draft Development plan.**
>
> (1) Subject to the provisions of this section, and not later than one year from the date of receipt of such plan from the Planning Authority, or as the case may be, from the said Officer, the State Government may, after consulting the Director of Town Planning by notification in the Official Gazette sanction the draft Development plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper, or return the draft Development plan to the Planning Authority or as the case may be, the said Officer for modifying the plan as it may direct, or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan:
>
> Provided that, the State Government may, if it thinks fit, whether the said period has expired or not, extend from time to time, by a notification in the Official Gazette, the period for sanctioning the draft Development plan or

refusing to accord sanction thereto, by such further period as may be specified in the notification:

Provided further that, where the modifications proposed to be made by the State Government are of a substantial nature, the State Government shall publish a notice in the Official Gazette and also in local newspapers inviting objections and suggestions from any person in respect of the proposed modifications within a period of sixty days from the date of such notice."

The aforesaid provision confers power on the State Government to sanction the draft Development plan submitted to it for the whole area or separately for any part thereof either without modification or subject to such modifications as it may consider proper. Therefore, Section 31 of the Act operates in the field of the power of the State Government to sanction a draft Development plan. Under the scheme of the Act, a minor modification of the Development plan sanctioned under Section 31(1) of the Act is provided under Section 37(2) of the Act. It reads as follows:

"37. Minor modification of final Development plan.

(1) xx xx xx

(2) The State Government may, after making such inquiry as it may consider necessary after hearing the persons served with the notice and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plan shall be deemed to have been modified accordingly."

From a plain reading of the aforesaid provision it is evident that the State Government has been conferred with the

power to make minor modification to the final Development plan. Thus, under the scheme of the Act, a Development plan sanctioned by the State Government prior to the commencement of the Act, shall be deemed to be the final Development plan and there can be minor modification in such Development plan by the State Government in exercise of power conferred under Section 37(2) of the Act. Sanction of draft Development plan is provided under Section 31(1) of the Act.

13. Bearing in mind the scheme of the Act, as aforesaid, we are of the opinion that the Development plan sanctioned by the State Government before commencement of the Act, has become final Development plan under the Act. The Development plan existing prior to the commencement of the Act shows that the area in question was reserved for "playground" which was modified to "school and cultural society" in exercise of power under Section 37(2) of the Act and earmarked for the "school and cultural centre" by notification dated 25th April, 1985. Such a course was permissible under law. It is the writ petitioner's plea that the Corporation informed it that in the proposed Development plan the area in question has beenshown as "cricket club and playground". Had the notification dated 25th April, 1985 been a sanction of final Development plan, the area in question ought not to have figured in the draft Development plan submitted to the State Government. The draft plan submitted to the State Government was considered by it and the Development plan dated 24th April, 1992 was sanctioned. This, in our opinion, is not the modification of the Development plan but sanction of the same in exercise of the power under Section 31(1) of the Act. It seems that the High Court misdirected itself by considering the notification dated 10th April, 1985 to be the sanction of the Development plan under Section 37(2) of the Act and the notification dated 24th April, 1992 to be the modification of the final Development plan which has rendered its order illegal. It is trite that the validity of the order does not depend upon the

section mentioned in the order. Wrong provision mentioned in the order itself does not invalidate the order, if it is found that order could be validly passed under any other provision. However in a case, like the present one, contrary to what have been mentioned in the notifications the Court cannot say that such powers were not exercised to render the notification illegal if in fact such power exists.

14. It is well settled that the user of the land is to be decided by the authority empowered to take such a decision and this Court in exercise of its power of judicial review would not interfere with the same unless the change in the user is found to be arbitrary. The process involves consideration of competing claims and requirements of the inhabitants in present and future so as to make their lives happy, healthy and comfortable.

We are of the opinion that town planning requires high degree of expertise and that is best left to the decision of State Government to which the advise of the expert body is available. In the facts of the present case, we find that the power has been exercised in accordance with law and there is no arbitrariness in the same.

15. In the result, the appeal is allowed, the impugned judgment of the High Court is set aside. However, there shall be no order as to costs.

CONTEMPT PETITION © NO.43 OF 2007:

16. In view of the order passed in Civil Appeal No.2047 of 2007, we are not inclined to entertain the contempt petition. The Contempt Petition stands dismissed.

D.G. Matters disposed of.

UNION OF INDIA & ORS

v.

J.D. SURYAVANSHI

(Civil Appeal No. 7658 of 2011)

SEPTEMBER 5, 2011

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

CONSTITUTION OF INDIA, 1950:

Article 226 – Writ petition – Scope of – In a writ petition filed as a public interest litigation High Court issuing series of interim orders effecting changes in timings of several trains, adding of coaches to several trains etc. – In some cases, Railways informed that demand for further trains/ coaches would not be feasible – However, High Court directing the Railways to provide a full AC-II coach in Intercity Express, and the General Manager (Traffic) to file his personal affidavit – Held: Going into details of railway administration and train schedule management are totally alien to judicial review and beyond judicially manageable standards – Railway administration is a specialized field – It has to cater to the needs of the entire country – High Court cannot interfere in regard to one sector without any material or information nor can it direct introduction of trains or additional coaches of a particular category or change in timings of a train – It has been repeatedly emphasised that courts should not interfere in matters of policy or in the day-to-day functioning of departments of governments or statutory bodies — The malaise of interference in the functioning of Railway administration is a matter of concern – Impugned order of High Court set aside and it would dispose of the writ petition itself without any further directions of similar nature – Administrative Law – Judicial review – Railways – Public interest litigation.

In compliance of the interim directions of the High Court in a writ petition filed as public interest litigation, the Railway administration effected changes in the timings of several trains and also added coaches to several trains. However, in some cases, the Railway administration informed the High Court that the demand for further trains/coaches would not be feasible. The High Court directed the General Manager (Traffic), Railways to file his personal affidavit and further directed the Railways to provide a full AC-II coach in Intercity Express. For alleged disobedience of one of the interim orders, a contempt petition was also filed against the Railways.

Allowing the appeal filed by the Railways, the Court

HELD: 1.1. Railway administration is a specialized field. It has to cater to the needs of the entire country. It has to distribute and utilize the available resources and the available Rolling Stock equitably, uniformly, and appropriately to serve all the sections of the country. The High Court cannot interfere in regard to only one sector without having any material or information about the requirements of other sectors available infrastructure, existing demands and constraints, safety requirements etc. Nor can the High Court direct introduction of trains or additional coaches of a particular category or direct change in timings of a train. Any attempt to pick and choose one train or one sector for improving the functioning will lead to chaos involving technical snags and safety problems. [para 8] [165-A-G]

Union of India v. Nagesh **- 2002 (7) SCC 603;** *Balco Employees' Union (Regd.) vs. Union of India & Ors*. **2001 (5) Suppl. SCR 511 = 2002 (2) SCC 333;** *Federation of Railway Officers Association vs. Union of India* **2003 (2) SCR 1085 =2003 (4) SCC 289; and** *Directorate of Film Festivals vs. Gaurav Ashwin Jain* **2007 (5) SCR 7 = 2007**

(4) SCC 737– relied on

Chief Constable of the North Wales Police vs. Evans **1982 (2) All ER 141 – referred to.**

1.2. This court has repeatedly warned that courts should resist the temptation to usurp the power of the Executive by entering into arenas which are exclusively within the domain of the executive, and should not interfere in matters of policy or in the day-to-day functioning of any departments of governments or statutory bodies. Even within the executive, the need for separation of roles has been voiced. [para 9-10] [168-C-E]

Rakesh Mohan Committee Report ***(1998)*** **– referred to.**

1.3. The record of the case shows that Railway had made all efforts to comply with the requirements/earlier directions of the High Court. Courtesies extended by Railways should not be taken as readiness to comply with impractical suggestions and unreasonable directions. The malaise of interference in the functioning of Railway administration is a matter of concern. The Railways should have the freedom and independence to grow, develop, improve and serve the nation. [para 11] [168-H; 169-A-C]

1.4. The impugned interim order dated 5.7.2010 is set aside. The High Court would dispose of the writ petition itself without any further directions of similar nature. [para 12] [169-C-D]

Case Law Reference:

2002 (7) SCC 603	**relied on**	**para 7**
2001 (5) Suppl. SCR 511	**relied on**	**para 9**
2003 (2) SCR 1085	**relied on**	**para 9**

2007 (5) SCR 7	**relied on**	**para 9**
1982 (2) All ER 141	**referred to**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7658 of 2011.

From the Judgment & Order dated 5.7.2010 of the High Court of Madhya Pradesh at Gwailor Bench in Writ Petition No. 1652 of 2009 (PIL).

Indira Jaisingh, ASG, Abhinav Mukerji, Samridhi Sinha for the Appellants.

The Order of the Court was delivered by

O R D E R

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

2. The respondent, a practicing lawyer, filed a public interest litigation in the year 2009 in the Madhya Pradesh High Court (Gwalior Bench) praying for issue of the following directions to the Railway administration (Western Railway, West Central Railway and North Central Railway) :

(i) the additional berths from Three Tier Sleeper & AC Class Coaches in all trains;

(ii) to complete the second track between Gwalior and Indore; and submit a progress report to court in respect of the work done in the last 25 years;

(iii) to reschedule the train timings of Bhind – Indore Intercity Express (Train No.9319/9320) and Gwalior-Indore Express (Train No.1125/1126) taking into account various factors and not to stop the train at Parihar and Laxmibai Nagar;

(iv) to fill all vacant posts of coolies in all stations to avoid discomfort to passengers;

(v) to introduce additional 3 tier sleeper coaches in all trains between Gwalior and Indore;

(vi) to introduce additional coaches (AC-I & AC-III) in Dehradun Express, additional coaches (AC I and AC-II tier) in Bhind-Indore Intercity Express and Gwalior-Indore Expresses (Train No.9319, 9320, 1125 & 1126);

(vii) to extend train route of Ujjain-Dehradun Express (Train No.4309 and 4310) upto Indore;

(viii) to re-schedule the timings of Intercity Express and Dehradun Express to enable more passengers can use them and;

(ix) to extend the route of Shuttle Express (Gwalior-Guna-Gwalior) and Indore-Maksi-Indore upto Indore and Gwalior respectively during day time.

3. The High Court passed a series of interim orders in the said case, in compliance of which, Railways made changes in the timings of several trains. They also added AC-II coaches, AC-I coaches, composite (AC-III cum AC-II) coaches to several trains. In some cases, the Railway Administration informed the court that the demand for further trains/coaches will not be feasible or could not be met, either due to technical reasons or lack of full capacity utilization in regard to existing trains/ coaches. They also pointed out that certain seasonal increase in passenger traffic like summer vacations, cannot be a ground for permanent or throughout the year addition of new trains or addition of new coaches.

4. But the High Court was not satisfied. It got into details of railway administration and train schedule management, which were totally alien to judicial review, and beyond judicially manageable standards. We extract below a typical interim order passed on 17.12.2009:

"It is reported to us that the Intercity Express though has some berths to accommodate the passengers who propose to travel in II AC but the bogie is made in two parts half of it is reserved for II AC while the other half is being utilized by the passengers traveling in III AC.

Learned counsel for the respondents pray for time to seek instructions in the matter.

Let the General Manger (Traffic), Railways file his personal affidavit in the matter as to why such a bogie has been provided and what problem would be faced by the Railway Administration if instead of half boogie II AC a full boogie II AC is provided."

5. By the impugned interim order dated 5.7.2010, the High Court directed the Railways to provide a Full AC-II coach in the Intercity Express. The High Court further directed the Railways to consider and introduce AC-I coach in the Intercity Express. While issuing the said direction the High Court observed: "Needless to say the Benches of this prestigious High Court are smoothly functioning at both the cities viz. Gwalior and Indore" thereby implying that the AC-I coach was necessary in the Intercity Express because the High Court has Benches at Gwalior and Indore. The High Court also directed the impleadment of Army Regiments and Border Security Forces to the PIL. It further directed the learned counsel for the Union of India to submit in writing how many officers of Central Government, Armed Forces and Border Security Forces are required to travel from Gwalior to Indore and back. For alleged disobedience of one of the interim orders, a contempt petition (No.178/2009) was also filed against the Railway which appears to be pending.

6. Feeling aggrieved the Railways have filed this petition contending as follows:

(i) High Court has no jurisdiction to direct either the

addition or deletion of coaches on any particular train, or to direct the change of frequencies or timings of a particular train.

(ii) Any directions for providing additional coaches where the trains were already running with its normal load of 15 coaches would causes several technical problems, coach shortages in other trains, complications, safety violations etc.

(iii) The High Court was not justified in directing the Railways to attach a full AC-II tier & AC-I, coaches in the Gwalior Indore Express 1125/1126.

7. A three Judge Bench of this Court in Union of India v. Nagesh - 2002 (7) SCC 603, dealing with similar directions regarding Railways by the said High Court, had set aside a decision of the High Court directing the central government to reschedule the timings of the Awantika Super Fast Express. This Court held:

"After we heard the matter, we are of the view that such a direction could not have been issued by the High Court to the appellants herein in a petition under Article 226 of the Constitution. What would be the scheduled timings for a train for its departure and arrival is an administrative decision keeping in view the larger public interest or public convenience and not the convenience of the public of a particular town. Such a decision is within the exclusive administrative domain of the Railways and is not liable to be interfered with in a petition filed under Article 226 of the Constitution."

(Emphasis supplied)

In spite of the said decision rendered in regard to the similar earlier orders of the said High Court, the Division Bench of the High Court has chosen to indulge in a similar exercise in this case.

8. Railway administration is a specialized field. It has to cater to the needs of the entire country. It has limited resources and limited number of railway engines and railway coaches, particularly AC coaches, more particularly AC-I class coaches. Railway will have to distribute and utilize the available resources and the available Rolling Stock equitably, uniformly, and appropriately to serve all the sections of the country. It is possible that in a particular section there may be hardship, inconveniences and need for introduction of more trains, better timings, and better facilities. But one sector is not India. We shudder to think what would happen if every High Court starts giving directions to the Railway to provide additional trains, additional coaches and change timings wherever they feel that there is a shortage of trains or need for better timings. Even in the State of Madhya Pradesh, we are sure that apart from Gwalior-Indore sector, there are other sectors which may be facing similar hardships and problems. The Railway does not exist to cater to a particular sector. It is for the Railway administration to decide where, how and when trains or coaches should be added or the timings should be changed. The Courts do not have data inputs, specialized knowledge or the technical skills required for running the Railways. The High Court cannot interfere in regard to only one sector without having any material or information about the requirements of other sectors available infrastructure, existing demands and constraints, safety requirements etc. Nor can the High Court direct introduction of trains or additional coaches of a particular category or direct change in timings of a train. Changing the timing of a train is not a simple process, but requires co-ordinated efforts, as it would affect the timings of other trains. There are also different types of trains - express trains, superfast trains, passenger trains, goods trains, with different speeds and priorities. Any attempt to pick and choose one train or one sector for improving the functioning will led to chaos involving technical snags and safety problems.

9. In *Balco Employees' Union (Regd.) vs. Union of India*

& Ors. [2002 (2) SCC 333], this Court held :

> "Judicial interference by way of PIL is available if there is injury to public because of dereliction of constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject-matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of constitutional or statutory provisions or non-compliance by the State with its constitutional or statutory duties. None of these contingencies arise in this present case."
>
> (Emphasis supplied)

In *Federation of Railway Officers Association vs. Union of India* [2003 (4) SCC 289] this Court was considering a challenge to the government's proposal to form new railway zones. The appellant therein placed some material to demonstrate that formation of new railway zones may not increase the efficiency of railway administration. This Court refused to interfere and observes :

> "Even otherwise, to meet the demands of backward areas cannot by itself be inconsistent with efficiency. When the Railways is a public utility service, it has to take care of all areas including backward areas. In doing so, providing service, efficient supervision and keeping the equipment and other material in good and workable condition are all important factors….
>
> Further, when technical questions arise and experts in the field have expressed various views and all those aspects have been taken into consideration by the Government in deciding the matter, could it still be said that this Court should re-examine to interfere with the same? The

wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same."

In *Directorate of Film Festivals vs. Gaurav Ashwin Jain* [2007 (4) SCC 737], this Court held :

"The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review".

The following observations of House of Lords setting the limits of judicial review in *Chief Constable of the North Wales Police vs. Evans* 1982 (2) All ER 141, can be usefully referred :

"The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law… The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. ….. Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

This court has repeatedly warned that courts should resist the temptation to usurp the power of the Executive by entering into arenas which are exclusively within the domain of the executive.

10. How many coaches should be attached, what types of coaches are to be attached, on which lines what trains should run, what should be their timings and frequency, are all matters to be decided by the Railway administration using technical inputs, depending upon financial, administrative, social and other considerations. This Court has repeatedly held that courts should not interfere in matters of policy or in the day-to-day functioning of any departments of governments or statutory bodies. Even within the executive, the need for separation of roles has been voiced. We may usefully refer to the following observation in the Rakesh Mohan Committee Report (1998) made in a different context :

"With regard to institutional separation of roles, into policy, regulatory and management functions, these roles are currently blurred, which causes confusion about the underlying vision and mission of Indian Railway. The institutional separation of roles will mean that policy makers are limited to setting policy; regulators fix competition rules in general and pricing in particular; management manages and is measured against clear performance indicators."

11. The record of the case shows that Railway had made all efforts to comply with the requirements/earlier directions of

the High Court. Courtesies extended by Railways should not be taken as readiness to comply with impractical suggestions and unreasonable directions. The malaise of interference in the functioning of Railway administration is a matter of concern. Courts, bureaucracy and political leaders should give up the tendency to compel or pressurize the Railway administration to cater to only parts of the country particularly to the State or area to which they belong. Any such attempt to promote only regional interests would affect the national interest. The Railways should have the freedom and independence to grow, develop, improve and serve the nation. Be that as it may.

12. In view of the above, the appeal is allowed and the impugned interim order dated 5.7.2010 of the High Court is set aside. In the light of what is stated above, we request the High Court to dispose of the writ petition itself without any further directions of similar nature.

R.P. Appeal allowed.

GOVT. OF A. P. & ORS.

v.

SRI SEVADAS VIDYAMANDIR HIGH SCHOOL & ORS.

(Special Leave Petition (Civil) No. 9541 of 2007)

SEPTEMBER 06, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]

SERVICE LAW:

Private Schools – Grant-in-aid posts – Filling up of – State of Andhra Pradesh Memo No. 1280/COSE/A2/2004-4 dated 20.10.2004 imposing ban on filling up of existing vacancies – Held: The Memo was issued after the schools had been given permission to fill up the vacant posts – It was not given retrospective effect – Therefore, no interference is called for with the judgments of the High Court that the ban would not be applicable to the recruitment process already initiated by the management of the private schools nor would the rationalization process apply to such schools.

Writ petitions were filed before the High Court challenging the Memo No.1280/COSE/A2/2004-4 dated 20th October, 2004, issued by the State Government of A.P., by which ban was imposed on the filling up of existing vacancies in the aided posts of teachers where the recruitment process had already been initiated by the management of the private schools. In some cases, a further prayer was made that the authorities concerned be also restrained from transferring the teachers from one school to another by declaring them surplus and to release the amount of salaries payable to the teachers appointed against the aided posts. The Single Judge of the High Court declared that the said ban would not be applicable to the recruitment process already initiated by

the management of the private schools for filling up the vacant aided posts of teachers prior to the coming into effect of the Memo in question and gave a direction to the authorities to allow the writ petitioners to complete the process of selection. The appeal filed by the State Government were dismissed by the Division Bench of the High Court. The Division Bench also quashed the exercise of rationalization undertaken by the Government in furtherance of the interim order dated 31.10.2005 together with directions contained in letter dated 03.11.2005, and gave the liberty to the State Government to undertake a fresh exercise of rationalization which might lead to certain teachers being declared surplus and for their absorption. Aggrieved, the State Government filed the special leave petitions.

Dismissing the petitions, the Court

HELD: 1.1. No interference is called for with the judgment and order of the Division Bench of the High Court impugned in these special leave petitions. There is no dispute that the Memo dated 20.10.2004, imposing a ban on recruitment to grant-in-aid posts was issued after the schools in question had been given permission by the State authorities to fill up the vacant posts. There is also no dispute that the said Memo was not given retrospective effect so as to negate the approval already given for filling up the grant-in-aid posts. The State Government and its authorities could not, therefore, contend that the rationalization process which had been introduced, would also apply in respect of the private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier. Furthermore, even the approval which was granted for filling up the vacant aided posts, had been granted after due scrutiny as to the requirements of the schools in question. It is well-settled that

administrative orders are prospective in nature, unless they are expressly or by necessary implication made to have retrospective effect. [Para 12-13] [179-A-F]

2. As regards SLP (C) Nos. 15231-32 of 2011 filed by the State Government questioning the claim of a sweaper and a gardener-cum-watchman for converting them as employees on the last grade service and the salaqry attached to such posts consequent upon their posts having been admitted into the grant-in-aid scheme, the Singh Judge of the High Court allowed their claim holding that G.OMs. No. 259 dated 18.06.1993 was applicable to their case. The Division Bench of the High Court dismissed the appeal of the State Government. It is in the light of the finding of the Division Bench of the High Court that findings of the Single Judge had not been challenged, that G.O.Ms.No.259 dated 18.06.1993, was made applicable to the petitioners. As the same had become final as between the writ petitioners and the State and it was no longer open to the State to come to a different conclusion, there is no reason to interfere with the impugned decision of the High Court. [Para 15-16] [180-E-H; 181-A-B]

3. As far as SLP (C) No. 469 of 2011 is concerned, the Division Bench of the High Court rejected the prayer made on behalf of the State Government to condone the delay of 366 days in filing the writ appeal. Even the filing of the special leave petition was delayed by 107 days. Since the subject matter of the writ petition was also with regard to application of the ban order imposed by the Memo dated 20.10.2004, which has already been considered in SLP (C) Nos.9541 and 10945 of 2007, this Court is not inclined to interfere with the order of the Division Bench dismissing the writ appeal on the ground of delay. [Para 17] [181-C-E]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 9541 of 2007.

