SMT. HAR DEVI ASNANI
v.
STATE OF RAJASTHAN & OTHERS
(Civil Appeal No. 8325 of 2011**)**

SEPTEMBER 27, 2011.

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

RAJASTHAN STAMP ACT, 1998:

s. 65(1), proviso –Revision of order determining the stamp duty – Requirement of deposit of 50% of recoverable amount – HELD: Proviso to s.65(1) is constitutionally valid — The right of appeal or revision is not an absolute right, but is a statutory right which can be circumscribed by the conditions in the grant made by the statute —Revision.

CONSTITUTION OF INDIA, 1950:

Article 226 – Writ petition challenging the order determining the stamp duty dismissed by High Court on the ground of alternative remedy of revision u/s 65 of Rajasthan Stamp Act – Held: Single Judge of the High Court should have examined the facts of the case to find out whether the determination of the value of the property purchased by the appellant and the demand of additional stamp duty made by the Additional Collector were exorbitant so as to make the remedy by way of revision requiring deposit of 50% of the demand before the revision is entertained, ineffective and call for interference under Article 226 – The orders passed by Single Judge in writ petition and by the Division Bench of the High Court in writ appeal are set aside and the writ petition is remanded to the High Court for consideration afresh in accordance with law – Rajasthan Stamp act, 1998 – s. 65.

The appellant purchased a residential plot in a Housing Scheme for a consideration of Rs.18 lacs under

a registered sale deed dated 16.05.2007 executed on a stamp duty of Rs.1,17,000/-. The Sub-Registrar did not accept the valuation made in the sale deed and after getting the plot inspected, determined the value of the land at Rs.2,58,44,260/-. The Additional Collector (Stamps), upholding the determination made by the Sub-Registrar held the appellant liable to pay deficit stamp duty of Rs.15,62,880/-, deficit registration charges of Rs.7,000/- and penalty of Rs.120/- totaling to a sum of Rs.15,70,000/- and accordingly made the demand on the appellant and directed recovery of the same. The appellant filed SB Civil Writ Petition No.12422 of 2009 before the High Court, which was dismissed by the Single Judge holding that the appellant had an alternative and efficacious remedy against the demand by way of a revision before the Board of Revenue. The appeal filed by the appellant was dismissed by the Division Bench of the High Court by order dated 22.03.2010. Aggrieved, the appellant filed C. A. No. 8326 of 2011.

In the meanwhile, the appellant filed D.B. Civil Writ Petition No.14220 of 2009 in the High Court challenging the constitutional validity of the proviso to s. 65(1) of the Rajasthan Stamp Act, 1998, which provided that no revision application would be entertained unless it was accompanied by a satisfactory proof of the payment of fifty percent of the recoverable amount. The writ petition was dismissed by the Division Bench of the High Court by its order dated 16.11.2009. The appellant challenged the order in C.A. No. 8325 of 2011.

Dismissing C.A. No. 8325 of 2011 and allowing C.A. No. 8326 of 2011, the Court

HELD: 1.1 This Court has taken a consistent view that the right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the

statute. The proviso to s. 65(1) of the Rajasthan Stamp Act, 1998, requiring deposit of 50% of the demand before a revision is entertained against the demand is only a condition for the grant of the right of revision and the proviso does not render the right of revision illusory and is within the legislative power of the State legislature. [Para 10] [610-B-C]

1.2 In the considered opinion of the Court, therefore, the proviso to s. 65(1) of the Act is constitutionally valid and this Court is not inclined to interfere with the order dated *16.11.2009* in *D.B.CWP No.14220 of 2009*. [para 11] [610-H]

Government of Andhra Pradesh and Others vs. *P. Laxmi Devi* **2008 (3) SCR 330 = (2008) 4 SCC 720 ;** *The Anant Mills Co. Ltd.* vs. *State of Gujarat and others* **1975 (3) SCR 220 = (1975) 2 SCC 175;** *Vijay Prakash D. Mehta and Another* vs. *Collector of Customs (Preventive), Bombay* **1975 (3) SCR 220 = (1988) 4 SCC 402 and** *Gujarat Agro Industries Co. Ltd.* Vs. *Municipal Corporation of the City of Ahmedabad and Others* **(1999) 4 SCC 468 – relied on.**

M/s Choksi Heraeus Pvt. Ltd., Udaipur v. State & Ors. **AIR 2008 Rajasthan 61 – approved.**

Mardia Chemical Ltd. And Others vs. *Union of India and Others* **(2004) 4 SCC 311 – held inapplicable.**

Seth Nand Lal and Another vs. *State of Haryana and Others* **1980 (supp) SCC 575 – cited.**

2. However, the Single Judge of the High Court in SB Civil Writ Petition No.12422 of 2009 as well as the Division Bench of the High Court in D.B. Civil Appeal (Writ) No.1261 of 2009 have not considered whether the determination of market value and the demand of deficit stamp duty were exorbitant so as to make the remedy by way of revision requiring deposit of 50% of the demand

before the revision is entertained ineffective. The Single Judge should have examined the facts of the case to find out whether the determination of the value of the property purchased by the appellant and the demand of additional stamp duty made by the Additional Collector were exorbitant so as to call for interference under Article 226 of the Constitution. Therefore, the orders passed by the Single Judge in SB Civil Writ Petition No.12422 of 2009 and by the Division Bench of the High Court in D.B. Civil Appeal (Writ) No.1261 of 2009 are set aside and the writ petition is remanded back to the High Court for consideration afresh in accordance with law. [para 12-14] [611-D; 612-B-D]

Case Law Reference:

AIR 2008 Rajasthan 61	**approved**	**para 4**
2004 (3) SCR 982	**held inapplicable**	**para 6**
2008 (3) SCR 330	**relied on**	**para 7**
1975 (3) SCR 220	**relied on**	**para 8**
(1999) 4 SCC 468	**cited**	**para 8**
1980 (supp) SCC 575	**relied on**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8325 of 2011.

WITH

CA No. 8326 of 2011.

Ajay Choudhary for the Appellant.