From the Judgment & Order dated 29.12.2006 of the High Court of Judicature Andhra Pradesh at Hyderabad in Writ appeal No. 1578, 1579, 1585, 1643, 1672, 1681, 1726, 1746, 1759, 1932, 1941, 1942, 1943, 1944, 1979, 1987, 1992, 1993, 2006, 2022, 2034, 2069, 2155, 2165, 2166, 2167, 2180, 2185, 2186, 2187, 2249, 2247, 2285, 2289, 2319 and 2383 of 2005, 104, 148, 309, 739, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1393, 1394, 1395, 1396, 1397, 1398, 1399 & 1400 of 2006 and W.P. Nos. 21793, 21794, 24718, 24983, 25215, 25481, 25482, 25522, 25524, 25527, 25583, 26323, 26328 of 2005 and 3330, 3450, 3451, 3531, 3550, 3575, 3587, 3594, 3599, 3643, 3660, 3821, 3822, 3823, 3837, 4240, 4241, 7031, 7068, 7069, 7070, 7120 of 2006.

WITH

SLP (C) Nos. 10945 of 2007, 15231-15232, 469 of 2011.

P. Vishwanatha Shetty, I. Venkatanarayana, G.N. Reddy, C. Kannan for the Petitioners.

Mahalashmi Pavani, B. Sunita Rao, J. Balaji, Priya Bhatnagar, A. Filza, Anindita Popli, C.K. Sucharita, Ashok Mathur, Guntur Prabhakar, K. Sarada Devi, D. Mahesh Babu, Dr. Kailash Chand, C.S.N. Mohan Rao, Prem Prakash, P. Venkat Reddy, Anil Kumar Tandale for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Two Special Leave Petitions, being SLP (C) Nos.9541 of 2007 and 10945 of 2007, arising out of the judgment and final order dated 29th December, 2006, passed by the Andhra Pradesh High Court have been taken up for consideration together, along with SLP(C)No.469 of 2011, which is directed against the judgment and order dated 9th July, 2009, passed by the said High Court in

W.A.M.P.No.661 of 2008 in W.A.No.954 of 2009 and SLP(C)Nos.15231-32 of 2011, which are directed against the judgment and order 17th August, 2010, passed by the said High Court in W.A.No.1868 of 2003 and W.P.No.24066 of 2004. Inasmuch as, SLP(C)Nos.469 of 2011 and 15231-32 of 2011 arise out of different orders of the Andhra Pradesh High Court, the same will be dealt with separately, although, they have been taken up for hearing along with the other Special Leave Petitions.

2. For the sake of convenience, we shall refer to the facts in SLP(C)No.9541 of 2007 *(Government of Andhra Pradesh & Ors. Vs. Sri Sevadas Vidyamandir High School & Ors.)* in deciding the matters.

3. The subject matter of the various writ petitions, which were disposed of by the learned Single Judge of the Andhra Pradesh High Court, culminating in the various appeals, which were disposed of by the common judgment dated 29th December, 2006, is the effect of the ban order imposed by the State Government vide Memo No.1280/COSE/A2/2004-4 dated 20th October, 2004, on the filling up of existing vacancies in the aided posts of teachers where the recruitment process had already been initiated by the management of the private schools. The learned Single Judge, who had heard the writ petitions, had declared that the said ban would not be applicable to the recruitment process already initiated by the management of the private schools for filling up the vacant aided posts of teachers prior to the coming into effect of the aforesaid memo. The learned Judge had given a further direction to the said authorities to allow the writ petitioners to complete the process of selection. In some cases, a further prayer was made that the concerned authorities be also restrained from transferring teachers from one school to another by declaring them surplus and to release the amount of salaries payable to the teachers appointed against the aided posts.

4. For the sake of convenience, the Division Bench of the

Andhra Pradesh noted the facts from the paper book of W.A.(S.R.)No.121938 of 2005, filed by the Government of Andhra Pradesh and Others against an order dated 9th March, 2005, passed by the learned Single Judge in Writ petition No.22804 of 2004, i.e., C.A.M. High School, Nellore Vs. Government of Andhra Pradesh and others, wherein, pursuant to leave granted, a prayer had been made for quashing the impugned Memo dated 20th October, 2004, along with Rc.No.140/B2-1/2005 dated 3rd November, 2005, issued by the Director of School Education, Andhra Pradesh, Hyderabad.

5. C.A.M. High School, Nellore, is a private aided school established by Samavesam of Telugu Baptist Churches, wherein all the posts of teachers sanctioned for the school are aided posts. In 2004, the management of the school approached the District Education Officer, Nellore, for grant of permission to fill up the existing vacant posts. The said officer, by his letter dated 17th September, 2004, to the Regional Joint Director, School Education, Guntur, recommended grant of sanction to the management of the school to fill up the vacant aided posts. Such permission was duly granted by letter dated 22nd September, 2004, which has been reproduced in full in the judgment of the Division Bench of the Andhra Pradesh High Court. Pursuant to such permission being granted by the Regional Director of School Education, Guntur, the management of the school initiated the recruitment process by requesting the District Employment Officer, Nellore, to forward the names of eligible candidates and also by publishing advertisements in two daily newspapers inviting applications for filling up the vacant posts.

6. While the recruitment process was underway, the school was informed that the Government had issued the above-mentioned Memo dated 20th October, 2004, imposing a ban on the filling up of the vacant posts and, therefore, the selection process could not be completed. The management thereupon filed Writ Petition No.22804 of 2004 for a declaration that the

decision contained in the said Memo dated 20th October, 2004, was not retrospective and the same could not, therefore, be applied to the ongoing process of recruitment initiated for the purpose of filling up the vacant aided posts for which permission had already been granted by the competent authority. As was noted by the Division Bench, in the counter filed by the District Education Officer, Nellore, it was not disputed that in furtherance of the sanction granted by the Regional Joint Director, Guntur, the process of recruitment of 8 teachers had been initiated by the management of the school and that Shri M. Ramalingam, Deputy Educational Officer, had been nominated as the departmental representative on the Staff Selection Committee. In fact, the date of interview had been fixed in consultation with Shri Ramalingam, but the same could not be completed on account of the promotion of Shri Ramalingam as the District Education Officer.

7. Thereafter, the management of the school suo motu fixed 14th December, 2004, as the date of the interview, but, although, the interviews were held, no further steps could be taken up on account of the ban order imposed by the State Government vide Memo dated 20th October, 2004. The Division Bench observed that the learned Single Judge had taken note of the fact that while permission had been given to fill up the vacant posts on 22nd September, 2004, the Memo in question was issued subsequently on 20th October, 2004.

8. Various appeals had been filed by the State of Andhra Pradesh against the said decision of the learned Single Judge before the Division Bench. While the appeals were pending, the Government began a process of rationalization for filling up all the vacant posts. Taking note of the same, the Division Bench adjourned the hearing of the appeals with liberty to the counsel for the writ petitioners in one of the cases to comprehensively amend the pleadings and also to challenge the legality of the Memo dated 20th October, 2004, if so advised. In furtherance of such leave, the writ petition filed by

the C.A.M. High School, Nellore, was amended to challenge the legality of the said Memo dated 20th October, 2004. Ultimately, the Division Bench dismissed the appeals filed by the Government of Andhra Pradesh and allowed the writ petitions filed by the management of the private schools and directed that they would be free to appoint selected candidates and seek approval of such appointments from the Competent Authority. The Division Bench also quashed the exercise of rationalization undertaken in furtherance of the interim order dated 31st October, 2005, together with the directions contained in the letter dated 3rd November, 2005, issued by the Director of School Education, with liberty to the Competent Authorities to undertake a fresh exercise of rationalization, which might lead to certain teachers being declared surplus and for their absorption.

9. Appearing for the Government of Andhra Pradesh, Mr. P. Vishwanatha Shetty, learned Senior Advocate, submitted that the ban order imposed by the State Government, vide Memo dated 20th October, 2004, came into operation in respect of appointments of teachers in private aided institutions in the State. Mr. Shetty submitted that the Government of Andhra Pradesh, which had the full authority to extend grant-in-aid to educational institutions, also possessed the consequential and incidental power to adjust the posts covered under the grant-in-aid scheme and to transfer personnel from one institution to another. Since a decision had been taken up by a High Power Committee presided over by the Chief Minister, its decision was final and conclusive and it was not open to the High Court to scrutinize the same. It was submitted that in certain eventualities it could become necessary to declare staff of a school to be surplus and to transfer them to other schools and the power of the Government in such cases could not be curtailed. Mr. Shetty submitted that it is to meet such eventualities that a decision had been taken by the State Government to rationalize the staff pattern of the different institutions on a need-based basis.

10. On the other hand, it was emphatically argued on behalf of the respondent School that the Memo dated 20th October, 2004, did not have retrospective effect and could not, therefore, stultify the recruitment process initiated by the management of private aided schools where permission of the Competent Authority had been given prior to 20th October, 2004. Accordingly, it was incumbent on the part of the Competent Authority to grant approval for the appointments made pursuant to the permission granted prior to 20th October, 2004, to the private aided schools for filling up the vacant posts in the school.

11. Holding the brief on behalf of Ms. Sunita Rao, learned Advocate, appearing for the respondent schools, Ms. Mahalakshmi Pavani, learned Advocate, submitted that as had been held by the Division Bench of the Andhra Pradesh High Court, the rationalization process was violative of Rule 10(17) of the A.P. Educational Institutions (Establishment, Recognition, Administration and Control of Schools Under Private Management) Rules, 1993, inasmuch as, although, the said statutory Rules stipulated that the strength of students in private aided schools for two consecutive years would be the determining factor for transfer of surplus staff, the State had resorted to a wholly whimsical and arbitrary method to determine such surplus staff. Ms. Pavani submitted that in any event, having permitted the schools in question to fill up the vacant grant-in-aid posts after taking into account the need and the roll and attendance of students, it was no longer open to the State Government to adopt a different posture on account of the Memo dated 20th October, 2004, which was, in any event, prospective and not retrospective. Ms. Pavani submitted that interviews had been duly conducted on 14th December, 2004, for filling up the vacant posts in question, but the State Government had quite unreasonably refused to allow the recruitment process to be completed and to grant approval to candidates who had already been interviewed and had been selected for appointment.

12. Having considered the submissions made on behalf of the respective parties, we are of the view that no interference is called for with the judgment and order of the Division Bench of the High Court. There is no dispute that the Memo dated 20th October, 2004, imposing a ban on recruitment to grant-in-aid posts was issued after the schools in question had been given permission by the State authorities to fill up the vacant posts in the schools being managed and run by the writ petitioners, who are the respondents in these Special Leave Petitions. There is also no dispute that the said Memo was not given retrospective effect so as to negate the approval already given for filling up the grant-in-aid posts. The State Government and its authorities could not, therefore, contend that the rationalization process which had been introduced, would also apply in respect of the private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier. Furthermore, as was submitted by Ms. Pavani, even the approval which was granted for filling up the vacant aided posts, had been granted after due scrutiny as to the requirements of the schools in question. Since it is well-settled that administrative orders are prospective in nature, unless they are expressly or by necessary implication made to have retrospective effect, there is no need to refer to the decisions cited by Ms. Pavani, appearing on behalf of the respondent schools.

13. As indicated hereinbefore, we, therefore, see no reason to interfere with the judgment and order of the Division Bench of the Andhra Pradesh High Court impugned in these Special Leave Petitions and the same are accordingly dismissed.

14. As far as SLP(C)Nos.15231-32 of 2011 are concerned, the same have been filed by the Government of Andhra Pradesh, represented by its Principal Secretary, Education Department, Hyderabad, against Shaik Lal Mohammed and others. These Special Leave Petition are

directed against the orders in the Writ Appeals filed by the Correspondent, Asafia High School, Malakpet, Hyderabad, against Shaik Lal Mohammed and others. The school was aggrieved by the order of the learned Single Judge in a writ petition filed by two employees of the school for a direction upon the State authorities to convert their posts into Class IV posts with effect from 9th June, 1980 and 16th March, 1981, respectively, and to pay them their arrears of salaries, which, according to them, were due. The two respondents had worked as sweeper and gardener-cum-watchman from 9th June, 1980 and 16th March, 1983, respectively. It was their claim that since their posts had been admitted into the grant-in-aid scheme and they had been appointed as full-time contingent employees, they were entitled to claim the benefit of certain Government Orders under which they were entitled to be converted as employees on the last grade service and the salary attached to such grade.

15. Claims of the said respondents were rejected by the State authorities on the ground that the posts had not been created under the orders of the Competent Authority and they had not been in service for a period of 10 years as on 1st April, 1985. Furthermore, they had not acquired the minimum educational qualification of Class VII as on the day G.O.Ms.No.259 dated 18th June, 1993, had been published. The learned Single Judge held that the said G.O.Ms. dated 18th June, 1993, was applicable to the said two respondents, who were the writ petitioners, and since the said findings had not been challenged by the Government, they had become final and, accordingly, the said respondents were entitled to have their posts converted into Class IV posts. Consequently, the order of rejection passed by the Regional Joint Director, Hyderabad, dated 6th April, 2004, was set aside and the writ appeal filed by the State against the said decision of the learned Single Judge was dismissed and the writ petitions filed by the said respondent Nos.1 and 2 were allowed.

16. It is in the light of the finding of the Division Bench of the High Court that findings of the learned Single Judge, had

not been challenged, that G.O.Ms.No.259 dated 18th June, 1993, was made applicable to the petitioners. As the same had become final as between the writ petitioners and the State and it was no longer open to the State to come to a different conclusion, we see no reason to interfere with the impugned decision of the High Court and the said Special Leave Petitions are, accordingly, dismissed also.

17. As far as SLP(C)No.469 of 2011 is concerned, the same has been filed against the judgment and order dated 9th July, 2007, passed by the Division Bench of the Andhra Pradesh High Court, rejecting the prayer made on behalf of the State and the State authorities to condone the delay of 366 days in filing the writ appeal. Even the filing of the Special Leave Petition was delayed by 107 days. Since the subject matter of the writ petition was also with regard to the application of the ban order imposed by the Memo dated 20th October, 2004, which we have already considered in SLP(C) Nos.9541 and 10945 of 2007 decided in the earlier part of the judgment, we are not inclined to interfere with the order of the Division Bench dismissing the writ appeal on the ground of delay. The SLP(C)No.469 of 2011 is, therefore, dismissed in the light of the decision rendered in the aforesaid Special Leave Petitions and also on the ground of delay.

18. Having regard to the different circumstances in which the Special Leave Petitions have been filed, the parties will bear their own costs therein.

R.P. Special Leave Petitions dismissed.

SANJAY KUMAR SINGH

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 4888 of 2005)

SEPTEMBER 6, 2011

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

Service Law:

Disciplinary proceedings – Water tanker and escort vehicle of CRPF attacked by militants – Five personnel out of six on the escort vehicle killed – Disciplinary proceedings initiated against personnel of water tanker and the survivor of escort vehicle – They were found guilty of charges of disobedience of orders, committing gross misconduct and displaying cowardice in execution of their duties – Punishment of dismissal from service imposed – HELD: Inquiry Officer referred to the statements of the appellants and other materials and came to the conclusion – Charge-sheet was supplied to appellants much in advance – List of witnesses was supplied to appellants and it was mentioned therein that any other witnesses could be examined – Appellants themselves refused to avail services of Defence Assistant — Appellants failed to show any prejudice to have been caused to them – Therefore, it cannot be said that inquiry proceedings are vitiated or there is any violation of principles of natural justice – Central Reserve Police Force Rules, 1955 – r. 27 – Principles of natural justice – Constitution of India, 1950:

CONSTITUTION OF INDIA, 1950:

Articles 226 and 136 – Scope of, as regards disciplinary proceedings – HELD: It is for the departmental authorities to conduct an inquiry in accordance with the prescribed Rules

– The role of the court in the matter of departmental proceedings is very limited and it cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record – In the instant case, two Benches of the High Court have recorded concurrent findings that there is no violation of the principles of natural justice and that the charges have been established against all the appellants and that the punishment awarded is not disproportionate to the offences alleged – Therefore, to re-appreciate the evidence and to come to a different finding would be beyond the scope of Article 136 – The judgments and orders passed by High Court suffer from no infirmity – Service Law – Central Reserve Police Force Rules, 1955 – r. 27.

On 13-3-1999 the appellants and five other personnel of the Central Reserve Police Force (CRPF) were detailed to go in two vehicles, one as escort and the other a water tanker for bringing water from a certain water point. While the water tanker, with the escort party following, was on its way to the water point, the militants ambushed the vehicles and started firing indiscriminately as a result of which five CRPF personnel in the escort vehicle were killed. The appellants were the four who survived the ambush. Head Constable 'EH' was the only survivor of the escort vehicle who jumped out of the escort vehicle when the ambush took place leaving behind the wireless set given to him in the truck itself. They were issued a charge-sheet with the allegations that they committed disobedience of orders, committed gross misconduct and displayed cowardice in execution of their duties and in their capacity as members of CRPF. The Inquiry Officer found the appellants guilty of the charges framed. The disciplinary authority passed the order dated 13/15.1.2000 dismissing the appellants from service. Their statutory appeals were dismissed by the appellate authority, viz., the Deputy Inspector General of Police, CRPF. Their writ

petitions were dismissed by the Single Judge and their appeals were dismissed by the Division Bench of the High Court.

Dismissing the appeals, the Court

HELD: 1.1. A perusal of inquiry report would indicate that the Inquiry Officer in his report, apart from referring to the other materials on record, also referred to the statements of the appellants. It has come on record that 'SKS' was driving the water tanker when he heard a sound. L/Nk 'JS' thought that there was a tyre burst and, therefore, he got down. Constable 'KNP' told 'SKS' that there was an ambush and when the latter found that the escort vehicle was not coming, he continued to drive the water tanker for 15 Kms without even waiting for L/Nk 'JS' to re-board the vehicle and went to the Police Station. The statement of L/Nk JS' is to the same effect. He further stated that after getting down from the vehicle he retaliated the fire which was actually directionless and when he could not re-board the vehicle, he hid himself in a gorge and came out of his hiding place when the search parties reached there. He also stated in his statement that although he was provided with 40 rounds but he could fire only 14 rounds during the said attack. Head Constable 'EH' also gave a statement that at the time of the attack, he jumped and took shelter in a banana grove. He admitted that he left his wireless set in the vehicle and that it was not in the vehicle when he came back. [Para 11-14] [192-C-H; 193-A]

1.2. The handbook of the CRPF makes it mandatory for each of the constables to carry arms whenever they go out in a militancy infested area. The driver of the tanker, namely, 'SKS', although was required, but he did not carry any weapon with him. His only defence is that he was not given any arms and ammunition. A CRPF

personnel is expected to be properly armed in a militancy infested area so as to enable him to face all eventualities and the said arms are required to be collected while going to any place, according to command. The driver ('SKS') was also a constable and, therefore, he was bound by the said instructions. It is stated that he did not follow the said instructions and, therefore, there was dereliction of duty and also misconduct on his part. [Para 15-16] [193-B-F]

1.3. So far as the issue with regard to violation of the principles of natural justice in conducting the departmental inquiry is concerned, the plea is that the charge-sheet was not issued in accordance with the provisions of r. 27(c) of the Central Reserve Police Force Rules, 1955. However, the records reveal that the charge-sheet was issued to the appellants on 11-8-1999 whereas the trial started only on 20.09.1999. Therefore, it was issued much before seven days as required to be done prior to holding of the trial. [Para 18] [193-H; 194-A-B]

1.4. As regards the reading out the charge-sheet, the same could be read out only when the trial begins in order to find out whether the appellants plead guilty to the charges or not and immediately thereafter the trial commences. In the instant case, the charge-sheet was read out when the trial commenced on 20.9.1999 and the first witness was examined on 21.09.1999, whereas the second witness was examined on 25.09.1999 and the next witness was examined on 29.9.1999. As the charge-sheet was sent to the appellants on 11-8-1999, therefore, they were fully aware of the contents of the charge-sheet. Thus, no prejudice has been caused to the appellants for not giving 48 hours after reading out the charges to them. [Para 19-20] [194-C-G]

1.5. It is true that a Defence Assistant is to be

provided by the authority to assist the delinquent in conducting the inquiry but, in the instant case, the records disclose that the appellants were asked as to whether they would require any Defence Assistant, and each one of them specifically stated in the inquiry proceedings itself that they did not need any Defence Assistant. They have in fact cross-examined the witnesses themselves, for which opportunity was granted to them. [Para 21] [194-H; 195-A-B]

1.6. So far as the examination of some of the witnesses whose names were not mentioned in the list of witnesses is concerned, in the list of witnesses supplied to the appellants, it has been categorically mentioned that there could be any witness, other than those who are cited specifically in the list. It has been held by this Court that unless and until it is shown that prejudice has been caused, it cannot be said that the inquiry proceeding is vitiated or that there is any violation of principles of natural justice. [Para 22-23] [195-C-F]

Managing Director, ECIL, Hyderabad and Ors. v. *B. Karunakar & Ors.* **1993 (2) Suppl. SCR 576 = (1993) 4 SCC 727 and** *Union of India & Ors.* v. *Alok Kumar* **2010 (5) SCR 35 = (2010) 5 SCC 349 - relied on.**

2.1. It is for the departmental authorities to conduct an inquiry in accordance with the prescribed Rules. The role of the court in the matter of departmental proceedings is very limited and it cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. [Para 24] [195-G-H]

2.2. In the instant case, two Benches of the High Court after looking into the records have found that there is no violation of the principles of natural justice and that

the charges have been established against all the appellants and that the punishment awarded is not disproportionate to the offences alleged. The findings recorded by the Benches of the High Court are concurrent findings and the same cannot be interfered with lightly. To re-appreciate the evidence and to come to a different finding would be beyond the scope of Article 136 of the Constitution of India. The judgments and orders passed by the High Court suffer from no infirmity. [Para 25 – 26] [196-A-D]

Case Law Reference:

1993 (2) Suppl. SCR 576	**relied on**	**para 23**
2010 (5) SCR 35	**relied on**	**para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4888 of 2005.