Abhishek Gupta, Kanku Gupta and R. Gopalakrishnan for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant purchased Plot No. A-7 situated in the Housing Scheme No.12, Ajmer Road, Jaipur, of Krishna Grah Nirman Sahakari Samiti Limited by a registered Sale Deed dated 16.05.2007 for a consideration of Rs.18 lacs. The Sale Deed was executed on a stamp duty of Rs.1,17,000/-. The Sub-Registrar, SR IV, Jaipur, did not accept the valuation made in the Sale Deed and appointed an Inspection Officer to inspect the plot purchased by the appellant and determined the value of the land at Rs.2,58,44,260/-. The Additional Collector (Stamps), Jaipur, served a notice under the Rajasthan Stamp Act, 1998 (for short 'the Act') to the appellant on 07.07.2008 to appear before him on 19.09.2008 and to show-cause why prosecution against the appellant should not be initiated for concealing or misrepresenting facts relating to the valuation mentioned in the Sale Deed resulting in evasion of stamp duty. The appellant filed a reply stating therein that the plot of land purchased by her under the Sale Deed was allotted to her for residential purposes and was not meant for commercial use and that the sale price was paid entirely by a cheque. The appellant also stated in her reply that adjacent to the plot purchased by her, Plot Nos.A-3 near Scheme No.12, Roop Sagar, had been sold by a registered Sale Deed on 16.12.2006 and another Plot No.A-38, near Scheme No.12, Roop Sagar, at a price less than the price in the Sale Deed dated 16.05.2007 under which she had purchased Plot No.A-7 in Housing Scheme No.12. Along with the reply, the appellant had also furnished copies of the two Sale Deeds of the adjacent Plot Nos.A-3 and A-38 in Scheme No.12. In the reply, the appellant requested the Additional Collector (Stamps) to drop the recovery proceedings. The Additional Collector (Stamps) heard the appellant and in his order dated 20.07.2009 held after considering the Site Inspection Report that the determination made by the Sub-Registrar at Rs. 2,58,44,260/- was correct and that the appellant was liable to pay deficit stamp duty of Rs.15,62,880/-, deficit registration charges of Rs.7,000/- and penalty of Rs.120/- totalling to a sum of Rs.15,70,000/- and

accordingly made the demand on the appellant and directed recovery of the same.

3. Aggrieved, the appellant filed SB Civil Writ Petition No.12422 of 2009 before the Rajasthan High Court challenging the order dated 20.07.2009 of the Additional Collector (Stamps), Jaipur. A learned Single Judge of the High Court, however, dismissed the Writ Petition by order dated 21.10.2009 holding that the appellant had a remedy against the order of the Additional Director by way of a revision before the Board of Revenue and as there was an alternative and efficacious remedy available to the appellant, there was no just reason for the appellant to invoke the extra-ordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. The appellant then filed D.B. Civil Appeal (Writ) No.1261 of 2009 before the Division Bench of the High Court, but by order dated 22.03.2010 the Division Bench of the High Court held that there was no error or illegality apparent on the face of the record in the order dated 21.10.2009 passed by the learned Single Judge and that the appeal was devoid of any merit and accordingly dismissed the appeal. Aggrieved, the appellant has filed Civil Appeal arising out of S.L.P. (C) No.17233 of 2010.

4. In the meanwhile, the appellant filed a separate Writ Petition D.B. Civil Writ Petition No.14220 of 2009 in the Rajasthan High Court challenging the constitutional validity of the proviso to Section 65(1) of the Rajasthan Stamp Act, 1998 (for short 'the Act'), which provided that no revision application shall be entertained unless it is accompanied by a satisfactory proof of the payment of fifty percent of the recoverable amount. The ground taken by the appellant in the writ petition before the High Court was that unless the appellant deposited fifty percent of the total amount of Rs.15,70,000/- towards deficit stamp duty, registration charges and penalty, the revision petition of the appellant would not be entertained and the appellant was not in a position to deposit such a huge amount as a condition

for filing the revision. The appellant accordingly contended before the High Court that the pre-condition of payment of fifty percent of the recoverable amount for entertaining a revision petition was arbitrary, unreasonable and unconstitutional. The Division Bench of the High Court, however, held in its order dated 16.11.2009 that the constitutional validity of the proviso to Section 65 (1) of the Act had been examined by another Division Bench of the High Court in *M/s Choksi Heraeus Pvt. Ltd., Udaipur v. State & Ors.* [AIR 2008 Rajasthan 61] and the proviso to Section 65 (1) of the Act had been held to be constitutionally valid. The Division Bench relying on the aforesaid decision in *M/s Choksi Heraeus Pvt. Ltd., Udaipur v. State & Ors.* (supra) dismissed the Writ Petition by order dated 16.11.2009. The appellant has filed the Civil Appeal arising out of S.L.P. (C) No.20964 of 2010 against the order dated 16.11.2009 of the Division Bench in D.B. Civil Writ Petition No.14220 of 2009.

5. For appreciating the contentions of the learned counsel for the parties, we must refer to Section 65 of the Act. Section 65 of the Act is quoted hereinbelow:

"65. Revision by the Chief Controlling Revenue Authority

(1) Any person aggrieved by an order made by the Collector under Chapter IV and V and under clause (a) of the first proviso to section 29 and under section 35 of the Act, may within 90 days from the date of order, apply to the Chief Controlling Revenue Authority for revision of such order:

Provided that no revision application shall be entertained unless it is accompanied by a satisfactory proof of the payment of fifty percent of the recoverable amount.

(2) The Chief Controlling Revenue Authority may suo moto or on information received from the registering officer or otherwise call for and examine the record of any case

decided in proceeding held by the Collector for the purpose of satisfying himself as to the legality or propriety of the order passed and as to the regularity of the proceedings and pass such order with respect

thereto as it may think fit:

Provided that no such order shall be made except after giving the person affected a reasonable opportunity of being heard in the matter."

6. Learned counsel for the appellant submitted that although sub-section (1) of Section 65 of the Act confers a right on a person to file a revision against the order of the Collector, the proviso to Section 65(1) of the Act renders this right illusory by insisting that the revision application shall not be entertained unless it is accompanied by a satisfactory proof of the payment of fifty percent of the recoverable amount. He submitted that the proviso to Section 65(1) of the Act is therefore unreasonable and arbitrary and violative of Article 14 of the Constitution and should be declared constitutionally invalid. He cited the decision of this Court in *Mardia Chemical Ltd. and Others vs. Union of India and Others* [(2004) 4 SCC 311] in which the provision requiring pre-deposit of 75% of the demand made by the bank or the financial institution in Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been held to be onerous and oppressive rendering the remedy illusory and nugatory and constitutionally invalid.

7. Learned counsel for the appellant submitted that assuming that the proviso to Section 65(1) of the Act is constitutionally valid where the valuation adopted by the Additional Collector or Collector and the consequent demand of additional stamp duty are unreasonable and exorbitant, the alternative remedy of revision after deposit of 50% of the exorbitant demand is not efficacious, and affected party should be able to move the High Court under Article 226 of the

Constitution. In support of this submission, he cited the decision of this Court in *Government of Andhra Pradesh and Others vs. P. Laxmi Devi* [(2008) 4 SCC 720]

8. Learned counsel for the respondents, on the other hand, submitted that a revision or an appeal is a right conferred by the statute and the legislature while conferring this statutory right can lay down conditions subject to which the appeal or revision can be entertained and that there is nothing unreasonable or arbitrary in the proviso to Section 65(1) of the Act requiring deposit of 50% of the recoverable amount before the revision application is entertained. He argued that the proviso to Section 65(1) of the Act is in no way illusory and is only a provision to ensure that the stamp duty demanded is recovered in time and is not held up because of the pendency of the revision. In support of his submission, learned counsel for the respondent relied on the decisions of this Court in *The Anant Mills Co. Ltd. vs. State of Gujarat and others* [(1975) 2 SCC 175]; *Seth Nand Lal and Another vs. State of Haryana and Others* [1980 (supp) SCC 575]; *Vijay Prakash D. Mehta and Another vs. Collector of Customs (Preventive), Bombay* [(1988) 4 SCC 402] and *Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad and Others* [(1999) 4 SCC 468].