From the Judgment & Order dated 10.12.2003 of the High Court of Gauhati in Writ Appeal No. 77 of 2003.

WITH

C.A. Nos. 4885 & 4886-4887 of 2005.

Anitha Shenoy, Amlan Kumar Ghosh, Utpal Saha, Y. Prabhakara Rao for the Appellant.

T.S. Doabia, Rashmi Malhotra, Satya Siddiqui, Shreekant N. Terdal, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By this common judgment and order we propose to dispose of all the four appeals which are interconnected as the issues and the facts arising for our consideration are similar. They were heard

together and, therefore, a common judgment and order is also passed.

2. These appeals are filed by the appellants being aggrieved by the judgment and order dated 10.12.2003 passed by the Gauhati High Court whereby the Division Bench of the High Court dismissed the writ appeals of the appellants and thereby confirmed the judgment and order dated 16.8.02 passed by the learned single Judge dismissing all the writ petitions filed by the appellants holding that the appellants were given all reasonable opportunity to defend themselves and, therefore, there was no merit in those writ petitions.

3. The brief facts leading to the filing of the present appeals are that on 13th March, 1999 the appellants and few others of the Central Reserve Police Force [for short "CRPF"] while serving under 60 Battalion stationed at Haflong were detailed to go in two vehicles, one as escort and other a water tanker for bringing water from Retezole Jatinga water point. Sanjay Kumar Singh, the driver, Jai Shankar Sharma and K.N. Paswan were in the water tanker and they were provided with an escort vehicle which was driven by Jawahar Lal and the other occupants in the said escort vehicle were Head Constable Emmanuel Herenz; L. Nk. Harendra Chowdhury; L. Nk. Jaswant Singh; Constable U.K.S. Gurung and Constable P.S. Madhvi. While the water tanker with the escort party following was on its way to the said water point, the militants ambushed the vehicles and started firing indiscriminately as a result of which five CRPF personnel in the escort vehicle were killed, namely, Driver Jawahar Lal; L. Nk. Harendra Chowdhury; L. Nk. Jaswant Singh; Constable U.K.S. Gurung and Constable P.S. Madhvi. The appellants were the four who survived the ambush.

4. Head Constable Emmanuel Herenz is the only survivor of the escort vehicle who jumped out of the escort vehicle when the ambush took place leaving behind the wireless set given to him in the truck itself. It has also come on record that when

the militants opened fire L. Nk. Jai Shankar Sharma sitting in the water tanker thought that there was a tyre burst. In order to look at it he got out of the water tanker when he came to realize that it is actually an attack by the militants. In the meantime, the driver Sanjay Kumar Singh stopped for a while and thereafter drove away the tanker but L. Nk. Jai Shankar Sharma could not despite his best efforts re-board the vehicle. It has also come in evidence that the driver of the tanker took the vehicle to the Haringajab Police Station, which was 15 kilometers away from the scene of occurrence, and from there he had allegedly informed his Unit about the incident.

5. When search parties reached the spot they found Head Constable Emmanuel Herenz hiding whereas L/Nk Jai Shankar Sharma who had also got down and had run away from the place of occurrence was found out from his hiding place which was under a gorge. On the same day the Deputy Commandant, 60 Battalion lodged a First Information Report with the officer-in-charge, Haflong Police Station and on 16.03.1999 all the appellants were suspended from service pending departmental proceedings against them. The appellants were thereafter issued a chargesheet with the allegations that while the appellants were deputed to function as escort party to the water tanker, they committed disobedience of orders, committed gross misconduct and displayed cowardice in execution of their duties and in their capacity as members of CRPF. The two articles of charges framed against them read as follows: -

"Article-I:-

"…. Out of the two vehicles (Regn. No. DIG 3390 water truck (3/5 ton) and Regn. No. DL-IG 7976 escort vehicle) deputed with escort party was attacked by the militants by laying ambush. The above personnel instead of properly retaliating to the five of militants in said ambush ran away as well as hiding themselves in safe places by leaving the other escort party personnel trapped in the ambush and

as a result of which five personnel namely, L/Nk. Harendra Chaudhary, L/Nk. Yaswant Singh, Ct. P.S. Madhvi, Ct. U. K.S. Gurung and Ct./Dvr. Jawahar Lal of the escort party belonging to this Unit were killed in the ambush on 13.3.1999 and their weapons and one wireless set were taken away by the militants. Their Act of running away from the place of occurrence which leads to their cowardice act in execution of duty in said incident of ambush instead of retaliating to the fire of militants to injure or kill them for safety of force personnel and arms ammunition and equipment is prejudicial, to good order and discipline of the Force."

Article-II:-

"... .That during the aforesaid period and functioning in aforesaid Unit..... They did not follow the orders/ instructions issued to them as escort party Comdr. which were to be followed by them in case of any attack etc., by militants on escort party and vehicles of which they were the Commander. They also failed to keep proper command and control on their party personnel effectively by timely retaliating the fire of the militants during the ambush..... As such..... disobeyed the orders issued to them in their capacity of commander of the party respectively and neglected in execution of their duties which is prejudicial to be good order and discipline of the Force.""

6. The departmental inquiry was thereafter initiated in terms of Rule 26 of the Central Reserve Police Force Rules, 1955 [for short "the Rules"]. On completion of the inquiry a report was submitted by the Inquiry Officer finding the appellants guilty of the charges framed but so far as L. Nk. Jai Shankar Sharma is concerned, the Inquiry Officer although found one of the charges proved but found the other charge only partially proved. After the submission of the said report to the disciplinary authority, viz., the Commandant and perusal thereof, the

disciplinary authority passed the order of dismissal from service by order dated 13/15.1.2000.

7. Being aggrieved by the aforesaid order of dismissal passed against them the appellants preferred statutory appeals before the appellate authority, viz., the Deputy Inspector General of Police, CRPF. The said appeals were however dismissed, as against which the writ petitions were filed in the Gauhati High Court which were heard by the learned single Judge and he dismissed the writ petitions.

8. The appellants still aggrieved filed writ appeals before the High Court which were also dismissed in the aforesaid terms. Consequently, the present appeals were preferred on which we heard the learned counsel appearing for the parties.

9. Counsel appearing for the appellants submitted that there was violation of the principles of natural justice in the departmental proceedings as the appellants were not given the list of witnesses and that some witnesses were examined who were not even cited as witnesses in the said list. It was also submitted that no Defence Assistant was provided to the appellants for assisting them in the departmental proceeding. It was further submitted that although the Inquiry Officer found one of the charges only partially proved as against L/Nk Jai Shankar Sharma, however, the disciplinary authority without showing any reason for disagreement held the said charge as also wholly proved. It was also submitted that the charges were not read over to the appellants in terms of the mandatory Rule being Rule 27(c). One of the submissions on behalf of Sanjay Kumar Singh was that he was not granted any arms and ammunition and, therefore, the finding that he had violated the standing orders is wrong and illegal.

10. Counsel appearing for the respondents however took us through the entire records to support his submission that there was no violation of the principles of natural justice at all. He also submitted that no prejudice is caused to the appellants

in the entire departmental proceedings in which reasonable opportunity was granted to the appellants at every stage and, therefore, the allegations are without any basis. He drew our attention extensively to the inquiry report submitted by the Inquiry Officer to support his contention that the appellants were provided with all opportunities to defend themselves. He also submitted that the punishments given to the appellants were commensurate with the offences alleged against them.

11. In order to appreciate the contentions put forth by the counsel appearing for the parties we have perused the records. A perusal of inquiry report would indicate that Inquiry Officer in his report apart from referring to the other materials on record also referred to the statements of the appellants. It has come on record that Sanjay Kumar Singh was driving the water tanker when he heard a sound.

12. L/Nk Jai Shankar Sharma thought that there was a tyre burst and, therefore, he got down but immediately after getting down he came to realize that there is an attack by the militants. Constable K.N. Paswan told Sanjay Kumar Singh that there was an ambush and when Sanjay Kumar Singh found that the escort vehicle was not coming, he continued to drive the water tanker for 15 Kms without even waiting for L/Nk Jai Shankar Sharma to reboard the vehicle and went to Haringajab Police Station from where he allegedly informed his Unit.

13. The statement of L/Nk Jai Shankar Sharma is to the effect that after getting down from the vehicle he retaliated the fire which was actually directionless and he ran after his vehicle but could not catch it as the vehicle moved forward. Therefore, he hid himself in a gorge and came out of his hiding place after 1-11/2hour when Shri S.S. Gohar came with a party from the battalion headquarter. L/Nk Jai Shankar Sharma also stated in his statement that although he was provided with 40 rounds he could fire only 14 rounds during the said attack.

14. Head Constable Emmanuel Herenz, one of the

appellants, also gave a statement that at the time of the attack; he jumped and took shelter in a banana grove. He admitted that he left his wireless set in the vehicle and that it was not in the vehicle when he came back.

15. Our attention was also drawn to the handbook of the CRPF which makes it mandatory for each of the constables to carry arms whenever they go out in a militancy infested area. Sanjay Kumar Singh although was a driver, he was also a constable and, therefore, he was bound by the aforesaid instructions issued. It is alleged that he did not follow the said instructions and, therefore, there was dereliction of duty and also misconduct on his part.

16. It appears that the driver of the escort vehicle, who was also killed, also did not carry any weapon with him and nor did Sanjay Kumar Singh, although, he was required to carry weapon with him. His only defence is that although others were provided with arms and ammunition in the Unit itself, he was not given any arms and ammunition. A CRPF personnel is expected to be properly armed in a militancy infested area so as to enable him to face all eventuality and the said arms are required to be collected while going to any place, according to command.

17. Sanjay Kumar Singh would have been justified in taking up a plea of the aforesaid nature if despite his asking for arms and ammunition he was not provided any such arms and ammunition from the Unit. However, Sanjay Kumar Singh has not been able to prove that he had gone to the Unit where arms and ammunition are kept for taking it with him and also that he had in fact asked for it. There is nothing on record to show that Sanjay Kumar Singh had exactly complied and followed the prescribed procedure and requested for giving him the arms as he was going out of the Unit. The aforesaid defence which is sought to be taken appears to be baseless.

18. So far the issue with regard to violation of the principles

of natural justice in conducting the departmental inquiry is concerned, the aforesaid submission is made on the ground that the chargesheet was not read out and issued in accordance with the provisions of Rule 27(c) of the Rules. On going through the records we find that the chargesheet was issued to the appellants on 11th August, 1999 whereas the trial started only on 20.09.1999. Therefore, it was issued much before seven days as required to be done prior to holding of the trial.

19. So far the question of reading out the chargesheet is concerned, it appears that the chargesheet was read out when the trial commenced on 20th September, 1999 and the first witness HC Bahadur Singh was examined on 21.09.1999 whereas, the second witness was examined on 25.09.1999 and the next witness was examined on 29.9.1999. As the chargesheet was sent to the appellants on 11th August, 1999, therefore, they were fully aware of the contents of the chargesheet. So far as the issue with regard to the reading out of the chargesheet is concerned, the same could be read out only when the trial begins in order to find out whether the appellants plead guilty to the charges or not and immediately thereafter the trial commences. We do not see any prejudice caused to the appellants because one of the witnesses was examined in the trial before expiry of forty eight hours, particularly in view of the fact that the appellants were made aware of the contents of the charges much prior.

20. In our considered opinion, no prejudice is caused to the appellants for not giving 48 hours after reading out the charges to them. Only one witness was examined within that 48 hours period whereas the next two witnesses were examined beyond the 48 hours period. The appellants have not been able to show any prejudice caused to them due to examining of Bahadur Singh on 21.09.1999.

21. It was also submitted that no Defence Assistant was provided to the appellants as required under the provisions of the Rules. It is true that a Defence Assistant is to be provided

by the authority to assist the delinquent officer in conducting the inquiry but in the present case the records disclose that the appellants were asked as to whether they would require any Defence Assistant for their aid and assistance. Each one of them has specifically stated in the inquiry proceedings itself that they do not need any Defence Assistant. They have in fact cross-examined the witnesses themselves, for which opportunity was granted to them.

22. So far as the contention of the Counsel appearing for the appellants that some of the witnesses whose names were not mentioned in the list of witnesses were examined is concerned, we find that a list of witnesses was also supplied to the appellants along with the chargesheet issued to them. Therefore, the appellants were fully aware as to who were the persons who are going to be examined in the proceeding. There were of course two witnesses who were not specifically named in the list of witnesses but when we refer to the list of witnesses the same makes it clear and prove that in that list it has categorically been mentioned that there could be any other witness, other than those who are cited specifically in the list.

23. We may here refer to the decision of this Court in *Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar & Ors.* reported in (1993) 4 SCC 727 wherein this Court has held that unless and until it is shown that prejudice has been caused it cannot be said that the inquiry proceeding is vitiated or that there is any violation of principles of natural justice. To the same effect is the decision of this Court in the case of *Union of India & Ors. v. Alok Kumar* reported in (2010) 5 SCC 349.

24. So far as the departmental proceedings are concerned it is for the departmental authorities to conduct an inquiry in accordance with the prescribed Rules. The role of the Court in the matter of departmental proceedings is very limited and the Court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record.

25. In the present case two Benches of the High Court after looking into the records have found that there is no violation of the principles of natural justice and that the charges have been established against all the appellants and that the punishment awarded is not disproportionate to the offences alleged. After the said findings have been recorded by the learned Single Judge and the Division Bench, there is hardly any scope for this Court to substitute its findings and come to a different conclusion, by re-appreciating the evidence. The findings recorded by the Benches of the High Court are concurrent findings and the same cannot be interfered with lightly.

26. In our considered opinion, to re-appreciate the evidence and to come to a different finding would be beyond the scope of Article 136 of the Constitution of India. Therefore, we hold that the judgment and order passed by the High Court suffers from no infirmity.

27. Accordingly, the appeals have no merit and are dismissed but without any order as to costs.

R.P. Appeals dismissed.

AJAY KUMAR DAS
v.
STATE OF JHARKHAND & ANR.
(Criminal Appeal no. 1735 of 2011)

SEPTEMBER 6, 2011.

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

CODE OF CRIMINAL PROCEDURE, 1973:

s. 482 – Petition seeking to quash criminal proceedings – Death of wife of appellant – FIR by father of deceased that her father-in-law and mother-in-law after talking to the appellant pushed the victim into a well – Charge sheet for an offence punishable u/s 304-B/34 IPC filed in the case – Petition filed by the husband seeking to quash the proceedings on the ground that no case was made out against him, dismissed by High Court – Held: The allegations made in the complaint and the FIR are required to be looked into – Charge-sheet has been filed against the appellant also holding that a case u/s 304-B IPC is made out – Appellant will have sufficient opportunity to place his case before the court at the time of framing of the charge – At this stage no case is made out to quash the entire proceedings – Penal Code, 1860 – s.304-B/34.

The father of the deceased filed a first information report stating that his daughter was tortured by her father-in-law and mother-in-law for dowry and on 29.9.2006, after talking to the appellant, the husband of the deceased, on telephone, they caused her death. After the charge-sheet for an offence punishable u/s 304-B read with s. 34 IPC had been filed, the appellant filed a petition u/s 482 Cr.P.C. seeking to quash the proceedings on the ground that no case u/s 304-B IPC was made out

against him. The High Court dismissed the petition. Aggrieved, the husband of the deceased filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. In the First Information Report, there is an allegation that the two other accused persons, namely, the parents of the appellant, on the fateful day after talking to him over telephone, in a pre-determined manner killed the informant's daughter by pushing her into a well. The said allegation is sought to be countered by referring to a document dated 19-11-2006 issued by the Commanding Officer to the appellant. In the said note, which was sent to the Superintendent of Police, it is mentioned that as per the statement of the appellant, his wife (the deceased) fell inside the well. The aforesaid document is in the nature of a defence and could be looked into by the court concerned at the appropriate stage. He also referred to some of the statements made in the case diary to justify the stand that no case against the appellant is made out. At this stage, the allegations made in the complaint and in the First Information Report are required to be looked into. [para 11] [204-B-F]

State of Haryana v. *Bhajan Lal* **1990 (3) Suppl. SCR 259 = 1992 Suppl. 1 SCC 335;** *Shanti & Another* v. *State of Haryana* **1990 (2) Suppl. SCR 675 =AIR 1991 SC 1226;** *Mahbub Shah v. King Emperor* **(1945) 72** Indian Appeals 148; *Bengai Mandal alias Begai Mandal v. State of Bihar* **2010 (1) SCR 439 = (2010) 2 SCC 91 – referred to.**

1.2. The records reveal that there was a demand for giving cows, motor cycle and other goods. All these allegations will have to be dealt with by the court at different stages for which liberty would be available to the appellant. This is not the stage when the court would make an inquiry into the factual position to find out as to

whether or not the appellant is guilty of the charges or not. The appellant will have sufficient opportunity to place his entire case before the court at the time of framing of the charge since charge sheet has already been filed against the appellant also holding that a case u/s 304B and s. 34 is made out. On a reading of the First Information Report and the materials that are available in the case file of the appellant, this Court is of the considered opinion that no case is made out so as to quash the entire proceeding. The appellant is at liberty to raise all his defence as may be available to him in accordance with law at the time of framing of the charge and at that stage the court shall consider the material on record as also the contentions raised by the appellant in proper perspective and decide the matter in accordance with law. [para 12] [204-G-H; 205-A-D]

Case Law Referene:

1990 (3) Suppl. SCR 259	**referred to**	**para 10**
(1945) 72 Indian Appeals 148	**referred to**	**para 8**
2010 (1) SCR 439	**referred to**	**para 9**
1990 (2) Suppl. SCR 675	**referred to**	**para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1735 of 2011.

From the Judgment & Order dated 19.8.2009 of the High Court of Jharkhand at Ranchi in Cr. M.P. No. 1347 of 2007.

Tapesh Kumar Singh, Krishnanand Pandeya, Amrendra Kr. Choubey, Ambhoj Kumar Sinha for the appearing parties.

The Judgment of the Court was delivered by

JUDGMENT

1. Leave granted.

2. This appeal is directed against the order dated 19th August, 2009 passed by the Jharkhand High Court dismissing the petition filed by the appellant herein praying for quashing of the entire criminal proceedings of Balumath P.S. Case No. 68 of 2006 (corresponding to G.R. Case No. 445 of 2006) in which cognizance was taken of the offence under Section 304B read with Section 34 of the Indian Penal Code against the appellant and others.

3. The informant filed a First Information Report that his daughter was married to the appellant herein in the year 2002, as per the Hindu rites and custom and that at the time of her marriage, informant had given sufficient dowry. It was stated therein that the informant's daughter complained about the torture meted out to her by the father-in-law and the mother-in-law to her husband, the present appellant who allegedly did not pay any heed. It was also alleged that on 29th September, 2006, father-in-law and the mother-in-law talked to the accused on telephone and in a well-planned conspiracy caused death of the daughter of the informant. On receipt of the aforesaid information a case was registered, thereafter the police started investigation. After the completion of the investigation, a charge sheet was filed on 14th April, 2007. An order was also passed on 17th April, 2007, by the Magistrate taking cognizance which is also assailed in the present case. The appellant was granted anticipatory bail by the High Court on 10th April, 2007.

4. After submission of the aforesaid charge sheet and passing of the order taking cognizance, the appellant filed a petition under Section 482 of the Code of Criminal Procedure praying for quashing of the proceeding in the aforesaid manner. The High Court considered the pleas raised by the parties and thereafter held that the case is a case of dowry death and that

the appellant is the husband. It was also held that the points taken by the appellant before the High Court are rather a defence case and that the same relates to factual dispute. The Court also referred to the decision of this Court in State of Haryana v. Bhajan Lal reported in 1992 Suppl. 1 SCC 335 and also to the settled position of law that genuineness of the allegations/charge is an issue to be tried and the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot delve into such factual controversy so as to quash the proceedings.