9. Learned counsel for the respondents submitted that the decision of this Court in *Mardia Chemical Ltd. and Others vs. Union of India and Others* (supra) declaring the provision of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, requiring deposit of 75% of the demand as constitutionally invalid does not apply to the facts of the present case. He submitted that in *Mardia Chemical Ltd. and Others* (supra) this Court clearly held that the amount of deposit of 75% of the demand is at the initial proceedings itself when the bank or the financial institution makes its demand on the borrower and the requirement of deposit of such a heavy amount on the basis of one-sided claim

of the bank or the financial institution at this stage, before the start of the adjudication of the dispute, cannot be said to be a reasonable condition. He submitted that in the instant case, the first adjudicatory authority is the Collector and only after the Collector determines the amount of stamp duty payable on the documents, the affected party has a right of revision under Section 65(1) of the Act. He further submitted that the requirement of 50% of the amount determined by the Collector at the stage of filing of the revision is therefore not a requirement at the initial stage but a requirement at the revisional stage and the decision of this Court in *Mardia Chemical Ltd. and Others vs. Union of India and Others* (supra) is distinguishable from the facts of the present case.

10. We need not refer to all the decisions cited by the learned counsel for the parties because we find that in Government of *Andhra Pradesh and Others vs. P. Laxmi Devi* (supra) this Court has examined a similar provision of Section 47-A of the Stamp Act, 1899, introduced by the Indian Stamp Act (A.P. Amendment Act 8 of 1998). Sub-section (1) of Section 47-A, introduced by Andhra Pradesh Act 8 of 1998 in the Indian Stamp Act, is extracted hereinbelow:

> "47-A. Instruments of conveyance, etc. how to be dealt with- (1) Where the registering officer appointed under the Registration Act, 1908, while registering any instrument of conveyance, exchange, gift, partition, settlement, release, agreement relating to construction, development or sale of any immovable property or power of attorney given for sale, development of immovable property, has reason to believe that the market value of the property which is the subject-matter of such instrument has not been truly set forth in the instrument, or that the value arrived at by him as per the guidelines prepared or caused to be prepared by the Government from time to time has not been adopted by the parties, he may keep pending such instrument and refer the matter to the Collector for determination of the

market value of the property and the proper duty payable thereon.

Provided that no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned."

Under sub-section (1) of Section 47-A quoted above, a reference can be made to the Collector for determination of the market value of property and the proper duty payable thereon where the registering officer has reason to believe that the market value of the property which is the subject-matter of the instrument has not been truly set forth in the instrument, or that the value arrived at by him as per the guidelines prepared or caused to be prepared by the Government from time to time has not been adopted by the parties. The proviso of sub-section (1) of Section 47-A, however, states that no such reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned. This proviso of sub-section (1) of Section 47-A was challenged before the Andhra Pradesh High Court by P. Laxmi Devi and the Andhra Pradesh High Court held that this proviso was arbitrary and violative of Article 14 of the Constitution and was unconstitutional. The Government of Andhra Pradesh, however, filed an appeal by special leave before this Court against the judgment of the Andhra Pradesh High Court and this Court held in para 18 at page 735 of [(2008) 4 SCC 720] that there was no violation of Articles 14, 19 or any other provision of the Constitution by the enactment of Section 47-A as amended by the Andhra Pradesh Amendment Act 8 of 1998 and that the amendment was only for plugging the loopholes and for quick realisation of the stamp duty and was within the power of the State Legislature vide Entry 63 of List-II read with Entry 44 of List-III of the Seventh Schedule to the Constitution. While coming to the aforesaid conclusions, this Court has relied on *The Anant Mills Co. Ltd. vs. State of Gujarat and others* (supra), *Vijay Prakash D. Mehta and Another vs. Collector of Customs (Preventive), Bombay*

(supra) and *Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad and Others* (supra) in which this Court has taken a consistent view that the right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the statute. Following this consistent view of this Court, we hold that the proviso to Section 65(1) of the Act, requiring deposit of 50% of the demand before a revision is entertained against the demand is only a condition for the grant of the right of revision and the proviso does not render the right of revision illusory and is within the legislative power of the State legislature.

11. We also find that in the impugned order the High Court has relied on an earlier Division Bench judgment of the High Court in *M/s Choksi Heraeus Pvt. Ltd., Udaipur v. State & Ors.* (supra) for rejecting the challenge to the proviso to Section 65(1) of the Act. We have perused the decision of the Division Bench of the High Court in *M/s Choksi Heraeus Pvt. Ltd., Udaipur v. State & Ors.* (supra) and we find that the Division Bench has rightly taken the view that the decision of this Court in the case of *Mardia Chemical Ltd. and Others vs. Union of India and Others* (supra) is not applicable to the challenge to the proviso to Section 65(1) of the Act inasmuch as the provision of sub-section (2) of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, requiring deposit of 75% of the demand related to deposit at the stage of first adjudication of the demand and was therefore held to be onerous and oppressive, whereas the proviso to Section 65(1) of the Act in the present case requiring deposit of 50% of the demand is at the stage of revision against the order of first adjudication made by the Collector and cannot by the same reasoning held to be onerous and oppressive. In our considered opinion, therefore, the proviso to Section 65(1) of the Act is constitutionally valid and we are therefore not inclined to interfere with the order dated 16.11.2009 in D.B.CWP No.14220 of 2009. The Civil

Appeal arising out of S.L.P. (C) No.20964 of 2010 is therefore dismissed.

12. We are, however, inclined to interfere with the order dated 21.10.2009 of the learned Single Judge of the High Court in SB Civil Writ Petition No.12422 of 2009 as well as the order dated 22.03.2010 of the Division Bench of the High Court in D.B. Civil Appeal (Writ) No.1261 of 2009. The learned Single Judge of the High Court and the Division Bench of the High Court have taken a view that as the appellant has a right of revision under Section 65(1) of the Act, the writ petition of the appellant challenging the determination of the value of the land at Rs.2,58,44,260/- and the demand of additional stamp duty and registration charges and penalty totaling to Rs.15,70,000/- could not be entertained under Article 226 of the Constitution. The learned Single Judge of the High Court and the Division Bench of the High Court have not considered whether the determination of market value and the demand of deficit stamp duty were exorbitant so as to make the remedy by way of revision requiring deposit of 50% of the demand before the revision is entertained ineffective. In Government of *Andhra Pradesh and Others vs. P. Laxmi Devi* (supra) this Court, while upholding the proviso to sub-section (1) of Section 47-A of the Indian Stamp Act introduced by Andhra Pradesh Amendment Act 8 of 1998, observed:

> "29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Articles 14 of the Constitution vide *Maneka Gandhi vs. Union of India* [(1978) 1 SCC 248]. Hence, the party is not remediless in this situation."