5. Learned counsel appearing for the appellant has challenged the legality of the aforesaid order passed by the High Court on the ground that no case is made out against the appellant either under Section 304B or under Section 34 of the Indian Penal Code as according to him there is no such allegation in the First Information Report specifically against the appellant. He has also submitted that the order taking cognizance is wrong and disclosed non-application of mind by the Magistrate for even prior to passing of the said order charge sheet was already filed. He also took us through the contents of the case diary wherein statements of seven witnesses have been recorded to substantiate his submission as aforesaid.

6. Counsel appearing for the respondents, however, submits that this is not the stage when this Court should embark upon a factual inquiry as regards the materials on record. It is also pointed out to us that in fact the appellant would have such an effective opportunity even at the stage when charges are framed. Counsel also submits that it is possible and also permissible to alter the charges and frame charges under some other provisions of law if it appears to the Court that material for framing such charge under other sections are also available on record.

7. Having heard the learned counsel appearing for the parties, we may appropriately refer to a decision of this Court

in *Shanti & Another v. State of Haryana* reported in AIR 1991 SC 1226. What was considered in that case by this Court was a case of dowry death under Section 304B and also a case of 498A of the Indian Penal Code. While dealing with the aforesaid provisions, this Court has held that the two sections are not mutually exclusive. It was also held that a person charged and acquitted under Section 304B could be convicted under Section 498A without charge being there if such a case is made out. This Court, however, hastened to add that to avoid technical defects it is necessary in such cases to frame charges under both the sections and that if the case is established then they can be convicted under both the sections but no separate sentences need be awarded under Section 498A in view of the substantive sentences being awarded for the major offence under Section 304B. In that decision, this Court considered the scope and ambit of Section 304B IPC and also of Section 498A IPC. Reference was also made to provisions of Section 113B of the Evidence Act. It was held that Section 113B of the Evidence Act lays down that if soon before the death such woman has been subjected to cruelty or harassment for or in connection with any demand for dowry then the Court would presume that such a person has committed the dowry death. It was also held that the meaning of 'cruelty' for the purpose of this Section has to be gathered from the language as found in Section 498A and as per that Section 'cruelty' means 'any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.'

8. Our attention is also drawn to the decision of *Mahbub Shah v. King Emperor* (1945) 72 Indian Appeals 148. In the

said decision, it was held that to invoke the aid of Section 34 IPC exclusively it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of common intention of all and if that is shown then the liability for the crime may be imposed on any one of the persons in the same manner as if the acts were done by him alone. It was further held that it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

9. This Court in the decision of *Bengai Mandal alias Begai Mandal v. State of Bihar* reported in (2010) 2 SCC 91 after referring to some allied decisions of this Court held that the position with regard to Section 34 IPC is crystal clear and that the existence of common intention is a question of fact. It was held that since intention is a state of mind it is, therefore, very difficult if not impossible to get or procure direct proof of intention and, therefore, courts in most cases have to infer the intention from the act or conduct of the party or other relevant circumstances of the case.

10. Counsel appearing for the appellant also drew our attention to the same decision which is relied upon in the impugned judgment by the High Court, i.e. the case of *State of Haryana v. Bhajan Lal and others* reported in 1992 suppl. 1 SCC 335. In the said decision, this Court held that it may not be possible to lay down any specific guidelines or water tight compartment as to when the power under Section 482 Cr.P.C. could be or is to be exercised. This Court, however, gave an exhaustive list of various kinds of cases wherein such power could be exercised. In paragraph 103 of the said judgment, this Court, however, hastened to add that as a note of caution it must be stated that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases for the Court would not be justified in embarking upon an inquiry as to

the reliability or genuineness or otherwise of the allegations made in the First Information Report or in the complaint that the extraordinary or the inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.

11. Keeping the aforesaid legal principles in our mind, we now proceed to examine the contentions raised by the counsel appearing for the appellant in order to ascertain and find out whether a case for quashing is made out in the facts of the present case. In the First Information Report, there is an allegation that the two other accused persons namely Ishwar Das and his wife Sunita Devi on the fateful day after talking to the present appellant over telephone in a pre-determined manner killed the informant's daughter Bimla Devi by pushing her into a well. Counsel appearing for the appellant even sought to counter the said allegation by referring to a document issued by the Commanding Officer to the appellant dated 19th November, 2006. In the said note, which was sent to the Superintendent of Police, it is mentioned that as per the statement of the appellant his wife Bimla Devi fell inside the well. The aforesaid document is in the nature of a defence and could be looked into by the appropriate Court at the appropriate stage and not now. What we are required to look at this stage is the allegations made in the complaint and in the First Information Report. He also referred to some of the statements made in the case diary to justify the stand that no case against the appellant is made out.

12. We are, however, unable to accept the said contention at this stage for we find that there was a demand for giving cows, motor cycle and other goods. All these allegations will have to be dealt with by the Court at different stages for which liberty would be available to the appellant. In our considered opinion, this is not the stage when the Court would make an inquiry into the factual position to find out as to whether or not the appellant is guilty of the charges or not. The appellant, in our considered opinion, will have sufficient opportunity to place

his entire case before the Court at the time of framing of the charge since charge sheet has already been filed against the appellant also holding that a case under Section 304B and Section 34 is made out. We do not wish to enter into the factual details for any discussion on them at this stage as the same may prejudicially affect the case of the appellant. We are, however, of the considered opinion that on a reading of the First Information Report and the materials that are available in the case file of the appellant that no case is made out so as to quash the entire proceeding. Therefore, while rejecting the contention of the counsel appearing for the appellant so far quashing of the proceedings is concerned we give him the liberty to raise all his defence as may be available to him in accordance with law at the time of framing of the charge and at that stage the Court shall consider the material on record as also the contentions raised by the appellant in proper perspective and decide the matter in accordance with law. We also make it clear that any observation made by us herein would not be in any manner construed as our observations or views with regard to the merit of the case or the defence of the appellant.

13. In terms thereof, we dismiss the appeal but with the aforesaid liberty granted to the appellant. The stay of further proceedings before the trial court granted vide this Court order dated 22nd October, 2010 stands vacated.

R.P. Appeal dismissed.

ALUVA SUGAR AGENCY

v.

STATE OF KERALA

(Civil Appeal No. 7731 of 2011)

SEPTEMBER 7, 2011

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

Kerala General Sales Tax Act, 1963: Second Schedule, Entry 17A – Margarine used for preparing bakery products and confectionaries – Taxability @ 4% or 8% – Held: Margarine is used as a substitute for butter and is used in preparation of food articles specially for preparing bakery products and also used in confectionary industry – For manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame are used – Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufacturer of margarine – According to Entry 90 in the First Schedule to the Kerala General Sales Tax Act, 1963, oils, whether edible or inedible, including refined or hydrogenated oils and margarine, not elsewhere mentioned is to be taxed at 8% – Concessional rate of 4% is levied on all edible oils as per Entry 17A of the Second Schedule read with Notification SRO No. 429/95 dated 31.2.1995 – Circular 2439/TD dated 19.2.1996 made it clear that edible oil like refined or hydrogenated oil such as groundnut oil, gingelly oil, refined and vanaspathi oils are to be taxed @ 4% and not at @ 8% – Edible oil is that oil which can be used for human consumption – It is not necessary that all edible things should be consumed in the form in which they are available – Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human

beings and, therefore, margarine is also edible and is eligible to benefit of rate of tax of 4% – Sales Tax – Notification SRO No. 429/95 dated 31.2.1995, Second Schedule, Entry 17A – Circular 2439/TD dated 19.2.1996.

The question which arose for consideration in the instant appeal was whether margarine used by appellant for preparing bakery products can be treated as edible oil and thus, the appellant is entitled to the benefit concessional of rate of tax of 4% as provided in Entry 17A of the second schedule of the Kerala General Sales Tax Act, 1963 read with Government Notification SRO No. 1725/93 and 429/95. The Department's case was that margarine would come under Entry 90 and, therefore, is taxable @ 8% and not at concessional rate of 4%.

Allowing the appeal, the Court

HELD: 1. Margarine is a generic term and it is used as a substitute for butter. It is used in preparation of food articles and specially used for preparing bakery products. For the purpose of manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame oils are used. Vegetable oils, salt, permitted emulsifiers and stabilizers are also used for manufacturing margarine. Margarine contains all edible things and is used exclusively as a raw-material for preparing bakery products and is also used in confectionary industry. Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufactures of margarine. As it is used for making eatables, margarine is also edible though it is not used for normal cooking as other oils like coconut, sunflower, soyabean, sesame oils are used but it can not be disputed that it is an edible oil. [Paras 14, 15] [214-G-H; 215-A-D]

2. According to Entry 90 in the First Schedule of the Kerala General Sales Tax Act, oils, whether edible or inedible, including refined or hydrogenated oils and margarine, not elsewhere mentioned is to be taxed at 8%. Concessional rate of 4% is levied on all edible oils as per Entry 17A of the Second Schedule read with Notification SRO No. 429/95 dated 31.2.1995. Thus, instead of 8%, edible oil is taxed at the rate of 4%. Margarine is definitely an edible oil as it is used for preparing bakery products but it is not used for normal cooking. As margarine is not used for normal cooking but is still used for preparing bakery products, a doubt prevailed whether margarine can be considered as edible oil. By virtue of the circular 2439/TD dated 19.2.1996, it was clarified that the term "edible oil" mentioned in the Notification SRO 429/95 dated 31.3.1995 included refined or hydrogenated oil such as groundnut oil, gingelly oil, refined oil and vanaspathi. The circular made it clear that edible oil like refined or hydrogenated oil such as groundnut oil, gingely oil, refined and vanaspathi oils are to be taxed @ 4% and not at @8%. The definition of "edible oil" given in the circular was not dealing exhaustively with all edible oils. It merely illustrated some of the oils which are edible oils. It means that the definition of the term "edible oil" in the circular is not exhaustive but is illustrative. This circular did not say that only edible oils referred to in the said circular would be taxed @ 4%. Edible oil is that oil which can be used for human consumption. It is not necessary that all edible things should be consumed in the form in which they are available. There are number of ingredients used in cooking for preparation of food articles which are not consumed in the same form but they are used in preparation of food articles which are consumed. Normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume

margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, it should be considered as edible oil. Upon perusal of the Circular dated 19th February, 1996, explaining the term "edible oil", the intention of the government was to give relief in tax to edible oils. The conclusion arrived at by the Tribunal to the effect that margarine is an edible oil is correct and, therefore, the appellant is entitled to benefit of reduced rate of 4%. [Paras 17-22] [216-C-E; 217-C-H; 218-A-E]

Commissioner of Trade Tax, UP v. Associated Distributors **2008 (7)SCC 409: 2008 (7) SCR 695 – referred to.**

Case Law Reference:

2008 (7) SCR 695 Referred to. Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7731 of 2011.

From the Judgment & Order dated 22.9.2006 of the High Court of Kerala at Ernakulam in S.T.R. No. 569 of 2004.

Subramonium Prasad for the Appellant.

Yashbant Das, S. Geetha, R. Satish for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. Being aggrieved by the judgement and order dated 22nd September, 2006, delivered in S.T.R. NO. 569 OF 2004 by the High Court of Kerala at Ernakulam, the appellant has filed this appeal.

3. The short question which arises for consideration in this

appeal is whether sale of margarine is to be taxed at 8% or 4% under the provisions of Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act").

4. The Sales Tax Officer held that margarine is a lubricant and animal fat, which is used for making bakery products, and is neither edible nor inedible oil. According to him, edible oil is defined in circular no.2439/96/TD dated 19.2.96, where it is stated that edible oil includes refined or hydrogenated oil such as ground nut oil, refined oil and vanaspathi and, therefore, he held that margarine is not edible. As margarine is not consumed directly, according to him, it is inedible oil. Entry 90 in the First Schedule specifically uses the phrase "and margarine" which establishes the fact that the same is neither edible nor inedible oil. Hence, margarine would come only under Entry 90 and, therefore, would be taxable at the rate of 8% and not at the concessional rate of 4%. Hence, the sale of margarine would be subjected to tax at 8%.

5. The appellant preferred an appeal before the Appellate Assistant Commissioner, Commercial Taxes, Ernakulam. The appeal was dismissed and the order of the Sales Tax Officer was upheld. Aggrieved by the above order, the appellant preferred an appeal against the said order before the Kerala Sales Tax Appellate Tribunal. The Tribunal set aside the order of the Appellate Assistant Commissioner in so far as it related to the rate of tax on margarine. According to the Tribunal:

> "…….margarine could be considered as "edible oil". According to New Webster's Dictionary, margarine is "a substitute for butter consisting of a mixture of prepared edible fats extracted from vegetable oils, and treated with lactic acid bacilli". According to Chambers Twentieth Century Dictionary, margarine is "any imitation butter". According to Concise Oxford Dictionary, margarine is "butter substitute made from edible oils and animal fats with milk". Thus, margarine is considered as a substitute for butter".

The Tribunal further held that by virtue of Circular No. 2439/83/96/TD dated 19.2.1996, the Government had clarified the doubt as to whether hydrogenated edible oil like vanaspathi oil would come within the ambit of edible oil. In the words of the Tribunal "The Government clarified that the expression edible oil would include hydrogenated oil such as groundnut oil, gingely oil, refined oil and vanaspathi. But this does not mean that margarine cannot be considered as edible oil. Further it is to be noted that the expression used in the above Government notification is "such as" and hence, it is not an exhaustive list. It is only illustrative. In any case, it is pertinent to note that margarine has been classified in Entry 90 (as extracted in para 2 above) which relates to oils. Hence, the intention of the legislature is to treat margarine as oil. Thus, the authorities below cannot take the stand that margarine is not oil. Considering all the above facts, we are of the view that margarine could be considered as edible oil. Since margarine is edible oil, the appellant is entitled to the benefit of the reduced rate of tax of 4 % as provided in Entry 17A of the Second Schedule of the Government notification S.R.O. No. 1725/93".

6. Against the order of the Tribunal, the respondent - State Government filed a revision petition in the High Court of Kerala at Ernakulam. The question raised in the revision petition was whether the Tribunal was justified in granting concessional rate of tax on BISBRI brand of bakery margarine sold by the appellant by treating it as an edible oil under Entry17A of the Second Schedule as per notification SRO 1728/1993 for the assessment year 1997-98. The High Court in the impugned judgement held that BISBRI brand bakery margarine sold by the appellant cannot be used for all purposes for which edible oils are used. The High Court observed:

"……..The product description of Respondent's product in the leaflet further shows that the item is enriched with

vitamin A and vitamin D and also contains permitted emulsifiers and stabilizers. Even though counsel for the Respondent referred to the leaflet of Dalda produced in court and contended that vitamin addition is there in other hydrogenated oils also, we do not think Dalda sold by hydrogenated oil is similar to bakery margarine sold by the Respondent. From the product description and the limited use of the item in the bakery and confectionary industry, it is clear that the Respondent's product namely, bakery margarine is a product made for a specific purpose i.e. for use in bakery and confectionary industry and the manufacturer has specifically prohibited use of the item for any other purpose. Edible oil, on the other hand, whether in hydrogenated form or not, is used for all cooking purposes. Even though hydrogenated oil or refined oil also can be used in the bakery or confectionary industry, the reverse is not true. In other words, margarine exclusively make to use in bakeries or confectionary industry cannot be treated as edible oil as the same cannot be used for all purposes for which edible oil is used. In fact, the Tribunal has allowed respondent's claim on the ground that the circular clarifying the notification uses the word "such as" and so much so, the list is not exhaustive. However, we find from the circular that the use of words "such as" after including hydrogenated oil is followed by specific items namely ground nut oil, gingili oil and vanaspathi. This only means that those items also are covered by notification. However, margarine referred above is not similar to those items is what we found. Therefore, we are of the view that bakery margarine is not edible oil covered by the notification and clarified in the circular and therefore, the decision of the Tribunal holding otherwise is liable to be reversed".

7. Being aggrieved by the said judgment, this appeal has been filed by the appellant-assessee.

8. The learned counsel for the appellant submitted that as

margarine is an edible vegetable oil, it squarely falls in Entry 17A of the Second Schedule of the Act and, therefore, it becomes eligible for concessional rate of tax at 4%. To substantiate this claim, he submitted that there are two types of margarine, namely, table and bakery margarine. The product dealt with by the appellant is bakery margarine. Photocopies of the labels affixed on the container of margarine manufactured by a few companies have been placed on record. The first one is the label of BISBRI bakery margarine. It is stated in the label that the said margarine is made from vegetable oils only and that it is enriched with vitamins A and D and is made from any or all of the following permitted ingredients:

> "refined and/or hydrogenated sunflower, soyabean, cottonseed, palmoline, palm and sesame oils, salt, permitted emulsifier and stabilizers".

9. Similarly, details of some other brands were given so as to substantiate his case that margarine is an edible oil, which is being used in eatables. He further submitted that the margarine used by the appellant does not become inedible oil just because it is meant for preparing bakery products. The question is not the use to which the oil is put but whether the oil is edible. The learned counsel for the appellant also argued that the intention of Entry 17A of the Second Schedule was to confer a concessional rate of tax at 4% for edible oils. Margarine, being hydrogenated oil and also edible, qualifies for the concession.

10. On the other hand, the learned counsel for the respondent contended that the notification SRO 1728/93 granted exemption only to edible oils, whereas Entry 90 of the First Schedule to the Act includes oils, edible or inedible, including refined or hydrogenated oils and margarine. It means that the concession is not granted to margarine as it is included in Entry 90 of the First Schedule. It was argued that as the intention of the legislature is clear, the appellant cannot claim

the benefit of reduced rate by submitting that its product also comes within the ambit of edible oils. He further submitted that the BISBRI brand margarine sold by the appellant cannot be used for all purposes for which edible oils, including hydrogenated oils and vanaspathi, are used. It was his case that margarine was used for a limited purpose i.e. only for preparing certain eatables and not for all purposes and, therefore, it cannot be said to be edible oil.

11. The learned counsel relied upon a judgment delivered in the case of *Commissioner of Trade Tax, UP v. Associated Distributors,* 2008(7) SCC 409. There the dispute was whether bubble gum was a mithai and could be taxed at 6.25% or whether bubble gum was an unclassified item to be taxed at 10%. This Court held that although bubble gum contained 60% of sucrose, still the same was not a mithai. Relying on the decision of the Apex Court in the aforestated case, the counsel contended that although margarine may be an edible product and used in bakeries, it cannot fall within the classification of 'edible oil' which is essentially a cooking medium in common parlance.

12. We have heard the learned counsel and also perused the records.

13. The main issue for adjudication in this appeal is whether margarine can be treated as edible oil and thus, fall under Entry 17A of the Second Schedule of the said Act.

14. Margarine is a generic term and it is used as a substitute for butter. It is used in preparation of food articles and specially used for preparing bakery products. For the purpose of manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame oils are used. Moreover, vegetable oils, salt, permitted emulsifiers and stabilizers are also used for manufacturing margarine. So far as the margarine manufactured by the appellant is concerned, it is

made only from vegetable oils as stated by the appellant and as borne out from the record. The margarine manufactured by the appellant is exclusively used as raw-material by bakeries and those who manufacture confectionaries.

15. Looking to the contents of margarine, it is clear that it contains all edible things. Margarine is used exclusively as a raw-material for preparing bakery products and is also used in confectionary industry. Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufactures of margarine. Vegetable and hydrogenated oils are used in manufacturing margarine and as it is used for making eatables, margarine is also edible though it is not used for normal cooking as other oils like coconut, sunflower, soyabean, sesame oils are used but it can not be disputed that it is an edible oil.

16. So far as imposition of tax under the Act is concerned, there are two relevant entries, which are as under:

"First Schedule of KGST Act:

Sl. No.	Description of goods	Point of levy	Rate of tax (percentage)
90.	Oils, edible or inedible including refined or hydrogerated oils and margarine not elsewhere mentioned in this Schedule or in the second schedule.	At the point of first sale in the State by a dealer who is liable to tax under Section 5.	8

Second Schedule:

Sl.No.	Description of goods	Existing rate of tax (percentage)	Reduced rate of tax (percentage)
17A	Edible oil	8	4

17. According to the above Entry 90 in the First Schedule, oils, whether edible or inedible, including refined or hydrogenated oils and margarine, not elsewhere mentioned is to be taxed at 8%. It is pertinent to note that concessional rate of 4% is levied on all edible oils as per Entry 17A of the Second Schedule read with Notification SRO No. 429/95 dated 31.2.1995. Thus, instead of 8%, edible oil is taxed at the rate of 4%. The question is whether the appellant is entitled to the aforestated benefit for the margarine manufactured by it. Margarine is definitely an edible oil as it is used for preparing bakery products but it is not used for normal cooking. As margarine is not used for normal cooking but is still used for preparing bakery products, a doubt prevailed whether margarine can be considered as edible oil. In the circumstances, Circular No. 2439/TD dated 19.2.1996 was issued by the Government, which reads as under:

"CIRCUAR

Sub:- Reduced rate of tax on Edible Oil – Clarification – regarding.