13. In our view, therefore, the learned Single Judge should have examined the facts of the present case to find out whether the determination of the value of the property purchased by the appellant and the demand of additional stamp duty made by the appellant by the Additional Collector were exorbitant so as to call for interference under Article 226 of the Constitution.

14. We, therefore, allow the appeal arising out of S.L.P. (C) No.17233 of 2010, set aside the order passed by the learned Single Judge of the High Court in SB Civil Writ Petition No.12422 of 2009 and the order passed by the Division Bench of the High Court in D.B. Civil Appeal (Writ) No.1261 of 2009 and remand the writ petition back to the High Court for fresh consideration in accordance with law. No costs.

R.P. Appeals disposed of.

ULTRA TECH CEMENT LTD.
(EARLIER ULTRATECH CEMCO LTD.)
v.
STATE OF MAHARASHTRA & ANR.
(Civil Appeal No. 864 of 2005)

SEPTEMBER 27, 2011

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

MINERAL CONCESSION RULES, 1961:

r. 27 (1) (d) – Mining lease – Lessee from the State Government – Demand for Zilla Parishad Cess (ZP cess) and Gram Panchayat Cess (GP cess) – Held: Where a particular cess is leviable under an enactment, and the contract says that the lessee is liable to pay such cess leviable under that enactment, but the enactment exempted a specified class of persons (to which the lessee belongs) from paying the said cess, the State Government cannot make the lessee liable to pay the said cess on the ground that under the contract entered under a different eneactment, the lessee is liable to pay such cess – In the instant case, since the assessee being a lessee from the Government is by virtue of s.151 of Zila Parishads and Panchayat Samitis Act, 1961 is exempt from paying GP cess under the Act, cess cannot be levied in terms of a contract – Similarly, as the lessee is, under clause VII(1) of the lease deed, exempt from land revenue, it is not liable to pay GP cess – Thus, the lessee is not liable to pay ZP cess or GP cess to the State Government under the lease deed – However, it is made clear that if ZP cess and GP cess become payable by the assessee by virtue of any amendment to the provisions of the respective enactments under which such cesses are leviable, then the lessee may have to pay the same – Maharashtra Zila Parishads and Panchayat Samitis Act, 1961 – s. 151(1) – Bombay Gram Panchayats Act, 1958

– s. 127 (1) – Maharashtra Land Revenue Code, 1966 – s. 64.

WORDS AND PHRASES:

Expression 'assessable' and 'cess assessable on land' – Explained.

The appellant, under the lease deed dated 12.2.1980, was granted a lease by the State Government for mining limestone. It approached the High Court challenging the demand for payment of Zila Parishad Cess (ZP cess) and Gram Panchayat Cess (GP cess) on the ground that s. 151(1) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 exempted the lessees from the State Government from payment of ZP cess and as per s. 64 of the Maharashtra Land Revenue Code, 1966, read with Clause VII(1) of the lease deed, it was not liable to pay the GP cess also. The High Court declined to interfere.

Allowing the appeal, the Court

HELD: 1.1 Where a particular cess is leviable under an enactment, and the contract says that the lessee is liable to pay such cess leviable under that enactment, but the enactment exempted a specified class of persons (to which the lessee belongs) from paying the said cess, the State Government cannot make the lessee liable to pay the said cess on the ground that under the contract entered under a different enactment, the lessee is liable to pay such cess. [para 7] [621-E-F]

1.2 It is evident from the provision of s.151(1) of the Maharashtra Zilla Parishads Act that a 'lessee from the state government' is not liable to pay ZP cess under the said provision. The ZP cess can be levied only in terms of and under the Zilla Parishads Act and cannot be levied by the State Government, under the terms of a contract. [para 7] [621-D]

1.3 It is significant to note that the State Government

has stipulated in the lease that the mining lessee shall pay *ZP cess assessable on the land*. It has not used the words 'an amount equivalent to ZP cess that could be or may be assessed on the land.' The word 'assessable' means liable to be assessed. The effect of clause V(4) of the lease deed providing that the mining lessee shall pay 'ZP cess assessable on the land' is this: if it is liable to be paid under the Zilla Parishads Act, that should be paid by the lessee and payment thereof is a term of the lease; and if the lessee is not liable to pay ZP cess in view of the exemption under the ZP Act, it is not payable. [para 6 and 8] [620-E; 622-C]

1.4 There is yet another indication that what is required to be paid is ZP cess, only if it is leviable under Zilla Parishads Act. Clause V(4) provides that the mining lessee shall pay "*cesses assessable on the land (ZP and GP cesses) subject to the revision of rates prescribed by Government from time to time."* This refers to revision by the State Government in exercise of the power u/s151(1) of Zilla Parishads Act and not in exercise of any power under the lease deed, as a lessor. This also shows that ZP cess as revised under the Zilla Parishads Act is payable only if it is payable under the Zilla Parishads Act and not otherwise. [para 10] [622-H; 623-A-B]

2. Section 127(1) of the Bombay Gram Panchayats Act, 1958 casts a liability to pay one hundred paise as cess on every rupee of *every sum payable to the state government as ordinary land revenue.* This cess is described as Gram Panchayat cess or GP cess. The effection of s. 127(1) is that only a person who is liable to pay land revenue will be liable to pay GP cess. Section 64 of the Land Revenue Code provides that all lands are liable to payment of land revenue to the State Government *except such as may be wholly exempted under the provisions of the special contract with the state* A B C D E F G H

A ***government.* Clause VII(1) of the lease deed dated 12.2.1980 between State Government and the appellant provides such exemption as it says the lessee shall not be liable to pay land revenue. Thus, there is a special contract between the State and the appellant whereby the** B **appellant is exempted from paying land revenue and, as such, it will not be liable to pay any GP cess, as s.127(1) makes it clear that the said cess is payable only on the** amount payable **as land revenue. Therefore, the appellant is not liable to pay GP cess under the Panchayats Act.** C **Clause V(4) of the lease deed requires payment of GP cess only if it is payable under the Panchayats Act. For the reasons stated while dealing ZP cess, it is held that the appellant is not liable to pay GP cess also. [para 12 and 13] [624-G; 625-G-H; 626-A]**

D **3. The appellant is not liable to pay ZP cess or GP cess to the State Government under the lease deed. It is however made clear that if the said cesses (ZP cess and GP cess) become payable by the appellant by virtue of any amendment to the provisions of the respective** E **enactments under which such cesses are leviable, then the appellant may have to pay the same. The judgment of the High Court is set aside. The writ petition filed before the High Court stands allowed and the demand notices dated (nil) July 1991 as amended on 28.10.1994** F **in regard to the period 1987 to 1992 are quashed in so far as the demand for payment of ZP cess and CP cess is concerned. [para 15 and 16] [621-E-G]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 864 of 2005.

G From the Judgment and Order dated 03.06.2003 of the High Court of Judicature at Bombay, Nagpur Bench in Writ Petition No. 2922 of 1999.

Bharat Sangal, R.R. Kumar and Srijana Lama for the H Appellant.

Madhavi Divan and Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J. 1. The appellant (the term 'appellant' refers to M/s Larsen & Toubro Ltd. till date of its demerger in 2004 and thereafter to M/s. Ultra Tech Cement Ltd.) obtained a mining lease for limestone from the Government of Maharashtra, as per lease deed dated 12.2.1980. Under the terms of the said lease, the appellant as lessee was required to pay dead rent as per clause V(1) and (2), royalty in terms of clause V(3) and surface rent, water rate and cesses in terms of clauses V(4) of the lease deed. In response to a notice served by the Collector on the appellant demanding payment of surface rent (equal to non-agricultural assessment) and the Zilla Parishad Cess (for short 'ZP Cess') and Gram Panchayat Cess (for short 'GP Cess'), the appellant informed the Collector by letter dated 3.1.1991, that it was not liable to pay the ZP cess and GP cess and that those cesses may be deleted from the demand. However by notice of demand dated (nil) July 1991, revised by notice dated 28.1.1994, the Collector, Chandrapur, reiterated the demand for surface rent as also the ZP and GP cesses for the years 1987 to 1992, on the following ground:

> "The Government of Maharashtra vide its letter Industries Energy and Labour Department (IND) No.TQCR-2176/ 45691/1172/IND-9 Bombay dated 13.06.1978 and Director, Geology & Mining, Govt.of Maharashtra, Nagpur vide letter No.STC/295/39/2007 dated 09.06.1989 have issued instructions regarding fixation of surface rent on the lease area used for mining purpose. As per these directives and Rule 27(1)(d) of Mineral Concession Rules, 1960, the lessee is required to pay the surface rent at such rate not exceeding the land revenue and the cesses assessable on the land. Since the mining operation is the use of land other than the Agriculture purpose, *the rate of non-agricultural assessment, together with the cesses assessable on the land, are applicable for levying the surface rent."*

(emphasis supplied)

2. The appellant was aggrieved by the demand in so far as it relates to ZP cess and GP cess. According to appellant section 151(1) of Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 ('Zilla Parishad Act' for short) exempted the lessees from the state government from payment of the ZP cess. The appellant also contended that it was not liable to pay the GP cess, as section 127 (1) of Bombay Gram Panchayats Act, 1958 ('Panchayats Act' for short) provides for levy of GP cess at the rate of one hundred paise on every rupee payable to the state government as ordinary land revenues in the area within the jurisdiction of the Panchayat, and as the appellant was exempted from paying land revenue under section 64 of the Maharashtra Land Revenue Code, 1966 ('Revenue Code' for short) read with clause VII(1) of the lease deed, it was not liable to pay the GP cess also. The appellant admitted the liability to pay surface rent equal to non-agricultural assessment.

3. On the other hand, the respondents contend that the demand for ZP cess and GP cess is authorized by Rule 27(1)(d) of the Mining Concession Rule, 1960 ('MC Rules' for short) read with clause V(4) of the lease deed and the appellant is liable for the same. The submission of the respondents is that they have not made any demand for cess under the Zilla Parishads Act or Panchayats Act and that the demand for ZP cess and GP cess is as a part of the surface rent. According to the respondents, the reference to ZP cess and GP cess assessable on the land, in the lease deed is only for the purpose of arriving at the figure of surface rent. The respondents' submission is that though "cesses per se could not have been levied under the Mineral Concession Rules", cesses assessable on the land has been demanded as a mode of calculating the charges for the surface area used by the lessee; and so long as the amount charged does not exceed

the land revenue plus ZP cess and GP cess assessable on the land, the lessees can have no grievance.

4. On the rival contentions urged, two questions arise for our consideration:

(i) Whether the appellant is liable to pay ZP Cess?

(ii) Whether the appellant is liable to pay GP Cess?

Re: Question No.(i)

5. Rule 27 of the Mining Concession Rules, 1960 prescribes the conditions subject to which a mining lease should be made. Clause (d) of sub-section (1) thereof is relevant and is extracted below :

"27. Conditions – (1) Every mining lease shall be subject to the following conditions – xxxx xxxx

(d) the lessee shall also pay, for the surface area used by him for the purposes of mining operations, surface rent and water rate at such rate, not exceeding the land revenue, and *cesses assessable on the land,* as may be specified by the State Government in the lease."

(emphasis supplied)

Clause 4 of Part V of the lease deed reads thus:

"The lessee/lessees shall pay rent and water rate to the State Government in respect of all parts of the surface of the said lands which shall from time to time be occupied or used by the lessee/lessees under the authority of those presents at the rate of Rs…and Rs…respectively per annum per hectare of the area so occupied or used and so in proportion for any area less than a hectare during the period from the commencement of such occupation or use until the area shall cease to be so occupied or used and shall as far as possible restore the surface land so used to us in original condition. Surface rent and water rate shall be paid as hereinbefore detailed in clause (2) provided that no such rent/water rate shall be payable in

respect of the occupation and use of the area comprised in any roads or ways to which the public have full right of access.

1. Surface rent equal the non-agricultural assessment.

2. Water rates not exceeding the land revenue.

3. *Cesses assessable on the land* (ZP and GP Cesses) subject to the revision of rates prescribed by government from time to time."

(emphasis supplied)

A combined reading of Rule 27(1)(d) of the Rules and Clause V(4) of the lease deed, makes it clear that the lessee under the mining lease deed is liable to pay, in addition to dead rent and royalty, the following amounts : (i) surface rent equivalent to non-agricultural assessment; (ii) water rate not exceeding the land revenue and (iii) cesses assessable on the land specified by the state government in the lease, that is *ZP cess and GP cess assessable on the land subject to revision of rates prescribed by government from time to time.*

6. What is significant to note is that the State Government has stipulated in the lease that the mining lessee shall pay ZP cess assessable on the land. It has not used the words 'an amount equivalent to ZP cess that could be or may be assessed on the land.' The word 'assessable' means liable to be assessed. Therefore when Clause V(4) of the lease deed requires the lessee to pay ZP cess assessable on the land, it would mean that the mining lessee would be liable to pay ZP cess if it is so due under the Maharashtra Zilla Parishads Act.

7. Section 151(1) of the Zilla Parishad Act which is relevant is extracted below:

"151. (1) – In the Vidarbha area of the State of Maharashtra, every malik-makhuza, raiyat malik and occupant and every raiyat, *other than a sub-tenant and lessee from the State Government* shall be liable in respect of the land held by him in the district to pay cess

for the purpose of this Act at the rate of twenty paise or at such increased rate not exceeding two hundred paise as may be determined by the State Government under section 155 on every rupee of the land revenue or rent assessed or fixed on such land or the lease money payable in respect thereof, whether or not such land revenue or rent or lease money or any portion thereof has been released, compounded for or redeemed.