1. As per the Entry 90 in the 1st Schedule to the Kerala General Sales Tax Act, Oils, - edible or inedible, including refined or hydrogenated oil and margarine not elsewhere mentioned in the Schedule are taxable @ 8% at the point of 1st sale in the State. As per the notification SRO 429/95 dated 31.3.1995, the rate of tax edible oil is reduced to

4% with effect from 1.4.1995.

2. Now certain doubts have been raised as to whether hydrogenated edible oil like vanaspathy will come within the concessional rate. Government, having examined the matter, are pleased to clarify that the term "Edible Oil" mentioned in the notification SRO 429/95 dated 31.3.1995 included refined or hydrogenated oil such as ground nut oil, gingely oil, refined oil and vanaspathi."

18. By virtue of the abovereferred circular, it has been clarified that the term "edible oil" mentioned in the Notification SRO 429/95 dated 31.3.1995 includes refined or hydrogenated oil such as groundnut oil, gingely oil, refined oil and vanaspathi. Thus, the term "edible oil" has been explained by virtue of the circular dated 19.12.1996. The afore-stated circular makes it clear that edible oil like refined or hydrogenated oil such as groundnut oil, gingely oil, refined and vanaspathi oils are to be taxed @ 4% and not at @8%. The definition of "edible oil" given in the aforestated circular is not dealing exhaustively with all edible oils. It merely illustrates some of the oils which are edible oils. It means that the definition of the term "edible oil" in the circular is not exhaustive but is illustrative. This circular does not say that only edible oils referred to in the said circular would be taxed @4%.

19. In the aforestated circumstances, one has to consider whether margarine can be considered as an edible oil. We clearly understand that edible oil is that oil which can be used for human consumption. It is not necessary that all edible things should be consumed in the form in which they are available. There are number of ingredients used in cooking for preparation of food articles which we do not consume in the same form but they are used in preparation of food articles which are consumed.

20. So as to simplify the conclusion, we may say that

normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, in our opinion, it should be considered as edible oil.

21. Upon perusal of the Circular dated 19th February, 1996, explaining the term "edible oil", we find that intention of the government was to give relief in tax to edible oils. So as to clarify the doubt, it has been specifically stated in the said circular that edible oils would also include hydrogenated oils such as ground nut oil, gingely oil, refined oil and vanaspathi oil. The aforestated circular clarified that hydrogenated edible oil like vanaspathi oil should be treated as edible oil. In our opinion, the Tribunal was right when it came to the conclusion that margarine should be taxed @ 4% as it is edible oil.

22. For the aforestated reasons, we are of the view that the conclusion arrived at by the Tribunal to the effect that margarine is an edible oil is correct and, therefore, the appellant is entitled to benefit of reduced rate of 4%.

23. We, therefore, allow the appeal by quashing the impugned order dated 22.9.2006 passed by the High Court. The appeal, is allowed accordingly with no order as to costs.

D.G. Appeal allowed.

COMMNR. OF CENTRAL EXCISE, NOIDA

v.

M/S. KITPLY INDUSTRIES LTD.

(Civil Appeal No.4462 of 2003)

SEPTEMBER 7, 2011.

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

Central Excise Tariff Act, 1985:

Schedule – Heading 44.08, sub-heading 4408.90 – 'Laminated panels of Particle' and 'Medium Density Fibre Board' – HELD: Are classifiable under Chapter Heading 44.08 and not under Chapter Heading 44.06, as the products are similar to plywood and veneered panels, and after lamination assume a distinct marketability and bring about a change in the products – Therefore, Heading 44.08 is squarely applicable and sub-heading 4408.90 would be the appropriate sub-heading for classification of the products in question – Rules of interpretation of the Act – r.3 – Interpretation of statute.

Words and Phrases:

Word 'similar' occurring in the expression 'similar laminated wood' in Chapter-Heading 44.08 in the Schedule to the Central Excise Tariff Act, 1985 – Connotation of.

In the instant appeals filed by the Revenue, the question for consideration before the Court was: whether laminated panels of particle and medium density fiber board should be classified under sub- heading no. 4406.90 and 4407.90 or under sub-heading no. 4408.90 of the Schedule to the Central Excise Tariff Act, 1985.

Allowing the appeals, the Court

HELD: 1.1. It is not in dispute that the product before the lamination is not classifiable under tariff heading 44.08 of the Schedule to the Central Excise Tariff Act,. 1985. The statement of the factory manager of the assessee discloses that in the process of manufacture of the panels, plain panels of the mother boards (plain particle/MDF fiber) are used. Papers are passed through the impregnating unit wherein the resin and other required chemicals are spread on the paper and the paper gets impregnated. The impregnated paper is further dried and cut into required length. These paper sheets are assembled with the mother boards in such a way that the impregnated paper is placed on the upper side and one layer of impregnated design paper is placed over one layer of impregnated tissue paper. This assembly is put for pressing under the required heat and pressure and is taken out as pre-laminated boards and is ready for dispatch. The manager of the assessee has said in his statement that the panels after lamination, become water resistant and look attractive due to printed paper and brings about a change in the name, usage etc. From the process as explained, it is clear that the products are pre-laminated wood, most aptly falling under chapter heading 44.08 as the said chapter heading specifically speaks of plywood, veneered panels and similar laminated wood. [Para 13-15] [227-C-H; 228-A]

1.2. The word "similar" has been discussed by this court in the case of *M/S Wood Craft Products Ltd.** **with regard to "Block board". The logic applied in the case of 'Block board' can very well be applied in the instant case. Heading 44.08 in the instant case covers "plywood", "veneered panels" together with all kinds of "similar laminated wood". Thus, it is treating "plywood" or "veneered panels" as "laminated wood". Therefore, it covers all kinds of laminated wood bearing any**

resemblance to "plywood" or "veneered panels". The word used is "similar" and not "same". Thus, some resemblance to "plywood" or "veneered panels" is enough, provided the article can be treated as "laminated wood". The sweep of the heading is, therefore, quite wide. Therefore, for the product to be classified under heading 44.08, it is enough if it is similar to laminated wood, which in the instant case is proved beyond reasonable doubt. Thus, it is clear that the product is similar to plywood and veneered panels and, therefore, tariff heading 44.08 is squarely applicable. [para 15-18] [227-H; 228-A-B; 229-A-C; F-G]

CCE, Shillong v. Wood Craft Products Ltd.* **1995 (77) ELT 23 – relied on

M/s Sausashtra Chemicals v. Collector of Customs, Bombay **1986 (23) ELT 283,** *Decorative Laminated (India) Pvt. Ltd. v. Collr. Of C. Ex., Bangalore* **1996 (86) ELT 186 (SC.)*; and*** *CCE, Indore v. Bombay Burmah Trading Corpn. Ltd.* **2000(39) RLT 184 – referred to.**

1.3. Further, in the instant case, the core layer is made up of the particle board or MDF board (referred to as "mother boards") and joined together with the help of resins and then laminated with plasticised paper (paper impregnated with melamine formaldehyde resin). Hence it is also clearly seen that the laminated panels manufactured by the respondent are covered under Chapter Note 5 to Chapter 44 of the schedule to the Act. The product need not be same as plywood or veneered panels but mere similarity with them is enough for chapter note 5 to apply. [Para 18] [229-G-H; 230-A]

1.4. The respondent's plea that the product is classifiable under chapter heading 44.06 cannot be accepted. In the proviso to the said heading, it has been mentioned that if the manufacturing process gives the

product the essential character of articles of another heading, then chapter heading 44.12 will not apply. In the instant case, going by the statement of the respondent's own officer, the product after lamination assumes a distinct marketability and brings about a change in the product. This change, after lamination makes the product fall outside the purview of chapter heading 44.06 and that would place the product under chapter heading 44.08 as the word used under chapter heading 44.08 are "*similar laminated wood".* **[Para 20] [230-E-G]**

1.5. Further, recourse may also be taken to rule 3 (c) of the Rules for interpretation of the Act which envisages that if the products are capable of classification under two chapter headings, then as per the said rule, the classification must be under the heading which occurs last in the numerical order. Therefore, sub-heading 4408.90 would be the appropriate sub heading for classification of the product in question. [Para 20] [230-G-H; 231-A]

1.6. The Tribunal has erred in holding that as "particle board" is specifically covered under heading 44.06, laminated particle board will come under the scope of "similar board of wood" under the said heading. The impugned judgments and orders passed by the Tribunal in both the appeals are, therefore, set aside and it would be open to the appellant to assess the respondent as per the findings of this Court. [Para 19 and 21] [230-B-C; 231-B-C]

Case Law Reference:

1995 (77) ELT 23	**relied on**	**para 9**
1986 (23) ELT 283	**relied on**	**para 9**
1996 (86) ELT 186 (SC.)	**relied on**	**para 9**
2000(39) RLT 184	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4462 of 2003.

From the Judgment & Order dated 23.9.2002 of the Customs Excise & Gold (Control) Appellate Tribunal, New Delhi, in Appeal No. E/1582/02D.

WITH

C.A. No. 9736 of 2003

P.P. Malhotra, ASG, Harish Chander, Sunita Rani Singh, Krishna Kumar, Kiran Bharadwaj, B. Krishna Prasad for the Appellant.

V. Lakshmi Kumaran, Alok Yadav, M.P. Devanath for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. The present appeals arise out of the judgments and orders passed on 23.9.2002 and 6.6.2003 by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi and the Customs, Excise & Service Tax Appellate Tribunal, dismissing the appeals filed by the appellant- Revenue Department. By this judgment, we dispose of Civil Appeal Nos. 4462/2003 and 9736/2003 as they involve similar questions of law.

2. The issue which falls for consideration in the present appeals is whether laminated panels of particle and medium density fiber board should be classified under sub- heading no. 4406.90 and 4407.90 or under sub-heading no. 4408.90. The appellant alleged that the product manufactured by the respondent herein was classifiable under sub heading 4408.90. For this purpose the appellant relied on Chapter Note 5 of Chapter 44 of the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the Act') which reads as under:-

"For the purposes of heading No. 44.08, the expression "similar laminated wood" includes blockboard, laminboard and battenboard, in which the core is thick and composed of blocks, laths or battens of wood glued or otherwise joined together and surfaced with the outer plies and also panels in which the wooden core is replaced by other materials such as a layer or layers of particle board, fiberboard, wood waste glued or otherwise joined together, asbestos or cork".

For the sake of convenience, the relevant headings are also extracted below:

"44.06 - Particle board and similar board of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances.

4406.10 - Plain particle boards.

4406.20- Insulation board and hardboard

4406.30- Veneered particle board, not having decorative veneers on any face

4406.90-Other.

44.07 – Fiber board of wood or other ligneous materials, whether or not bonded with resins or other organic substances.

4407.10-Insulation board and hardboard

4407.90- Other.

44.08-Plywood, veneered panels and similar laminated wood. ı4408.10 – Marine plywood and aircraft plywood.ı44 8.30- Decorative plywood

4408.40- Cuttings and trimmings of plywood of width not exceeding 5 centimeters

4408.90 – Other".

3. In order to decide the issue arising in the present case in its proper perspective, basic facts leading to filing of the present appeals are being recapitulated hereunder:

The respondent asessee, who is engaged in the manufacture of wood and articles of wood falling under Chapter 44, was issued show cause notices dated 16.2.2000 and 27.12.2000 by the appellant authorities, inter alia, calling upon it to show cause as to why classification of its products (1) Laminated Particle Board and (2) Laminated Medium Density Fibre Board should not be changed to chapter Sub-heading no 4408.90 The respondent replied to the said notices refuting the allegations on merits as well as on limitation. The said show cause notices were adjudicated and the demand proposed therein was dropped by the Commissioner of Central Excise, Meerut-II vide Orders dated 20.4.2001 and 31.10.2001 respectively. The Commissioner, ultimately found that the pre requisites of Chapter Note 5 of Chapter 44 were not satisfied and, therefore, no further action was taken so far as the aforestated classification was concerned.

4. Aggrieved by the orders, the Revenue filed appeals before the Tribunal. The Tribunal dismissed the said appeals vide orders dated 23.9.2002 and 6.6.2003, upholding the findings of the Commissioner.

5. Aggrieved by the orders of the Tribunal, the Reveue has filed the present appeals.

6. The learned counsel for the appellant submitted that the Tribunal had erred in not appreciating that the manufacturing process, as stated by the factory manager clarified that "pre-laminated" meant already laminated and as a result of the process, the surface of the panels become water resistant as well as scratch resistant and due to melamine surface, it resisted cigarette burns and also got an attractive look. In spite of the above facts stated by the factory manager with regard

to the process, the respondent-assessee never mentioned the word "Panel" in the manufacturing process submitted along with classification declared under Rule 173 B of the Central Excise Rules 1944.

7. Learned counsel for the appellant further argued that Chapter Note 44.08 specifically speaks of plywood, veneered panels and 'similar laminated wood'. He pointed out that in the instant case, it is an admitted fact that the goods in question, which are 'wood products' are laminated and they are covered under chapter heading 44.08 and not under chapter heading 44.06 as there is no mention of lamination in the latter chapter sub heading.

8. The learned counsel for the appellant also submitted that the Tribunal failed to appreciate that if a product is capable of being classified under two chapter headings, then Rule 3 (c) of the Rules for interpretation of the Act envisages that classification under the heading, which occurs last in the numerical order. Therefore, chapter sub-heading 4408.90 would be the appropriate sub heading for classification of the products in question.

9. To substantiate his claim, he relied on the cases of *CCE, SHILLONG v. WOOD CRAFT PRODUCTS LTD.* 1995 (77) ELT 23, *M/S SAUSASHTRA CHEMICALS v. COLLECTOR OF CUSTOMS, BOMBAY* 1986 (23) ELT 283, *DECORATIVE LAMINATED (INDIA) PVT LTD v. COLLR. OF C. EX., BANGALORE* 1996 (86) ELT 186 (S.C.).

10. On the other hand, the learned counsel for the respondent submitted that for Chapter Note 5 of Chapter 44 to apply, an essential pre-requisite is that the similar laminated wood must be surfaced with outer plies, which is conspicuously absent in the present case and hence the said chapter note would not apply. He also submitted that the impregnation is only an additional process, which is done on the particle board to increase its strength and, therefore, the goods would still continue to fall under heading 4406.

11. The learned counsel also submitted that the decision in the case of *Wood Craft Products Ltd*. (supra) would not be applicable to the instant case as it was with respect to classification of block board. The respondent relied on the case of *CCE, INDORE v. BOMBAY BURMAH TRADING CORPN. LTD.* 2000(39) RLT 184 to substantiate its claim that pre-laminated particle board is classifiable under heading 44.06 and not under heading 44.08.

12. We have heard the learned counsel for the parties and perused the records.

13. It is not in dispute that the product before the lamination is not classifiable under tariff heading 44.08. However, it is the case of the appellant that after the lamination, the panels so obtained become a distinct product falling outside the purview of 44.06. Hence, what needs to be determined by us is whether even after the lamination, the products falls under sub-heading 4406.90 and 4407.90 or would it fall under sub- heading 4408.90.

14. For this purpose, it is important to refer to the statement of the factory manager Shri B.V Rao, who stated that in the process of manufacture of the panels, plain panels of the mother boards (plain particle/MDF fiber) are used. Papers are passed through the impregnating unit wherein the resin and other required chemicals are spread on the paper and the paper gets impregnated. The impregnated paper is further dried and cut into required length. These paper sheets are assembled with the mother boards in such a way that the impregnated paper is placed on the upper side and one layer of impregnated design paper is placed over one layer of impregnated tissue paper. This assembly is put for pressing under the required heat and pressure. The above assembly is taken out as pre-laminated boards and is ready for dispatch.

15. From the above process, it is clear that the products are pre-laminated wood, most aptly falling under chapter

heading 44.08 as the said chapter heading specifically speaks of plywood, veneered panels and similar laminated wood. The word "similar" discussed in the above para has been discussed by this court in the case of *CCE, Shilling v M/S Wood Craft Products Ltd.* (supra) wherein a similar issue with regard to "Block board" had arisen. For sound reasons recorded, this Court held that 'Block board' should be classified under heading No. 44.08. The logic applied in the case of 'Block board' can very well be applied in the instant case. In the said judgment, this Court observed as under in paras 5 and 6

> "5. It is significant that Heading No. 44.12 of the HSN is the same as Heading No. 44.08 of the Indian tariff and reads "Plywood, veneered panels and similar laminated wood." The explanatory notes on the HSN indicate the meaning of the expression "similar laminated wood" as under:-
>
> "similar laminated wood. This group can be divided into two categories:
>
> Block board, lamin board and batten board, in which the core is thick and composed of blocks, laths or battens of wood glued together and surfaced with the outer plies. Panels of this kind are very rigid and strong and can be used without framing or backing."
>
> 6. It is clear that if the expression "similar laminated wood" in the Indian Tariff is understood as it meant under the HSN on which pattern the Central Excise Tariff Act is based, then block boards of all kinds would fall within the expressionn "similar laminated wood". This is how the amended Chapter Note reads expressly. The question is whether it can be so read even for the earlier periods particularly the first period before amendment of Chapter Note 5 to expressly include block board in the expression "similar laminated wood".

16. Heading 44.08 in the instant case covers "plywood", "veneered panels" together with all kinds of "similar laminated wood". In other words, it is treating "plywood" or "veneered panels" as "laminated wood". Therefore, it covers all kinds of laminated wood bearing any resemblance to "plywood" or "veneered panels". The word used is "similar" and not "same". Thus, some resemblance to "plywood" or "veneered panels" is enough, provided the article can be treated as "laminated wood". The sweep of the heading is, therefore, quite wide.

17. Therefore, for the product to be classified under the above heading, it is enough if it is similar to laminated wood, which in the instant case is proved beyond reasonable doubt. Even factory manager, Shri B.V. Rao admitted the facts with regard to lamination. At this point we may again refer to the case of *M/s. Wood Craft Products Ltd.* (supra). It has been mentioned therein that "The meaning of the significant words and description of the wood products as intermediate materials meant for manufacture of final products clearly indicate that "laminated wood" means a wood product prepared by placing layer on layer and "block board" is a plywood board with a core of wood. Any plywood board with a core of wood in which there are layers, one above the other is, therefore, laminated wood similar to plywood or, veneered panels. It is "similar laminated wood" included in the heading "Plywood, veneered panels and similar laminated wood". Similarity with, and not identity with plywood or veneered panels is required".

18. From the above, it is clear that the product is similar to plywood and veneered panels and hence tariff heading 44.08 is squarely applicable. Further, in the instant case, the core layer is made up of the particle board or MDF board (referred to as "mother boards" in the process mentioned above) and joined together with the help of resins and then laminated with plasticised paper (paper impregnated with melamine formaldehyde resin). Hence it is also clearly seen that the laminated panels manufactured by the respondent are covered

under Chapter Note 5 to Chapter 44 of the schedule to the Act. The product need not be same as plywood or veneered panels but mere similarity with them is enough for chapter note 5 to apply.

19. The Tribunal has erred in holding that as "particle board" is specifically covered under heading 44.06, laminated particle board will come under the scope of "similar board of wood" under the said heading. It is clear that the product after the lamination is a distinct marketable commodity different from the original one. This conclusion is further substantiated by the fact that Shri B.V. Rao said in his statement that the panels after lamination, become water resistant and look attractive due to printed paper and brings about a change in the name, usage etc. Therefore, the Tribunal's conclusion that the laminated board is similar to 'particle board' is incorrect and cannot be accepted.

20. The respondent has placed reliance on the pari materia heading in the HSN 44.10 to contend that the product is classifiable under chapter heading 44.06. We cannot accept this argument. In the proviso to the said heading, it has been mentioned that if the manufacturing process gives the product the essential character of articles of another heading, then chapter heading 44.12 will not apply. In the instant case, going by the statement of the respondent's own officer, the product after lamination assumes a distinct marketability and brings about a change in the product. This change, after lamination makes the product fall outside the purview of chapter heading 44.06 and that would place the product under chapter heading 44.08 as the word used under chapter heading 44.08 is *"similar laminated wood"* (emphasis supplied). Further recourse may also be taken to rule 3 (c) of the Rules for interpretation of the Act which envisages that if the products are capable of classification under two chapter headings, then as per the said rule, the classification must be under the heading which occurs last in the numerical order. Therefore, heading 4408.90 would

be the appropriate sub heading for classification of the product in question.

21. In terms of the above conclusions arrived at and on appreciation of the materials on record, we are of the view that the findings arrived at by the Tribunal are unjustified and cannot be accepted. The impugned judgments and orders passed by the Tribunal in both the appeals are, therefore, set aside and it would be open to the appellant to assess the respondent as per the above findings. Accordingly, the appeals are allowed but leaving the parties to bear their own costs.

R.P. Appeals allowed

KUSHAL KUMAR GUPTA AND ANR.

v.