[Note : the words in italics should be read as 'at the rate of two hundred paise or at such increased rate not exceeding seven hundred paise as may be determined by the concerned Divisional Commissioner" after amendment of section 151(1) by Maharashtra Act 1 of 1993]

(emphasis supplied)

It is evident from the said provision of the Zilla Parishad Act that a 'lessee from the state government' is not liable to pay ZP cess under section 151 (1) of the Zilla Parishads. The ZP cess can be levied only in terms of and under the Zilla Parishads Act and cannot be levied by the state government, under the terms of a contract. Where a particular cess is leviable under an enactment, and the contract says that the lessee is liable to pay such cess leviable under that enactment, but the enactment exempted a specified class of persons (to which the lessee belongs) from paying the said cess, the state government cannot make the lessee liable to pay the said cess on the ground that under the contract entered under a different enactment, the lessee is liable to pay such cess. For example, if a Sales Tax Act exempts the sale of particular goods from tax, the seller of such goods cannot demand Sales Tax on the ground that the contract of sale provides that the buyer is liable to pay all taxes leviable under any enactment. It follows that if a lessee from the State Government is exempted from payment of ZP cess leviable under section 151(1) of the Zilla Parishads Act, by section 151(1) itself, the State Government cannot 'levy' the said ZP cess under a contract entered in terms of the Mineral Concession Rules. For payment of a cess under a

particular Act, liability under that Act is condition precedent. Therefore if ZP cess is not due or payable by a lessee under the ZP Act, the State cannot say that the amount is due under the lease deed executed in terms of the Mineral Concession Rules.

8. The effect of clause V(4) of the lease deed providing that the mining lessee shall pay 'ZP cess assessable on the land' is this: if it is liable to be paid under the Zilla Parishads Act, that should be paid by the lessee and payment thereof is a term of the lease; and if the lessee is not liable to pay ZP cess in view of the exemption under the ZP Act, it is not payable. The position would have been different if the lease deed had stipulated that the lessee is liable to pay as consideration, in addition to other sums payable, a sum equivalent to ZP cess under Zilla Parishad Act, irrespective of whether the lessee is liable to pay such cess under the Zilla Parishads Act or not. If the lease deed had contained such a term, the lessee would have been liable to pay a sum equivalent to ZP cess, irrespective of his liability under the Zilla Parishads Act.

9. We may in contrast, refer to the term in the lease regarding payment of surface rent. The clause says what is payable is 'surface rent equal the non-agricultural assessment'. The clause does not say that the lessee is liable to pay 'non-agricultural assessment' assessable on the land. Consequently, irrespective of whether non-agricultural assessment is leviable or not under the Maharashtra Land Revenue Code, 1966, the lessee shall be liable to pay an amount equivalent to non-agricultural assessment, as surface rent. What is payable under the contract is 'surface rent' and non-agricultural assessment is made only the basis for quantification of the surface rent. But the wording relating to payment of ZP cess and GP cess, are significantly different from the wording relating to payment of surface rent.

10. There is yet another indication that what is required to

be paid in ZP cess, only if it is leviable under Zilla Parishads Act. Clause V(4) provides that the mining lessee shall pay *"cesses assessable on the land (ZP and GP cesses) subject to the revision of rates prescribed by Government from time to time."* This refers to revision by the State Government in exercise of the power under section 151(1) of Zilla Parishads Act and not in exercise of any power under the lease deed, as a lessor. This also shows that ZP cess as revised under the Zilla Parishads Act is payable only if it is payable under the Zilla Parishads Act and not otherwise.

Re: Question No.(ii)

11. Section 127 of the Bombay Gram Panchayats Act, 1958 deals with levy and collection of cess. The said section is extracted below :

> "(1) The State Government shall levy cess at the rate of one hundred paise, *on every rupee of every sum payable to the state government as ordinary land revenue in the area within the jurisdiction of a panchayat* and thereupon, the state government shall (in addition to any cess leviable under the Maharshtra Zilla Parishads and Panchayat Samitis Act, 1961) levy and collect such cess in such area.
>
> (2) to (4) deleted by Maharashtra Act 10 of 1992.
>
> (5) For the purpose of levying and collecting the cess referred to in sub-section (1), in the Bombay area athe provisions of section 144 (including the Fourth Schedule), 145, 147 and 149, in the Vidarbha area, the provisions of section 151, and in the Hyderabad area, the provisions of section 152 of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961, shall apply thereto as they apply to the levy of cess leviable under section 144, section 151, or as the case may be, section 152 of that Act."
>
> (emphasis supplied)

Section 64 of the Maharashtra Land Revenue Code, 1966 ('Code' for short) reads thus:

> "64. All land liable to pay revenue unless specially exempted.
>
> All land, whether applied to agricultural or other purposes, and wherever situate, is liable to the payment of land revenue to the State Government as provided by or under this Code *except such as may be wholly exempted under the provisions of any special contract with the State Government,* or an any law for the time being in force or by special grant of the State Government.
>
> But nothing in this Code shall be deemed to affect the power of the Legislature of the State to direct the levy of revenue on all land under whatever title they may be held whenever and so long as the exigencies of the State may render such levy necessary."
>
> (emphasis supplied)

The term 'land revenue' is defined in section 2(19) of the said Code as under:-

> "(19) "land revenue" means all sums and payments, in money received or legally claimable by or on behalf of the State Government from any person on account of any land or interest in or right exercisable over land by or vested in him, under whatever designation such sum may be payable and any cess or rate authorised by the State Government under the provisions of any law for the time being in force; and includes premium, rent, lease money, quit rent, judi payable by an inamdar or any other payment provided under any Act, rule, contract or deed on account of any land."

12. Section 127(1) of the Panchayats Act casts a liability to pay one hundred paise as cess on every rupee of every *sum payable to the state government as ordinary land revenue.* This cess is described as Gram Panchayat cess or GP cess. The effection of section 127(1) is that wherever land revenue is payable by a person, such person liable to pay the land

revenue, will also have to pay GP cess equal to the amount of the land revenue. Therefore only a person who is liable to pay land revenue will be liable to pay GP cess. Section 64 of the Land Revenue Code provides that all lands are liable to payment of land revenue to the state government except such as may be wholly exempted under the provisions of the special contract with the state government. Clause VII(1) of the lease deed dated 12.2.1980 between State Government and the appellant provides such exemption as it says the lessee shall not be liable to pay land revenue. We extract below clause (1) of Part VII of the lease deed for ready reference:

> "Lessee to pay rents and royalties, taxes, etc.
>
> 1. The lessee/lessees shall pay the rent, water rate and royalties reserved by this lease at such times and in the manner provided in the PARTS V and VI of these presents and shall also pay and discharge all taxes, rates assessment and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed by the authority of the Central and State Governments upon or in respect of the premises and works of the lessee/lessees in common with other premises and works of the like nature *except demands for land revenues*."
>
> (emphasis supplied)

13. Even under Clause V(4) of the lease deed, what is liable to be paid is 'surface rent' which is equivalent to the non-agricultural assessment, and not land revenue, that is non-agricultural assessment itself. Thus there is a special contract between the State and the appellant whereby the appellant is exempted from paying land revenue. If the appellant is not liable to pay the land revenue, it will not be liable to pay any GP cess, as section 127(1) makes it clear that the said cess is payable only on the amount payable as land revenue. If no amount is payable as land revenue, it follows as no amount is payable as GP cess. Therefore appellant is not liable to pay GP cess

under the Panchayats Act. Clause V(4) of the lease deed requires payment of GP cess only if it is payable under the Panchayats Act. For the reasons stated while dealing ZP cess, we hold that the appellant is not liable to pay GP cess also.