MALA GUPTA

(Special Leave Petition (Crl.) No. 6269 of 2009)

SEPTEMBER 07, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Code of Criminal Procedure, 1973: s.181(4) – Applicability of – Complaint filed against petitioners-parents-in-law u/ss.406 and 498-A IPC before Judicial Magistrate at Patiala – Issuance of process against petitioners – Revision thereagainst dismissed – Application filed u/s.482 by petitioners on the ground that the Court at Patiala had no jurisdiction to entertain the complaint since no part of cause of action for the same arose within its jurisdiction – High Court dismissed s.482 application – On appeal, held: It is during the trial that the petitioners would have to disprove the complainant's case that part of the cause of action arose in Patiala where the dowry articles were to be returned to the complainant – The complaint indicated that a part of the cause of action arose in Patiala, therefore, provision of s.181(4) was attracted – High Court rightly observed that on a bare perusal of the complaint, the Patiala Court has jurisdiction to entertain the complaint – No reason to interfere with the order of the High Court – Penal Code, 1860 – ss.406 and 498A – Jurisdiction.

The respondent filed a complaint against her parents-in-law (the petitioners) under Sections 406 and 498-A, IPC before the Judicial Magistrate at Patiala. The Magistrate issued process against the petitioners. The petitioners filed a revision petition against the summoning order which was dismissed. Thereafter, the petitioners filed application under Section 482 Cr.P.C. for

quashing of the said proceedings on the ground that the Court at Patiala had no jurisdiction to entertain the complaint since no part of the cause of action for the same had arisen within its jurisdiction. The High Court dismissed the application filed under Section 482, Cr.P.C. The instant special leave petition was filed challenging the order of the High Court.

Dismissing the special leave petition, the Court

HELD: During the trial, the petitioners will have to disprove the complainant's case that part of the cause of action arose in Patiala where the dowry articles were to be returned to the complainant. The complaint did indicate that a part of the cause of action arose in Patiala, thus attracting the provisions of Section 181(4) Cr.P.C. The High Court rightly observed that on a bare perusal of the complaint, the Patiala Court has jurisdiction to entertain the complaint. There is no reason to interfere with the order of the High Court. [Paras 7, 8] [235-G-H; 236-A-B, E]

Harmanpreet Singh Ahluwalia v. State of Punjab and Ors. **(2009) 7 SCC 712: 2009 (7) SCR 563;** *State of Haryana v. Bhajan Lal* **(1992) Supp. 1 SCC 335: 1990 (3) Suppl. SCR 259 – distinguished.**

Case Law Reference:

2009 (7) SCR 563	**distinguished**	**Para 7**
1990 (3) Suppl. SCR 259	**distinguished**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 6269 of 2009.

From the Judgment & Order dated 28.7.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. Petition No. 19996-M of 2009.

Ugra Shankar Prasad for the Petitioners.

Brijender Chahar, K.R. Anand, Jyoti Chahar, Vinay Garg (AC) for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This Special Leave Petition is directed against the judgment and order dated 28th July, 2009, passed by the learned Single Judge of the Punjab and Haryana High Court dismissing the petitioners' application under Section 482 of the Criminal Procedure Code, 1973, hereinafter referred to as "Cr.P.C.", for quashing of order dated 2nd July, 2009, passed by the learned Additional Sessions Judge, Patiala, as also the summoning order passed by the learned Judicial Magistrate, 1st Class, Patiala, on 5th August, 2008.

2. The respondent herein, Mala Gupta, filed a complaint against the petitioners, who are her father and mother-in-law, under Sections 406 and 498A of the Indian Penal Code, hereinafter referred to as "I.P.C.". On being satisfied that a prima facie case to go to trial had been made out, the learned Magistrate issued process against the petitioners. Aggrieved thereby, the petitioners filed a revision petition against the summoning order, which was dismissed on 2nd July, 2009. Thereafter, the petitioners filed the application under Section 482 Cr.P.C. for quashing of the proceedings arising out of the complaint under Sections 406 and 498A I.P.C.

3. The main ground taken in the said petition was that the Court at Patiala had no jurisdiction to entertain the complaint since no part of the cause of action for the same had arisen within its jurisdiction. On a construction of the provisions of Section 181(4) Cr.P.C., both the learned Additional Sessions Judge, Patiala, and the High Court, dismissed the Criminal Revision Application No.48 of 2008, and the Crl. Misc. Case No.19996-M of 2009. As indicated hereinabove, the High Court

also dismissed the petitioners' application under Section 482 Cr.P.C. by the impugned order dated 28th July, 2009.

4. The only point for consideration in this case is whether the learned Magistrate at Patiala had jurisdiction to entertain the complaint and to issue summons on the basis thereof.

5. Learned counsel for the petitioners contended that both the learned Additional Sessions Judge, Patiala, and the High Court misconstrued the provisions of Section 181(4) Cr.P.C. in holding that the complaint was maintainable, as no part of the cause of action had arisen within the jurisdiction of the Courts at Patiala. It was urged that the respondent/complainant had received back all her articles and personal effects and nothing remained to be handed over to the complainant at Patiala so as to give rise to a cause of action within the jurisdiction of the Courts at Patiala. Learned counsel urged that the complaint was wholly motivated and without basis and was liable to be quashed.

6. On the other hand, learned counsel for the respondent, Mala Gupta, submitted that the complaint itself contains a categorical statement that the dowry articles were to be returned at Patiala Court, thus attracting the provisions of Section 181(4) Cr.P.C. It was also submitted that at the stage of taking cognizance, the Magistrate was only required to see whether there was any material in the complaint to proceed against the accused and the learned Magistrate had rightly observed that documents produced on behalf of the accused would be considered at the time of trial.

7. In the ultimate analysis, what emerges from the submissions of the parties is that during the trial the petitioners will have to disprove the complainant's case that part of the cause of action arose in Patiala where the dowry articles were to be returned to the complainant. As it stands, the complaint does indicate that a part of the cause of action arose in Patiala, thus attracting the provisions of Section 181(4) Cr.P.C. The

High Court has quite rightly observed that on a bare perusal of the complaint, the Patiala Court has jurisdiction to entertain the complaint. The decisions cited on behalf of the petitioners are not of much help to the petitioners' case. In *Harmanpreet Singh Ahluwalia Vs. State of Punjab and Others,* [(2009) 7 SCC 712], this Court held that when on investigation it was found that no case of cheating or criminal breach of trust had been made out against the accused, the High Court should have exercised its jurisdiction under Section 482 Cr.P.C. and quashed the proceedings. In the said case the issue was whether a prima facie case had been made out against the accused. The situation in this case is different, since the complaint itself makes out a prima facie case to go to trial. The petitioners' case does not fall within any of the circumstances indicated by this Court in paragraph 102 of its judgment in *State of Haryana Vs. Bhajan Lal,* [(1992) Supp.1 SCC 335]. The other judgments cited are on the same lines and do not require our attention separately.

8. We, therefore, see no reason to interfere with the judgment of the High Court impugned in this Special Leave Petition, and the same is, accordingly, dismissed.

D.G. Special Leave Petition dismissed.

MOHD. SALMAN
v.
COMMITTEE OF MANAGEMENT & ORS.
(Civil Appeal Nos. 6601-6602 of 2008)

SEPTEMBER 08, 2011

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

Service Law:

Uttar Pradesh Ashaskiya Arabi Tatha Farsi Madarson Ki Manyata Niyamawali – r. 26 – Interpretation of – Appointment of appellant as Assistant teacher in a school on probation initially for a period of one year– Appointment letter to the effect that the services of the appellant would be regularized only if his performance during probation period was found to be satisfactory, otherwise he could be terminated from service anytime without assigning reason – Appellant's working not satisfactory and probation extended time and again – Subsequently, termination of services in terms of r. 26 – Challenge to – Single Judge of the High Court set aside the termination order with a direction to reinstate the appellant, on the ground that on expiry of two years period of probation, there is an automatic confirmation of the service of the appellant – Division Bench set aside the order of the Single Judge – On appeal, held: The service of the appellant was not found to be satisfactory by the Authorities and the said fact was brought to the notice of the appellant continuously and repeatedly so as to give him an opportunity to improve his performance, however, his performance and service were not improved and, thus, the service was terminated – In the appointment letter issued to the appellant, it was specifically mentioned that his service would be regularised only when his performance during the probation period is found to be good/

satisfactory – Thus, so long an order is not passed holding that the service of the appellant is good and satisfactory, it could not have been held that his service could be regularised automatically by a deeming provision.

Kedar Nath Bahl vs. The State of Punjab and Ors. **1974 (3) SCC 21 – relied on.**

The State of Punjab vs. Dharam Singh **AIR 1968 SC 1210 – distinguished.**

M.K. Agarwal vs. Gurgaon Gramin Bank and Ors. **1987 Suppl. SCC643;** *State of Uttar Pradesh vs. Akbar Ali Khan* **AIR 1968 SC 1842 – referred to.**

Case Law Reference:

1987 Suppl. SCC 643	**Referred to.**	**Para 9**
AIR 1968 SC 1842	**Referred to.**	**Para 10**
AIR 1968 SC 1210	**distinguished.**	**Para 12**
1974 (3) SCC 21	**Relied on.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6601-6602 of 2008.

From the Judgment & Order dated 20.8.2007 of the High Court of Judicature at Allahabad Bench at Allahabad in Special Appeal No. 339 of 1997 and (115) of 1998 New No. 329 of 2005.

Purnima Bhat for the Appellant.

Shrish Kumar Misra, Samir Ali Khan, Anis Suhrawardy, S. Mehdi Imam for the Respondents.

The following Order of the Court was delivered

O R D E R

1. We propose to dispose of both the appeals by this common judgment and order as the issues involved are inter-connected.

2. The issue that arises for consideration in these appeals is whether the appellant is entitled to claim deemed confirmation of his service as an Assistant Teacher in the respondent no. 1 institution on an interpretation of Rule 26 of the Uttar Pradesh Ashaskiya Arabi Tatha Farsi Madarson Ki Manyata Niyamawali. However, before we deal with the contentions on the legal issues which arise for our consideration, it would be necessary to state certain facts for proper appreciation of the issues.

3. The appellant was appointed on 1st March, 1989 as an Assistant Teacher in the primary section of Madarsa Hanifa Ahle Sunnat Bahrul Uloom, Mau. A copy of the appointment order dated 22.2.1989 is placed on record. The said order not only states that by virtue of the said order, the appellant was appointed in the said Madarsa to the post of Assistant Teacher Tahtania(primary) but it was also mentioned therein that the said appointment is purely on probationary basis. In the said letter, the appellant was further informed that his services could regularised but only if his performance during probation period was found to be good/satisfactory. It was also indicated therein that if his performance during the aforesaid period is not satisfactory, then he could be terminated from the service of Madarsa anytime without assigning any reason.

4. The appellant was appointed initially on probation for a period of one year. The said period of probation was extended for a further period of one year. The respondent no. 1 in the counter affidavit filed has annexed a series of letters issued on behalf of respondent no. 1 to the appellant. One of such letters is dated 10.4.1992. By writing the aforesaid letter, the respondent no. 1 informed the appellant that his application for

extension of probation period was received but since his teaching work was not satisfactory, therefore, respondent no. 1 had decided to give him a chance again to improve his work so that in future his services could be made permanent. By the said letter, his probation period was extended for one year more.

5. There is yet another letter which is also placed on record which is dated 13.2.1993 wherein by referring to the earlier letter dated 10.4.1992, respondent no. 1 informed the appellant that earlier the committee extended his probation time and again to improve his performance and teaching work but it appeared to them that the appellant did not possess teaching capability at all. By the said letter, the appellant was directed to show cause as to why his service should not be dispensed with from the Madarsa.

6. Even thereafter, there is a letter issued on 3.4.1993 wherein his attention was drawn to the earlier letters directing him to improve his performance to which according to respondent no. 1, the appellant did not pay any heed or attention. The appellant was, therefore, intimated that his service now stood terminated in terms of clause 26 of Rules, 1987.

7. The aforesaid order came to be challenged by the appellant by filing a writ petition in the Allahabad High Court which was allowed on the ground that on expiry of the two years' period of probation, there is an automatic confirmation of the service of the appellant and, therefore, the decision of this Court in the case of *The State of Punjab Vs. Dharam Singh* AIR 1968 1210 becomes applicable. Consequent upon the aforesaid findings, the order of termination dated 3.4.1993 was set aside with a further direction that the appellant be reinstated in service.

8. Being aggrieved by the said judgment and order passed by the learned Single Judge of the Allahabad High Court, the

respondents filed an appeal before the Division Bench which was entertained and was registered as Special Appeal No. 329 of 2005. By the impugned judgment and order, the appeal was allowed and judgment and order of the learned Single Judge was set aside and the writ petition filed by the present appellant was dismissed. The appellant, therefore, has filed the present appeal as against the said impugned judgment and order in which we have heard learned counsel appearing for the parties who have taken us through the records as also the relevant rule concerning the service of the appellant as also the decisions which are referred to and relied upon by the learned Single Judge as also by the Division Bench of the High Court.

9. The contention of Ms. Purnima Bhat, learned counsel appearing for the appellant is that the service of the appellant must be accepted as a case of deemed confirmation on expiry of the period of probation of two years as held by the learned Single Judge. In support of the aforesaid contention, the counsel has relied upon the decision of this Court in *Dharam Singh* (supra). She has also drawn our attention to the decision of this Court in the case of *M.K. Agarwal Vs. Gurgaon Gramin Bank and Others* 1987 Suppl. SCC 643.

10. Learned counsel appearing for the respondent nos. 1 and 2 Mr. Anis Suhrawardy and Mr. Shrish Mishra respectively, however, has drawn our attention to the aforesaid correspondences between respondent no. 1 and the appellant. In support of their submission that the service of the appellant continued on probation they referred to the contents of the order of appointment and the series of the letters. In terms and conditions of his appointment, his services could be terminated without assigning any reason or on the ground of suitability at any point of time. In support of their contentions, they have also relied upon the decisions of this Court in *State of Uttar Pradesh Vs. Akbar Ali Khan* AIR 1968 SC 1842 and also the decision in the case of *Kedar Nath Bahl Vs. The State of Punjab and Others* 1974(3)SCC 21. In the light of the aforesaid

submissions of the learned counsel appearing for the parties, we have considered the records.

11. There is no dispute with regard to the fact that the appointment of the appellant as the Assistant Teacher in the primary Section of the aforesaid school was on probation initially for a period of one year. The appointment letter also specifically conveys the position and the stipulation that his services could be regularised only if his performance during probation period was found to be good/satisfactory. Rule 26 to which reference was made again and again is extracted hereunder:-

> "The appointment of a candidate against the permanent vacancy shall be made on probation. The period of probation shall be one year. It can be extended by one year. Before the completion of probation period, the Committee of Management shall be entitled to pass an order for removal from service."

12. Having considered the language of the aforesaid rule, we are of the considered opinion that the decision in the case of *Dharam Singh*(supra) is not applicable to the facts and circumstance of the present case. In fact, the aforesaid Rule 26 is somewhat similar to the Rule which was considered by this Court in the case of *Akbar Ali Khan* (supra). A constitution Bench of this Court in the case of *Akbar Ali Khan* (supra) examined relevant provisions contained in Rules 12 and 14 of the UP Subordinate Revenue Executive Service (Tahsildar) Rules dealing with the provision of probation period. The said rule provided that the period of probation would be two years which could be extended by the Board to three years. The Constitution Bench of this Court considered as to whether a probationer stood confirmed after the expiry of the period of probation in paragraph 5 of the said judgment. This Court held in paragraph 5 as follows:-

> "The respondent was posted as a Tehsildar and

placed on probation for two years. The initial period of probation was liable to be extended by the Board of Revenue or by the Governor. There is no rule that on the expiry of the period of probation the probationer shall be deemed to have been confirmed in the post which he is holding as a probationer. If a probationer was found not to have made sufficient use of his opportunities or had failed to pass the departmental examination "completely" or if he had otherwise failed to give satisfaction he may be reverted to his substantive appointment again confirmation in the appointment at the end of the period of probation could only be made if the probationer had passed the departmental examination for tahsildars "completely" and the Commissioner reported that he was fit for confirmation and that his integrity was unquestionable. It is common ground in this case that the respondent had not passed the departmental examination before 1955. He had therefore not qualified himself for confirmation."

13. Having held thus, this Court recorded its opinion in paragraph 6 in the following manner:-

"The scheme of the rules is clear: confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation is not made, the holder of the post remains a probationer. It has been held by this Court that when a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post, after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation the appointee will stand confirmed in the absence of any order to the contrary, the appointee will

acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of period of probation."

14. The aforesaid rule which is referred to in the case of *Akbar Ali Khan* (supra) appears to be similar to the case in hand. So far the case of Dharam Singh(supra) which is relied upon by the learned counsel appearing for the appellant is concerned, the rule which was considered in that case was rule 6(3). A bare perusal of the said rule would indicate that by adding a proviso to the substantive rule, a maximum period of probation was provided and in that context, this Court has held that in view of the aforesaid proviso, the Rule postulates that there would be an automatic confirmation after expiry of the period mentioned in Rule 6(3). Because a maximum period of probation was provided in the service rules in the case of *Dharam Singh* (supra), therefore, in that decision, it was held by this Court that continuation of the probationer thereafter would ipso facto be held as deemed confirmation. The said decision is, therefore, not applicable to the present case and is clearly distinguishable.

15. The correspondences which are on record also indicate that the service of the appellant was also found to be not satisfactory by the respondent and the said fact was also brought to the notice of the appellant continuously and repeatedly so as to give him an opportunity to improve his performance. However, despite the said opportunity granted

and also extension, his performance and service were not improved and, therefore, the service was terminated under the aforesaid letter dated 3.4.1993.

16. In the case of *Kedar Nath Bahl Vs. The State of Punjab and Others* reported in 1974 (3) SCC 21, this Court clearly laid down the proposition of law that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed on that behalf. It was also held in that decision that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or that there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. This Court went on to hold that at the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and if he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer.

17. In our considered opinion, the ratio of the aforesaid decision is also clearly applicable to the facts of the present case. In the present case, in the appointment letter issued to the appellant, it was specifically mentioned that his service would be regularised only when his performance during the probation period is found to be good/satisfactory.

18. In view of the aforesaid stipulation, so long an order is not passed holding that the service of the appellant is good and satisfactory, it could not have been held that his service could be regularised automatically by a deeming provision.

19. In that view of the matter, we find no merit in these appeals which are dismissed leaving the parties to bear their own costs.

N.J. Appeals dismissed.

MUKHIYA KARYAPALAK ADHIKARI, U. P. KHADI TATHA GRAMODYOG BOARD KARMIT ANUBHAG, LUCKNOW & ANR.

v.

SANTOSH KUMAR

(Civil Appeal No.7756 of 2011)

SEPTEMBER 08, 2011

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

Service Law – Termination – Respondent was working on contract basis as a Peon – His service was terminated by the appellant – Respondent filed writ petition praying for quashing the termination order – Single Judge of the High Court dismissed the writ petition – Appeal before Division Bench of High Court – Division Bench admitted the appeal but while doing so, it stayed the termination order and also specifically ordered that the respondent be allowed to continue to work – Held: The Division Bench of High Court while admitting the appeal, ought not to have passed an order so as to allow the appeal itself even at that interim stage – Order passed by the Division Bench was illegal, without jurisdiction and was passed without any application of mind – Matter remitted back to Division Bench of the High Court.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7756 of 2011.

From the Judgment & Order dated 09.08.2010 of the High Court of Judicature at Allahabad, in Special Appeal No. 1066 of 2004.

R.D. Upadhyay, Dr. Madan Sharma, J.P. Tripathy, Ashay Upadhyay for the Appellants.

A.S. Pundir, Anurag Tiwari, Amardeep Dhaka, Irshad Ahmad for the Respondent.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. We have heard the learned counsel appearing for the parties on this appeal who have taken us through the records. The respondent was engaged on contract basis as a Peon on a lumpsum salary of Rs. 2,500/-on 1.4.2003. Subsequently, an order came to be passed against the respondent on 26.6.2004. By the aforesaid order, the contract service of the respondent was terminated w.e.f. 5.7.2004.

3. The respondent being aggrieved by the aforesaid order of termination filed a writ petition in the Allahabad High Court which was registered as 28789 of 2004. In the said writ petition filed by the respondent, a prayer was made for quashing the order dated 26.6.2004 terminating the service of the respondent. The learned Single Judge who heard the writ petition passed an order on 28.7.2004 dismissing the said writ petition holding that the engagement of the respondent on contract basis did not vest on him any legal right to regular appointment.

4. The High Court passed an order in the said appeal which was filed in 2004 which was registered as Special Appeal No. 1066 of 2004. The appeal was listed before the Division Bench nearly six years of passing of the order of the learned Single Judge and the Division Bench passed the order for admitting the appeal. But peculiarly enough the High Court passed an order that the order dated 26.6.2004 passed by the appellant terminating the service would remain stayed. It was also made specific in that order that the respondent should be allowed to continue to work.

5. We fail to understand as to how the Division Bench while admitting an appeal could pass such an order so as to allow the appeal itself even at that interim stage. The respondent was not working when the suit was filed and his writ petition was dismissed. Despite the said fact not only the Division bench stayed the operation of the order after six years of filing the appeal, but directed for allowing the respondent to continue to work despite the fact that he was not working on that date.

6. Therefore, the aforesaid order passed by the Division Bench is illegal, without jurisdiction and was passed without any application of mind. We set aside the said order and remit back the matter to the Division Bench of the High Court for disposal of the appeal as expeditiously as possible. The order dated 9.8.2010 passed by the Division Bench staying the order dated 26.6.2004 and directing the appellant to allow the respondent to continue to work stand quashed and would not operate in any manner till the disposal of the appeal.

7. The appeal is allowed to the aforesaid extent in terms of the aforesaid order.

B.B.B. Appeal allowed.

BIHAR STATE ELECTRICITY BOARD & ANR.
v.
RAM DEO PRASAD SINGH & ORS.
(Civil Appeal No. 7754 of 2011)

SEPTEMBER 08, 2011

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

Bihar Reorganisation Act, 2000 – s. 89 – Transfer of pending proceedings – Respondent working at Thermal Power Station, Hazaribagh dismissed from service – Suit filed by respondent after four years before Munsif, Patna seeking declaration that dismissal was bad and inoperative in law – Suit allowed by the trial court – First appellate court by judgment dated 18.1.2006 upheld the said order – Patna High Court also upheld the order – On appeal, held: Suit filed by the respondent was not maintainable – On bifurcation of State of Bihar with effect from 15.11.2000, the appointed date under the Reorganisation Act, Thermal Power Station Hazaribagh which was earlier part of State of Bihar, forms part of the newly created State of Jharkhand – Transfer of proceedings in terms of s. 89 was to take place by operation of law – First appellate court as also the Patna High Court had no jurisdiction to hear and decide the matters – Patna High Court lost sight of fact that it was affirming a decree that was no longer executable in the State of Bihar – Jharkhand State Electricity Board came into existence on April 1, 2001 – Thereafter, Bihar State Electricity Board could not reinstate the respondents as security guards at Thermal Power Station, Hazaribagh where they were working at the time of dismissal – Respondent working as security guard at the Thermal Power Station, Hazaribagh were workmen under the Industrial Disputes Act – They could raise industrial disputes concerning their dismissal from service – Thus, the judgment passed by first appellate court as also Patna High Court was illegal and without jurisdiction – Judgment and decree under challenge

are set aside and suit is dismissed – Industrial Disputes Act, 1947.

In the year 1975, respondents working as security guards at Patratu Thermal Power Station, Hazaribagh, were dismissed from service, on charges of misconduct. After four years, the respondents filed a suit in the court of Munsiff, Patna, seeking declarations that their dismissal was bad, unconstitutional and inoperative in law and they would be legally deemed to have continued in service. The trial court allowed the suit. The appellants filed an appeal and the Additional District Judge dismissed the same by order dated 18.01.2006. The High Court also dismissed the second appeal. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The district of Hazaribagh, where Patratu Thermal Power Station is situated, was earlier part of the State of Bihar but on bifurcation of the State with effect from November 15, 2000, the appointed date under the Reorganisation Act it forms part of the newly created State-Jharkhand. From a bare reading of Section 89 of the Bihar Reorganisation Act, 2000, it is evident that on the appointed date the appeal preferred against the judgment and decree passed by the Munsiff stood transferred to a corresponding court in the State of Jharkhand. The transfer of the appeal took place by operation of law and the Additional District Judge, Patna was denuded of all authority and jurisdiction to proceed with the matter or to hear and decide the appeal. It follows equally that the Patna High Court had no jurisdiction to hear and decide the second appeal arising from the suit. Thus, in view of section 89 of the judgments of the High Court and the first appellate court appear to be manifestly illegal and without jurisdiction. [Para 4] [254-A-B; 255-C-E]

1.2 The judgment passed by the first appellate court was illegal and without jurisdiction and the judgment and order passed by the Patna High Court is equally without jurisdiction. It is quite strange the High Court lost sight of the fact that it was affirming a decree that was no longer executable or enforceable in the State of Bihar. Section 62 of the Re-organisation Act contains provisions relating to Bihar State Electricity Board besides two other Corporations. In terms of sub-section 3 of section 62, Jharkhand State Electricity Board came into existence on April 1, 2001. After that date it is no longer possible for the Bihar State Electricity Board to reinstate the respondents as security guards at Patratu Thermal Power Station where they were working at the time of dismissal from service. Thus, the judgments passed by the first appellate court and the High Court are untenable in law and the decree passed by the trial court, in the absence of Jharkhand State Electricity Board having been impleaded as a defendant, is rendered non-executable in the State of Bihar. [Paras 9, 10 and 11] [257-G-H; 258-H; 260-A-B]

1.3 The submission that the case may be transferred to an appropriate court in the State of Jharkhand from the stage of the first appeal against the judgment and decree passed by the Munsiff, Patna, and before that court the respondents might take steps for impleadment of the Jharkhand State Electricity Board as one of the defendants cannot be accepted. [Para 12] [260-C-D]

1.4 The respondents were dismissed from service on November 11, 1975. They filed the suit four years later at Patna and tried to overcome the bar of limitation by pleading that they first came to know about their dismissal from service when they went to collect their wages in October, 1976. The Munsiff strangely accepted the plea. [Para 14] [260-E-F]

1.5 Before filing the suit at Patna, the respondents had filed suits being title suit Nos. 65, 66, 67 and 72 of 1975 before the Munsiff, Hazaribagh. Those suits were dismissed for default. Before the Patna court an objection was raised on behalf of the defendants-appellants regarding the maintainability of the suit in terms of Order 9 Rule 4 of the Code of Civil Procedure. The plaints of the suits filed at Hazaribagh were produced before the Patna court but the objection was overruled on the ground that the Board omitted to get the plaintiffs' signatures on the plaints and vakalatnamas filed before the Hazaribagh court formally proved. [Para 15] [260-G-H; 261-A]

1.6 The suit filed by the plaintiffs was itself not maintainable. The respondents worked as security guards at the Thermal Power Station, they were, therefore, workmen within the meaning of the Industrial Disputes Act, 1947 and their service conditions were governed by the standing orders framed under the Industrial Establishment (Standing Orders) Act, 1946 and the relevant rules framed by the Board. Therefore, it was open to the respondents to raise an industrial dispute concerning their dismissal from service. [Para 16] [261-B-C]

The Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke ofBombay and Ors. **(1976) 1 SCC 496: 1976 (1) SCR 427 – referred to.**

1.7 The respondents' suit was itself not maintainable. The judgments and decree coming under challenge are set aside and the suit filed by the respondents is dismissed. [Paras 17 and 18] [262-E-F]

Case Law Reference:

1976 (1) SCR 427 Referred to Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7754 of 2011.

From the Judgment and Order dated 22.09.2008 of the High Court of Patna in SA No. 97 of 2006.

Navin Prakash for the Appellants.

S.B. Sanyal, Subhro Sanyal, Gopal Prasad, Rajiv Shankar Dvivedi and Praveen Kr. Singh for the Respondents.

The Judgment of the Court of was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. The appellants, Bihar State Electricity Board and its Chairman were the defendants in a suit filed by respondents 1 to 8, the plaintiffs. The respondents were the workmen of the Board and at the material time, i.e., in the year 1974 they were working as security guards at Patratu Thermal Power Station, Hazaribagh. They were proceeded against on certain charges of misconduct. In the domestic enquiry the charges were established and on the basis of the findings of the domestic enquiry, they were dismissed from service on November 11, 1975. After 4 years of dismissal from service they filed a suit (T.S. No. 95/1979) in the court of Munsiff V, Patna, seeking declarations that their dismissal was bad, unconstitutional and inoperative in law and they would be legally deemed to have continued in service.

3. The trial court allowed the suit by judgment and decree dated August 29, 1981. The appeal preferred by the appellants against the judgment and decree passed by the trial court (Title Appeal No. 147 of 1981/62/2004) was dismissed by the Additional District Judge, fast track court No. 2, Patna, by judgment dated January 18, 2006. The appellants, then, brought the matter before the High Court in second appeal (SA No. 97 of 2006) but this too was dismissed by judgment and order dated September 22, 2008. The appellants are now before this Court assailing the judgments and decree passed against them.

4. In view of section 89 of the Bihar Reorganisation Act, 2000 the judgments of the High Court and the first appellate court appear to be manifestly illegal and without jurisdiction. It may be noted that the district of Hazaribagh, where Patratu Thermal Power Station is situated, was earlier part of the State of Bihar but on bifurcation of the State with effect from November 15, 2000, the appointed date under the Reorganisation Act it forms part of the newly created State-Jharkhand. Section 89 of the Reorganisation Act dealing with transfer of pending proceedings provides as follows –

"89."Transfer of pending proceedings –

(1) Every proceeding pending immediately before the appointed day before the court (other than the High Court), tribunal, authority or officer in any area which on that day falls within the State of Bihar shall, if it is a proceeding relating exclusively to the territory, which as from that day is the territory of Jharkhand State, stand transferred to the corresponding court, tribunal, authority or officer of that State.

(2) If any question arises as to whether any proceeding should stand transferred under sub-section (1), it shall be referred to the High Court at Patna and the decision of that High Court shall be final.

(3) In this section, –

(a) "proceeding" includes any suit, case or appeal; and

(b) "corresponding court, tribunal authority or officer" in the State of Jharkhand means, –

(i) the court, tribunal, authority or officer in which, or before whom, the proceeding would have laid if it had been instituted after the appointed day; or

(ii) in case of doubt, such court, tribunal, authority, or officer in that State, as may be determined after the appointed day by the Government of that State or the Central Government, as the case may be, or before the appointed day by the Government of the existing State of Bihar to be the corresponding court, tribunal, authority or officer."

(emphasis added)

From a bare reading of section 89 of the Act, it is evident that on the appointed date the appeal preferred against the judgment and decree passed by the Munsiff stood transferred to a corresponding court in the State of Jharkhand. The transfer of the appeal took place by operation of law and the Additional District Judge, Patna was denuded of all authority and jurisdiction to proceed with the matter or to hear and decide the appeal. It follows equally that the Patna High Court had no jurisdiction to hear and decide the second appeal arising from the suit.

5. From the judgment of the Patna High Court it appears that one of the three substantial questions of law arising in the second appeal related to the question of jurisdiction of the first appellate court to hear the appeal and the question was framed as follows: –

"3. Whether the lower appellate court had the jurisdiction to hear the title appeal after coming into force of the Bihar Re-organisation Act, 2000?

6. The High Court answered the question in the negative, but in doing so it sought to side-step section 89 of the Re-organisation Act in curious ways. In paragraphs 9 and 10 of the judgment it held and observed as follows: –

"9. It is not in dispute that when the title suit was filed the

said Act had not come into force and even when the title appeal was filed in the year 1981 the said Act was not in force and the said Act came into force in the year 2000 and it was made effective from 15.11.2000 much after the title appeal had been admitted and was pending for hearing. Furthermore, there was an issue before the trial court with respect to the jurisdiction of the court to try the suit as objection was raised by the defendants that the suit should have been filed at Hazaribagh and the said issue was framed as issue no. (iv) but the same was not pressed by the defendants before the trial court and hence it appears to have been conceded by them that the court at Patna had jurisdiction to try the suit.

10. Section 89 of the Act specifically provides that a suit or an appeal pending in the territory of reorganised State of Bihar would stand transferred to the State of Jharkhand if the subject matter of the suit falls within the State of Jharkhand. But it is also provided that if any question arises as to whether it shall be referred to Patna High Court and decision of that High Court shall be final. However, in the instant case it is quite apparent that the title appeal remained pending for about four years after coming into force of the aforesaid Act but the defendants who were the appellants in that Court never raised any such question with regard to the jurisdiction of the Court nor any such matter was ever referred to the High Court at Patna as per the said provisions of Law. Hence, in these circumstances the learned court of appeal below was quite justified in hearing the said title appeal and deciding it on merits."

7. The High Court is wrong on all scores. The fact that the appeal against the judgment and decree passed by the Munsiff was filed before the bifurcation of the State and on the appointed date (November 15, 2000) the appeal was already pending before the Additional District Judge has no bearing

on the issue. Section 89 relates to proceedings pending on the appointed date and not to proceeding that might be filed after that date. Secondly, the objection in regard to the territorial jurisdiction, raised before the trial court was in an altogether different context. The objection before the trial court was based on the ground that the plaintiffs-workmen were working at Patratu Thermal Power Station and their dismissal had taken place there. The cause of action having arisen at Patratu, the suit ought to have been filed before a court under whose territorial jurisdiction Patratu Thermal Power Station is situate. The objection was not pressed before the trial court presumably because the head office of the Board being at Patna it was believed that the plaintiffs could file the suit at Patna as well. But the objection taken before the Munsiff, whether pressed or given up, could have no bearing on the transfer of the proceedings on the bifurcation of the State in terms of section 89 of the Reorganisation Act.

8. The third ground given by the High Court that the defendants who were the appellants before the Additional District Judge never raised the question with regard to the jurisdiction of the court nor any such question was referred to the Patna High Court for its decision, is equally misconceived and untenable. As noted above, the transfer of the proceedings in terms of section 89 of the Act is to take place by operation of law and is not dependant upon any objection raised by any of the two sides.

9. In light of the above, it must be held that the judgment passed by the first appellate court was illegal and without jurisdiction and equally without jurisdiction is the judgment and order passed by the Patna High Court.

10. Further, quite strangely the High Court lost sight of the fact that it was affirming a decree that was no longer executable or enforceable in the State of Bihar. Section 62 of the Reorganisation Act contains provisions relating to Bihar State Electricity Board besides two other Corporations and in so far

as relevant for the present provides as under: –

> "62. Provisions as to Bihar State Electricity Board, State Warehousing Corporation and State Road Transport Corporation.-
>
> (1) The following bodies corporate constituted for the existing State of Bihar, namely:-
>
> (a) the State Electricity Board constituted under the Electricity Supply Act, 1948 (54 of 1948);
>
> (b) the State Warehousing Corporation established under the Warehousing Corporations Act, 1962 (58 of 1962);
>
> (c) the State Road Transport Corporation established under the Road Transport Act, 1950 (64 of 1950),
>
> shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provisions of this section and to such directions as may, from time to time, be issued by the Central Government.
>
> (2) Any directions issued by the Central Government under sub-section (1) in respect of the Board or the Corporation shall include a direction that the Act under which the Board or the Corporation was constituted shall, in its application to that Board or Corporation, have effect subject to such exceptions and modifications as the Central Government thinks fit.
>
> (3) The Board or the Corporation referred to in sub-section (1) shall cease to function as from, and shall be deemed to be dissolved on such date as the Central Government may, by order, appoint; and

upon such dissolution, its assets, rights and liabilities shall be apportioned between the successor States of Bihar and Jharkhand in such manner as may be agreed upon between them within one year of the dissolution of the Board or the Corporation, as the case may be, or if no agreement is reached, in such manner as the Central Government may; by order, determine:

Provided that any liabilities of the said Board relating to the unpaid dues of the coal supplied to the Board by any public sector coal company shall be provisionally apportioned between the State Electricity Boards constituted respectively in the successor States of the existing State of Bihar or after the date appointed for the dissolution of the Board under this sub-section in such manner as may be agreed upon between the Governments of the successor States within one month of such dissolution or if no agreement is reached, in such manner as the Central Government may, by order, determine subject to reconciliation and finalisation of the liabilities which shall be completed within three months from the date of such dissolution by the mutual agreement between the successor States or failing such agreement by the direction of the Central Government:

Provided further that an interest at the rate of two per cent higher than the Cash Credit interest shall be paid on outstanding unpaid dues of the coal supplied to the Board by the public sector coal company till the liquidation of such dues by the concerned State Electricity Board constituted in the successor States on or after the date appointed for the dissolution of the Board under this sub-section.

……."

In terms of sub-section 3 of section 62, Jharkhand State Electricity Board came into existence on April 1, 2001. After

that date it is no longer possible for the Bihar State Electricity Board to reinstate the respondents as security guards at Patratu Thermal Power Station where they were working at the time of dismissal from service.

11. Thus, looked at from any angle, the judgments passed by the first appellate court and the High Court are untenable in law and the decree passed by the trial court, in the absence of Jharkhand State Electricity Board having been impleaded as a defendant, is rendered non-executable in the State of Bihar.

12. Mr. S.B. Sanyal, learned senior advocate, appearing for the plaintiffs-respondents, submitted that the case may be transferred to an appropriate court in the State of Jharkhand from the stage of the first appeal against the judgment and decree passed by the Munsiff, Patna. And before that court the plaintiffs-respondents might take steps for impleadment of the Jharkhand State Electricity Board as one of the defendants.

13. We are completely disinclined to take that course for the following reasons.

14. It may be recalled that the respondents were dismissed from service on November 11, 1975. They filed the suit four years later at Patna and tried to overcome the bar of limitation by pleading that they first came to know about their dismissal from service when they went to collect their wages in October, 1976. The Munsiff strangely accepted the plea.

15. Secondly, before filing the suit at Patna, they had filed suits being title suit Nos. 65, 66, 67 and 72 of 1975 before the Munsiff, Hazaribagh. Those suits were dismissed for default. Before the Patna court an objection was raised on behalf of the defendants-appellants regarding the maintainability of the suit in terms of Order 9 Rule 4 of the Code of Civil Procedure. The plaints of the suits filed at Hazaribagh were produced before the Patna court but the objection was overruled on the ground that the Board omitted to get the plaintiffs' signatures

on the plaints and vakalatnamas filed before the Hazaribagh court formally proved.

16. Thirdly and most importantly the suit filed by the plaintiffs was itself not maintainable. It may be recalled that plaintiffs worked as security guards at the Thermal Power Station, they were, therefore, without doubt workmen within the meaning of the Industrial Disputes Act, 1947 and their service conditions were governed by the standing orders framed under the Industrial Establishment (Standing Orders) Act, 1946 and the relevant rules framed by the Board. It was, therefore, open to the respondents to raise an industrial dispute concerning their dismissal from service. A suit seeking reinstatement was therefore clearly barred and not maintainable. The issue stands settled by the decision of this Court in *The Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Others,* (1976) 1 SCC 496. In paragraphs 23 and 24 of the judgment this Court held as follows: –

> "23. To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus:
>
> (i) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.
>
> (ii) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
>
> (iii) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

> (iv) If the right which is sought to be enforced is a right created under the Act such as Chapter V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.
>
> 24. We may, however, in relation to principle No. 2 stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of Section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2A of the Act will be an industrial dispute even though it may otherwise be an individual dispute. Civil Courts, therefore, will have hardly an occasion to deal with the type of cases falling under principle No. 2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by principle No. 3 stated above."

17. We, thus, come to the inescapable conclusion that the plaintiffs-respondents' suit was itself not maintainable and was liable to be dismissed.

18. For the reasons discussed above the appeal is allowed. The judgments and decree coming under challenge are set aside and the suit filed by the plaintiffs-respondents is dismissed.

19. In the facts of the case there will be no order as to costs.

N.J. Appeal allowed.

OM PRAKASH

v.

STATE OF PUNJAB AND ORS.

(Civil Appeal No. 4893 of 2007)

SEPTEMBER 08, 2011

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

Service law: Termination/Dismissal from service – Absence from duty without leave/information – Disciplinary proceedings – Dismissal from service – Appeal and revision dismissed – Suit for declaration and for setting aside order of dismissal from service – Trial court decreeing the suit holding that in view of the regularisation of the leave by the competent authority for the period of unauthorized absence, the charge would no longer survive – Consequently, order of dismissal set aside with direction to reinstate the appellant in service and to pay him backwages – Appeal before District Judge dismissed – Appeal before High Court – High Court held that the order of punishment awarded against appellant was legal and valid – Justification of – Held: Justified – Appellant's contention that absence report was not furnished to him which vitiated the inquiry proceeding not tenable since appellant himself was fully conscious and aware that he was absent from duties for 39 days – The said fact was mentioned in the charge-sheet and he had full opportunity to defend himself – No prejudice was, thus, caused to him even if such a report was not furnished to him by the departmental authorities – Contention that appellant was not given any opportunity of hearing in the departmental proceedings also not tenable – Records showed that the appellant participated in the Departmental proceedings and was given an opportunity to cross-examine which he had availed of – He had even taken notes from the records as also of the

proceedings before the Inquiry Officer – Moreover it was established from the records and the report of the Inquiry Officer that no medical certificate was produced by the appellant before the Inquiry Officer during the departmental proceeding – Contention that period of absence of the appellant having been regularized, the said charge of unauthorized absence would fall through not tenable since period of the unauthorised absence was not condoned by the authority but the same was simply shown as regularised for the purpose of maintaining a correct record – Appellant was a habitual absentee without leave and, therefore, deserved no sympathy.

State of M.P. v. Harihar Gopal **1969 SLR 274 (SC);** *Maan Singh v.Union of India and Others* **2003 (3) SCC 464: 2003 (2) SCR 129 – relied on.**

Case Law Reference:

1969 SLR 274(SC)	**relied on**	**Para 11**
2003 (2) SCR 129	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4893 of 2007.

From the Judgment & Order dated 01.03.2007 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. No. 336 of 1993.

Harikesh Singh (for Yash Pal Dhingra) for the Appellant.

Kuldip Singh, R.K. Pandey, H.S. Sandhu, Mohit Mudgil for the Respondents.

The following order of the Court was delivered

O R D E R

1. This appeal is directed against the judgment and order

dated 1.3.2007 passed by the Punjab & Haryana High Court setting aside the judgment and decree passed in favour of the appellant herein and thereby upholding the order of punishment awarded to the appellant.