Conclusion

14. The object of clause V(4) of the lease deed is clear. Normally, all leases will contain a provision as to who will be liable to pay the rates, taxes, cesses on the property leased. If the lease deed is silent, then the lessor would be liable to bear and pay the rates, taxes and cesses. Therefore, where the understanding is that the lessee should be liable to pay the rates, taxes and cesses in addition to the rent or premium, the lease deed will provide specifically that the lessee shall bear and pay all rates, taxes and cesses. But this is always on the assumption that there is a liability under the respective enactments to pay any rates, taxes, cesses in respect of the property. All that clause V(4) of the lease deed provides is that the lessee should bear and pay the ZP cess and GP cess, if it is leviable under the respective enactments.

15. In view of the above, we accept the contention of the appellant that it is not liable to pay ZP cess or CP cess to the State Government under the lease deed. It is however made clear that if the said cesses (ZP cess and CP cess) become payable by the appellant by virtue of any amendment to the provisions of the respective enactments under which such cesses are leviable, then the appellant may have to pay the same. Be that as it may.

16. The appeal is therefore allowed. The judgment of the High Court is set aside. The writ petition filed before the High Court stands allowed and the demand notices dated (nil) July 1991 as amended on 28.10.1994 in regard to the period 1987 to 1992 is quashed in so far as the demand for payment of ZP cess and CP cess.

R.P. Appeal allowed.

NASIB HUSSAIN SIDDI AND ORS.

v.

STATE OF GUJARAT

(Criminal Appeal No. 1879 of 2011)

SEPTEMBER 28, 2011

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

Penal Code, 1860:

ss.325, 506(2), 333, 342 and 114 – Conviction under – Quarrel between appellant no.1 and another person – Constable-complainant ordered them to accompany him to police station – Appellant no.1 caught hold of complainant and pushed him – Appellant 2 and 3, the mother and wife of appellant no.1 joined appellant no.1, exchanged hot words with complainant and prevented him from taking appellant no.1 to police station – Conviction of appellants – High Court affirmed the conviction, however, reduced sentence to 1½ years – On appeal, held: Two of the appellants were females and had not physically assaulted the complainant – Even appellant no.1 was not alleged to have used any force against the complainant in the incident – The incident took place nearly ten years back – Keeping in view all the circumstances and the fact that appellant no.1 who was mainly responsible for the grievous injury caused to the complainant has already served the sentence awarded to him, interest of justice would be sufficiently served if the sentence awarded to the appellants is modified and reduced to the sentence already undergone by them.

CRIMINAL APPELLATE JURISDICITION : Criminal Appeal No. 1879 of 2011.

From the Judgment and Order dated 13.04.2011 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 315 of 2007.

D.N. Ray, Lokesh K. Choudhary and Sumita Ray for the Appellants.

Hemantika Wahi and Jesal for the Appellant.

The order of the Court was delivered by

O R D E R

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of an order passed by the High Court of Gujarat at Ahmedabad whereby conviction of the appellants for offences punishable under Sections 325, 506(2), 333, 342 and 114 IPC has been affirmed and the sentence reduced to imprisonment for a period of 1½ years.

3. When the special leave petition came up for admission, this Court by its order dated 1st August, 2011 issued notice to the respondents only on the question of sentence. We are not, therefore, examining the validity of the order of conviction which both the Courts below have passed on a proper appreciation of the evidence on record. The only question on which we have heard learned counsel for the parties is whether the sentence awarded to the appellants needs to be reduced and, if so, to what extent.

4. The genesis of the case of the appellants lies in an incident that took place on 7th September, 2003 at village Chitrod in the District of Kutch, State of Gujarat. The complainant in the case was, during the relevant period, a Constable posted at Chitrod outpost of Police Station Bhimasar. The prosecution case is that at about 10.30 a.m. on 7th September, 2003 when the complainant was on patrol duty, he found one Babubhai quarrelling in public place with one Hussain Ibrahim Siddi, accused no.1. The constable appears to have accosted the quarrelling duo and asked them as to why they were disturbing peace and ordered them to accompany

him to the police station. This appears to have infuriated Hussain Ibrahim Siddi who caught hold of the Constable from his collar and pushed him. In the meantime the son, wife and mother of Hussain Ibrahim Siddi also appear to have joined Hussain Ibrahim Siddi, exchanged hot words with constable and prevented him from taking Hussain Ibrahim Siddi to the Police Station. It was on those allegations that Hussain Ibrahim and the appellants were tried together for the offences mentioned earlier.

5. At the trial the prosecution examined as many as 13 witnesses to support its case. The depositions of these witnesses were found reliable by the Trial Court resulting in the conviction of Hussain Ibrahim for the offence punishable under Section 325 and sentence of five years RI besides a fine of Rs.500/-. In default he was directed to undergo a further sentence of six months. He was also convicted under Section 506(2) of the IPC and sentenced to undergo imprisonment for a period of five years and a fine of Rs.500/- and in default to undergo further imprisonment for a period of six months. Hussain Ibrahim was in addition convicted and sentenced to imprisonment for five years and a fine of Rs.500/- under Section 333 and in default to undergo further imprisonment of six months. Imprisonment for a period of one year and a fine of Rs.100/- was awarded to him under Section 342 of the IPC and in default to undergo further imprisonment for a period of one month.

6. In so far as the appellants Hussain Siddi, Malubai wife of Ibrahim Siddi and Hawabai wife of Hussain Ibrahim are concerned, the Trial Court found them also to be guilty of offences punishable under Sections 333 of the IPC and sentenced them to undergo simple imprisonment for a period of three years and a fine of Rs.200/-. Malubai accused no.3 and appellant before us was also in addition convicted and sentenced to undergo imprisonment for a period of three years under Section 506(2) IPC apart from a fine of Rs.500/-. In

default of payment of fine she was sentenced to undergo six months further imprisonment.

7. Aggrieved by the orders of conviction and sentence the appellants preferred an appeal before the High Court of Gujarat at Ahmedabad who has while upholding the conviction of the appellants reduced the sentence awarded to all of them to 1½ years instead of three years.

8. It is common ground that the appellants, two of whom happen to be females had not physically assaulted the constable. Even appellant no.1 is not alleged to have used any force against the constable in the incident in question. The incident itself is nearly ten years old by now. Keeping in view all these circumstances and the fact that Hussain Ibrahim Siddi accused no.1 who was mainly responsible for the grievous injury caused to the constable has already served the sentence awarded to him, we are of the opinion that interest of justice would be sufficiently served if the sentence awarded to the appellants is modified and reduced to the sentence already undergone by them.