2. The appellant was working as Head Constable in Punjab Police. He absented from duty on 13.10.1984 which was recorded vide D.D.R. No. 2 at 10.00 A.M. It is alleged on behalf of the respondents that neither did he pray for any leave for his absence nor did he intimate the authorities the reasons for not attending the duty. The appellant after absenting from duty for 39 days reported back on 22.11.1984. Even at that stage, he did not produce any document regarding his illness or any evidence to indicate that he was admitted in any hospital.

3. Consequently, a departmental proceeding was initiated against the appellant for awarding major punishment. In the said proceedings, the appellant appeared and contested the matter. After the conclusion of the inquiry, the inquiry officer submitted his report finding the appellant guilty of the charges. On submission of the aforesaid report by the Inquiry Officer, the competent and disciplinary authority on going through the records passed an order of dismissal from service.

4. The said order was challenged by the appellant by filing an appeal which was dismissed and thereafter, by filing a revision petition, which was also dismissed.

5. The appellant thereafter filed a civil suit seeking for a declaration and for setting aside the order of dismissal from service. The Trial Court decreed the suit holding that in view of the regularisation of the leave by the competent authority for the period of unauthorised absence, the charge no longer survives. Consequently, the order of dismissal was set aside with a direction to reinstate the appellant in service and to pay him back wages.

6. Being dissatisfied with the aforesaid judgment and

decree passed by the Trial Court, an appeal was filed which was heard by the District Judge and the said appeal filed by the respondent herein was dismissed. Still aggrieved, the respondent filed an appeal before the High Court which was registered as RSA No. 336 of 1993. The said second appeal was heard and by the impugned judgment and order, the said second appeal was allowed and the judgment and decree passed was set aside. The High Court held that the order of punishment awarded against the appellant herein is legal and valid. Being aggrieved, the appellant has filed this appeal on which we have heard the learned counsel for the parties who have taken us through the records.

7. The first contention that is raised by the counsel appearing for the appellant is regarding non furnishing of the absence report. The submission is that it was not furnished to the appellant at all during the proceeding and, therefore, the Inquiry proceeding was vitiated. The aforesaid submission is untenable. The appellant himself was fully conscious and aware that he was absent from duties for 39 days. The said fact was mentioned in the charge-sheet and he had full opportunity to defend himself against the said allegation of unauthorised absence of 39 days. Therefore, no prejudice was caused to the appellant even assuming that such a report was not furnished by the departmental authorities.

8. The next contention is that the appellant was not given any opportunity of hearing in the departmental proceedings. The said submission is belied on the face of the records as it is established from the records that the appellant participated in the departmental proceedings. He was given an opportunity to cross-examine which he had availed of. He had taken even notes from the records as also of the proceedings before the Inquiry Officer. The said contention, therefore, is also baseless.

9. It was also sought to be contended that he produced a medical certificate in support of his contention that he was medically unfit to work. However, it is established from the

records and the report of the Inquiry Officer that no such medical certificate was produced by the appellant before the Inquiry Officer during the departmental proceeding.

10. The next contention that is raised is that the period of absence of the appellant having been regularised, the aforesaid charge of unauthorised absence would fall through and, therefore, the order of punishment is required to be set aside and quashed. We are unable to accept the aforesaid contention as period of the unauthorised absence was not condoned by the authority but the same was simply shown as regularised for the purpose of maintaining a correct record.

11. A similar issue came to be raised in this Court several times. In the case of *State of M.P. Vs. Harihar Gopal* 1969 SLR 274(SC), this Court noticed that the delinquent officer in failing to report for duty and remaining absent without obtaining leave had acted in a manner irresponsibly and unjustifiedly; that, on the finding of the enquiry officer, the charge was proved that he remained absent without obtaining leave in advance; that the order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service and adjustment of leave due to the delinquent officer and for regularising his absence from duty. This Court in the said decision held that it could not be accepted that the authority after terminating the employment of the delinquent officer intended to pass an order invalidating that earlier order by sanctioning leave so that he was to be deemed not to have remained absent from duty without leave duly granted.

12. Our attention is also drawn to the decision of this Court in *Maan Singh Vs. Union of India and Others* 2003(3) SCC 464 wherein a similar situation and proposition has been reiterated by this Court. There are a number of decisions of this Court where it has been held that if the departmental authorities, after passing the order of punishment, passes an order for maintaining a correct record of the service of the

delinquent officer and also for adjustment of leave due to the delinquent officer, the said action cannot be treated as an action condoning the lapse and the misconduct of the delinquent officer.

13. There is yet one more factor which stands against the appellant herein. It is indicated from the counter affidavit filed by the respondents 1 to 4 that the appellant had also been punished earlier to the aforesaid incident also with a punishment for leave without pay for total of 527 days on different occasions in service as per details below:-

13.11.1965 to 05.01.1996	-	54 days
25.07.1973 to 28.07.1973	-	4 days
04.10.1977 to 12.01.1978	-	120 days
13.01.1978 to 09.05.1978	-	118 days
25.10.1979 to 31.10.1979	-	6 days
10.02.1981 to 14.08.1981	-	185 days
13.10.1984 to 22.11.1984	-	40 days

14. Therefore, it is established that the appellant was a habitual absentee without leave and, therefore, he does not deserve any sympathy from this Court. In terms of the aforesaid order, we hold that there is no merit in this appeal which is dismissed but leaving the parties to bear their own costs.

D.G. Appeal dismissed.

MARATHWADA GRAMIN BANK KARAMCHARI SANGHATANA AND ANOTHER
v.
MANAGEMENT OF MARATHWADA GRAMIN BANK AND OTHERS

(Civil Appeal No. 7766 of 2011)

SEPTEMBER 9, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Employees Provident Fund and Miscellaneous Provisions Act, 1952: s.12 – Liability of employer to pay provident fund – Held: Employer is under an obligation to pay provident fund to its employees in accordance with the statutory scheme – Employer cannot be compelled to pay the amount in excess of its statutory liability for all times to come just because it had paid provident fund in excess of its statutory liability for sometime.

Respondent-Bank was established in 1976. The provisions of the Employees Provident Fund Scheme, 1952 became applicable to the respondent bank from 1.9.1979. According to the respondent bank, it meticulously complied with the provisions of the Scheme till 31.8.1981. Thereafter, the respondent bank formed its own trust and framed its own Scheme for payment of provident fund to its employees. According to that Scheme of the bank, the employees were getting provident fund in excess of what was envisaged under the Employees Provident Fund Scheme, 1952.

The Regional Provident Fund Commissioner exempted the respondent bank from complying with the statutory provisions of the Scheme with effect from 1.9.1981 and permitted the respondent bank to pay

provident fund to its employees according to its own Scheme. The respondent bank contributed provident fund to its employees as per its own Scheme for the period from 1.9.1981 to 31.8.1993.

On 14.10.1991, the said exemption/relaxation granted to the respondent bank was withdrawn and cancelled and the respondent bank was directed to implement the provisions of the statutory Scheme. Despite cancellation of exemption, the respondent bank continued to make payment of provident fund in accordance with the earlier Scheme till 31.8.1993.On account of huge accumulated losses, the respondent-Bank decided to discontinue contribution of provident fund in excess of its statutory liability with effect from 1.11.1998 and issued a notice of change under section 9A of the Industrial Disputes Act, 1947. The Commissioner issued a letter informing the respondent bank that it cannot withdraw the benefit of paying matching employer's share without any limit to wage ceiling and directed it to continue extending the same benefit as was granted prior to 01.11.1998.

The reference of dispute was made to the Industrial Tribunal. The Tribunal held that the action of the respondent bank to reduce the contribution of the provident fund or to put a ceiling on the provident fund was not justified and also directed that the workmen would continue to draw the benefit of the prevailing practice of contribution of Employees Provident Fund without any ceiling.

The respondent bank filed a writ petition before the High Court. The High Court allowed the writ petition holding that it was the express term of employment that the contribution of the bank would be in accordance with the provisions of the 1952 Act. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. Owing to huge accumulated losses of the respondent bank, the bank though continued to pay according to the provisions of the statutory Scheme, but discontinued payment of provident fund in excess of its statutory liability. The respondent bank is under an obligation to pay provident fund to its employees in accordance with the provisions of statutory Scheme. The respondent bank cannot be compelled to pay the amount in excess of its statutory liability for all times to come just because it had formed its own trust and started paying provident fund in excess of its statutory liability for some time. The appellants were certainly entitled to provident fund according to statutory liability of the respondent bank. The respondent bank never discontinued its contribution towards provident fund according to the provisions of the statutory Scheme. The view which was taken by the High Court was just, fair, appropriate and in consonance with the provisions of the 1952 Act. Therefore, no interference is called for. [Paras 27-29] [279-E-H; 280-A-C]

Committee for Protection of Rights of ONGC Employees and Others v. Oil and Natural Gas Commission and Another **(1990) 2 SCC 472: 1990 (2) SCR 156;** *Vijayan v. Secretary to Government* **2006 (3) KLT 291;** *Madura Coats Employees Union v. Regional Provident Fund Commissioner and Others* **(1999) ILLJ 928 Bombay – referred to.**

Case Law Reference:

1990 (2) SCR 156	**referred to**	**Para 12**
2006 (3) KLT 291	**referred to**	**Para 12**
(1999) ILLJ 928 Bom.	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7766 of 2011.

From the Judgment and Order dated 14.11.2008 of the High Court of Judicature of Bombay at Nagpur in LPA No. 347 of 2008.

WITH

C.A. No. 7767 of 2011.

C.U. Singh, Dhruv Mehta, Shivaji M. Jadhav, Brij Kishor Sah, Amit Singh, R.S. Hegde, Chandra Prakash, Prakash Chandra Sharma (for P.P. Singh), Manish Pitale, Rahul Bhangde (for Chander Shekhar Ashri), Aparna Bhat and Ramesh Kumar P., for appearing parties.

DALVEER BHANDARI, J. 1. Leave granted in both the matters.

2. We propose to dispose of these appeals by a common judgment. These appeals emanate from the judgment and final order dated 14.11.2008 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Letters Patent Appeal Nos.347 and 348 of 2008.

3. Marathwada Gramin Bank (for short, respondent bank) was established in 1976. The provisions of the Employees Provident Fund Scheme, 1952 became applicable to the respondent bank from 1.9.1979. According to the respondent bank, it meticulously complied with the provisions of the Scheme till 31.8.1981. Thereafter, the respondent bank formed its own trust and framed its own Scheme for payment of provident fund to its employees. According to that Scheme of the bank the employees were getting provident fund in excess of what was envisaged under the Employees Provident Fund Scheme, 1952.

4. The Regional Provident Fund Commissioner vide order dated 29.8.1981 exempted the respondent bank from complying with the statutory provisions of the Scheme with effect from 1.9.1981 and permitted the respondent bank to pay

provident fund to its employees according to its own Scheme. The respondent bank contributed provident fund to its employees as per its own Scheme for the period from 1.9.1981 to 31.8.1993.

5. On 14.10.1991, the said exemption/relaxation granted to the respondent bank was withdrawn and cancelled and the respondent bank was directed to implement the provisions of the statutory Scheme. Despite cancellation of exemption, the respondent bank continued to make payment of provident fund in accordance with the earlier Scheme till 31.8.1993. In the said Scheme, the respondent bank was contributing provident fund for the employees in excess of the statutory obligation.

6. According to the respondent bank, owing to huge accumulated losses, it issued a notice of change under section 9A of the Industrial Disputes Act, 1947 expressing its intention to discontinue payment of provident fund in excess of its statutory liability with effect from 1.11.1998, but would continue to contribute towards Employees Provident Fund according to the statutory liability.

7. The Regional Provident Fund Commissioner-II issued a letter dated 13.5.1999 informing the respondent bank that it cannot withdraw the benefit of paying matching employer's share without any limit to wage ceiling and directed it to continue extending the same benefit as was granted prior to 01.11.1998.

8. Thereafter, the Central Government made a reference of the dispute to the Central Government Industrial Tribunal, Nagpur (for short, the Tribunal). The said Tribunal relied on Section 12 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short, 1952 Act) and held that the management cannot reduce, directly or indirectly, the wages of any employee to whom the Scheme applies or the total quantum of benefits in the nature of old age pension gratuity (provident fund) or life insurance to which the employee is entitled under the terms of his employment, express or

implied. Section 12 of the 1952 Act reads as under:-

> "No employer in relation to [an establishment] to which any [Scheme or the Insurance Scheme] applies shall, by reason only of his liability for the payment of any contribution to [the Fund or the Insurance Fund] or any charges under this Act or the [Scheme or the Insurance Scheme] reduce, whether directly or indirectly, the wages of any employee to whom the [Scheme or the Insurance Scheme] applies or the total quantum of benefits in the nature of old age pension, gratuity [provident fund or life insurance] to which the employee is entitled under the terms of his employment, express or implied.]"

9. The Tribunal directed that the employees of the respondent bank shall continue to draw equal amount of contribution from the bank towards provident fund without any ceiling on their wages. According to the Tribunal, the action of the respondent bank to reduce the contribution of the provident fund or to put a ceiling on the provident fund is not justified. The Tribunal also directed that the workmen shall continue to draw the benefit of the prevailing practice of contribution of Employees Provident Fund without any ceiling.

10. The respondent bank, aggrieved by the said award passed by the Tribunal, preferred a writ petition before the learned Single Judge of the High Court of Judicature of Bombay at Nagpur Bench, Nagpur.

11. It was submitted by the respondent bank that the impugned award as well as the communication issued by the Regional Provident Fund Commissioner-II is contrary to law as the same is based on the assumption that Section 12 of the 1952 Act creates bar for imposing the ceiling in accordance with the Provident Fund Act.

12. The learned counsel for the respondent bank in support of his contention, before the learned Single Judge of

the High Court, placed reliance on the judgment of the Constitution Bench of this Court in *Committee for Protection of Rights of ONGC Employees and Others v. Oil and Natural Gas Commission and Another* (1990) 2 SCC 472 and the judgment of the High Court of Kerala in *Vijayan v. Secretary to Government* 2006 (3) KLT 291.

13. It was also submitted that the respondent bank is under an obligation to make contribution towards Employees Provident Fund in accordance with the statutory provisions of 1952 Act. It was further urged that the respondent bank all through has at least made contribution towards Employees Provident Fund in consonance with the statutory provisions. On behalf of the respondent bank it was submitted that the respondent bank has always complied with the statutory obligation. It was also contended by the respondent bank that the appellants cannot claim as a matter of right the amount in excess of the statutory provisions of 1952 Act.

14. Before the High Court, for the first time, the appellants herein submitted that Section 17(3)(b) of the 1952 Act regarding exemption of any establishment from the operation of the Scheme was subject to certain conditions.

Section 17(3)(b) of the 1952 Act reads as under:-

17. Power to exempt

(1) xxx xxxxx xxxx

(2) xxx xxxxx xxxx

(3) Where in respect of any person or class of persons employed in an establishment an exemption is granted under this section from the operation of all or any of the provisions of any Scheme (whether such exemption has been granted to the establishment wherein such person or class of persons is employed or to the person or class of

persons as such), the employer in relation to such establishment--

(a) xxx xxxxx xxxx

(b) shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of the exemption;"

15. The learned Single Judge in his judgment observed that Section 17(3)(b) of the 1952 Act was never pressed into service by the appellants herein either before it or the Tribunal and the appellants herein cannot be allowed to raise the said contention for the first time in the writ petition. In that judgment, it was also observed that even otherwise, the said provision applies when the exemption is granted and is in force and in the instant case admittedly the exemption was already cancelled. Therefore, Section 17(3)(b) of 1952 Act is not applicable.

16. On analysis of Section 12 of the 1952 Act, the learned Single Judge of the High Court came to the conclusion that Section 12 of the 1952 Act will operate as a bar in case the same is the term of employment expressed or implied. In the instant case, it is not in dispute that under Regulation No.56 of the Marathwada Gramin Bank (Staff) Service Regulations, 1980, the express term of employment accepted by the employees is that contribution to the provident fund shall be in accordance with the provisions of the 1952 Act. Regulation No.56 reads as under:-

"56. All officers and employees who have completed continuous minimum service as specified in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1792) shall be members of the Provident Fund. The contribution to the provident fund

by the officers and employees and the Bank shall be in accordance with the provisions of the aforesaid Act."

17. The learned Single Judge observed that in the instant case it is the express term of employment that the contribution of the bank shall be in accordance with the provisions of the 1952 Act. The learned Single Judge thus observed that the bar of Section 12 will not operate as otherwise held by the Tribunal in the impugned award.

18. The learned Single Judge also observed that under Section 17(3)(b) of the 1952 Act, the said permission would be required in case an exemption from the operation of the provisions of the 1952 Act has been obtained. In the instant case, the exemption was already cancelled on 14.10.1991 and consequently this provision has no application to the facts of this case. The learned Single Judge consequently set aside the impugned judgment of the Tribunal and allowed the writ petition filed by the respondent bank.

19. The appellants, aggrieved by the judgment of the learned Single Judge, preferred Letters Patent Appeals before the Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur and contended that under Section 17(3)(b) of the 1952 Act once the exemption is granted by the Appropriate Government, it shall not, without the leave of the Central Government reduce the total quantum of benefits in the nature of pension, gratuity or provident fund etc.

20. It was also contended by the appellants that in the instant case, the respondent bank did not obtain leave of the Central Government before acting on the communication dated 14.10.1991 by issuing notice of change.

21. The appellants relied on the case of *Madura Coats Employees Union v. Regional Provident Fund Commissioner and Others* (1999) ILLJ 928 Bombay and particularly relied on paragraphs 6, 7 and 8 of that judgment where the Court

observed that the benefit cannot be taken away by the employer without prior permission of the Central Government. The Division Bench approved the view of the learned Single Judge that the case of *Madura Coats* (supra) did not apply to the present case because in the instant case the relaxation/exemption was withdrawn/cancelled. The Division Bench also observed that in Madura Coats case there was no contention that the relaxation/exemption was withdrawn at any time. This is the main distinguishing feature in both these cases. The Division Bench did not interfere with the judgment of the learned Single Judge and dismissed the appeals filed by the appellants. The appellants are aggrieved by the impugned judgment of the Division Bench of the High Court and have approached this Court by preferring these appeals under Article 136 of the Constitution.

22. The appellants contended before this Court that this case involved substantial question of law regarding interpretation of the provisions of Section 12 of 1952 Act. It was also argued by the appellants that the contribution to provident fund is a component of wages and when admittedly the respondent bank has paid its share of the provident fund contribution in excess of the amount prescribed in the 1952 Act for a long period of time and continued to contribute at such higher rate without any ceiling even after withdrawal of the exemption for a period of 7 years and had also framed rules whether it is open to the respondent bank to reduce its contribution towards provident fund.

23. The appellants submitted that in view of the facts of this case, Section 12 of the 1952 Act is clearly attracted. The appellants reiterated before this Court the submissions advanced before the Division Bench of the High Court.

24. We have heard the learned counsel for the parties at length and perused the relevant provisions of the Act. It may be pertinent to mention that the respondent bank complied with the provisions of the 1952 Act meticulously after it became

applicable from 1.9.1979. The respondent bank complied with the provisions of the Scheme till 31.8.1981. Thereafter, the respondent bank formed its own trust and framed its own Scheme for payment of provident fund. In that Scheme, the respondent bank paid higher amount of provident fund to its employees than what the respondent bank was obliged to pay according to the statute or the agreement with the appellants.

25. The Regional Provident Fund Commissioner vide order dated 29.08.1981 exempted the respondent bank from complying with the statutory provisions of the Scheme with effect from 1.9.1981. Admittedly, the respondent bank paid provident fund to its employees as per its own Scheme for the period from 1.9.1981 to 31.8.1993.

26. The said exemption/relaxation granted on 29.8.1981 was withdrawn and cancelled on 14.10.1991 and the respondent bank was directed to implement the provisions of the statutory Scheme. Despite cancellation of the exemption, the respondent bank continued to pay excess provident fund to its employees in accordance with the earlier Scheme till 31.8.1993. Thereafter, the respondent bank issued a notice of change under section 9A of the Industrial Disputes Act, 1947 expressing its intention to discontinue payment of provident fund in excess of its statutory liability with effect from 1.11.1998. It may be pertinent to mention that owing to huge accu*mulated losses of the respondent bank, the bank though continued to pay according to the provisions of the statutory Scheme, but discontinued payment of provident fund in excess of its statutory liability.

27. The respondent bank is under an obligation to pay provident fund to its employees in accordance with the provisions of statutory Scheme. The respondent bank cannot be compelled to pay the amount in excess of its statutory liability for all times to come just because the respondent bank formed its own trust and started paying provident fund in excess of its statutory liability for some time. The appellants are certainly

entitled to provident fund according to statutory liability of the respondent bank. The respondent bank never discontinued its contribution towards provident fund according to the provisions of the statutory Scheme.

28. The view which has been taken by the learned Single Judge and affirmed by the Division Bench of the High Court is just, fair, appropriate and in consonance with the provisions of the 1952 Act.

29. In our considered view, no interference is called for. These appeals filed by the appellants being devoid of any merit are accordingly dismissed. In the facts and circumstances of these appeals, the parties are directed to bear their own costs.

D.G. Appeal dismissed.