9. We order accordingly. The appellants shall be set at liberty forthwith unless required in any other case. The appeal is allowed to the above extent.

D.G. Appeal allowed.

BALJINDER SINGH @ BITTU
v.
STATE OF PUNJAB
(Criminal Appeal No. 1878 of 2011)

SEPTEMBER 28, 2011

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

Penal Code, 1860 – ss. 326 and 324 – Conviction of appellant under – Appellant sentenced to rigorous imprisonment for a period of four years and fine of Rs. 5,000/- for commission of offence punishable u/s. 326 and rigorous imprisonment for two years with fine of Rs. 2000/- for commission of offence punishable u/s. 324 by courts below – On appeal, held: It is evident from the material on record that the incident had resulted in injuries to both the parties and the incident took place because of a sudden fight – Nature of the injuries inflicted, the absence of any criminal antecedents of the accused appellant, and the period that has elapsed since the occurrence, all call for a suitable alteration in the sentence awarded to the appellant – Sentence awarded to the appellant u/s. 326 reduced from four years rigorous imprisonment to two years rigorous imprisonment and the amount of fine increased from Rs.5,000/- to Rs.50,000/- – However, sentence and fine u/s. 324 maintained.

CRIMINAL APPELLATE JURISDICITION : Criminal Appeal No. 1878 of 2011.

From the Judgment & Order dated 5.10.2010 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 375 of 2000.

Mahabir Singh, Vikram Chaudhari, Nikhil Jain and Preeti Singh for the Appellant.

Harendra Singh, Sandeep Kr. Mishra and Kuldeep Singh for the Respondent.

The Order of the Court was delivered by

O R D E R

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of an order dated 5th October, 2010 passed by the High Court of Punjab and Haryana at Chandigarh whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of four years and a fine of Rs.5,000/- for an offence punishable under Section 326 of the Indian Penal Code and rigorous imprisonment for two years with a fine of Rs.2,000/- for an offence punishable under Section 324 IPC.

3. When the special leave petition came up for admission on 11th April, 2011 notice to the respondent was issued by this Court only on the question of sentence awarded to the appellant. We have, accordingly heard learned counsel for the parties on the quantum of sentence awarded to the appellant and perused the record.

4. The incident in question is said to have taken place as early as in July, 1994. The genesis of the occurrence has no element of premeditation or other criminal overtones. It arose out of what was according to the prosecution an unintended and innocuous straying of the complainant's cart into the paddy field of Natha Singh, father of Bhupinder Singh and Baljinder Singh, the appellant. The brothers were enraged by what they thought was a trespass into the field owned by them and their father. ?-

They caught hold of and beat Kulwinder Singh the complainant, owner of the cart who received two knife blows on the front of his right chest and a blow in the scapular region. The co-accused Bhupinder Singh was also alleged to have

given a fist blow at the back of Kulwinder Singh. The incident was witnessed by Bachan Singh PW-2 and Sukhchain Singh who intervened to prevent any further injury to any one of them. At the trial the prosecution adduced evidence that comprised among others the depositions of Kulwinder Singh, PW-1, Bachan Singh, PW 2 and Dr. K.K. Sharma, PW-3. Relying upon the deposition of the said witnesses, the trial Court found both the accused guilty of the offences under Sections 324 and 326 IPC and sentenced the appellant to undergo rigorous imprisonment for a period of four year and two years apart from payment of fine of Rs.5,000/- and Rs.2,000/- respectively for offences punishable under Sections 326 and 324 IPC respectively. In so far as Bhupinder Singh was concerned, the trial Court sentenced him to rigorous imprisonment for a period of three years under Section 326 read with Section 34 IPC and rigorous imprisonment for one year under Section 324 read with Section 34 IPC apart from payment of Rs.2,000/- for the former and Rs.1,000/- for the later offence.

5. The High court on an appeal filed by the accused, acquitted Bhupinder Singh giving him the benefit of doubt but maintained the sentence awarded to the appellant. The High Court found that while Dr. Rattanjit Singh, DW-1 had deposed and certified the appellant having suffered three injuries, one of which sustained on the left side of the forehead was reported to be a grievous injury, in the absence of any x-ray examination and in the absence of any analysis of the cut sustained by the appellant, the injury had to be treated to be a superficial one only. The fact that the incident had resulted in injuries to both the parties is all the same evident from the material on record. Superadded to that is the fact that incident took place because of a sudden fight. The nature of the injuries inflicted, the absence of any criminal antecedents of the accused appellant, and the period that has elapsed since the occurrence, all call for a suitable alteration in the sentence awarded to the appellant. We are further of the opinion that while the sentence could be reduced from four years rigorous imprisonment to two

years rigorous imprisonment for the offence under Section 326 IPC, the amount of fine could be increased from Rs.5,000/- to Rs.50,000/-. The sentence and fine under Section 324 IPC will, however, remain unaltered. Having regard to the nature of the injuries sustained by Kulwinder Singh the medical expenses that he would have incurred in connection with the treatment of those injuries, we consider it just and proper to award Rs.50,000/- out of the fine amount as compensation under Section 357 of Cr.P.C. to Kulwinder Singh the victim of the assault. The above modification would in our view serve the ends of justice.

5. In the result, we allow this appeal but only in part and to the extent that the sentence awarded to the appellant under Section 326 IPC shall stand reduced from four years rigorous imprisonment to two years rigorous imprisonment with a fine of Rs.50,000/-. In the event of default in payment of fine, the appellant shall suffer rigorous imprisonment for a further period for one year. The sentence of imprisonment and fine awarded to the appellant under Section 324 is, however, maintained. We further direct that in case the fine amount is recovered from the appellant, a sum of Rs.50,000/- shall be paid to Kulwinder Singh as compensation under Section 357 of the Code of Criminal Procedure.

N.J. Appeal allowed.

BEDANGA TALUKDAR

v.

SAIFUDAULLAH KHAN & ORS.

I.A. No. 5-8

IN

(Civil Appeal Nos. 8343-8344 of 2011)

SEPTEMBER 28, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Service law – Selection – Challenge to – Issuance of advertisement to hold preliminary examination for recruitment to various posts in Public Service – Failure of respondent No. 1-physically handicapped candidate to submit the requisite disability certificate within the stipulated period as provided in the advertisement – Respondent No. 1 submitted the mandatory documents after the selection process was over, with the publication of the select list of the successful candidates and rejection of his candidature – Selection of appellant in the reserved category but not of respondent No. 1 despite respondent No. 1 having scored more marks than the appellant – Writ petition by respondent No. 1 – Order of High Court directing the Public Service Commission to examine the entitlement of respondent No. 1 by taking into account the identity card produced by him – On appeal, held: All appointments to public office have to be made in conformity with Article 14 – There must be no arbitrariness resulting from any undue favour being shown to any candidate – Thus, the selection process has to be conducted strictly in accordance with the stipulated selection procedure – When a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained – There can be no relaxation in the terms and conditions contained in the advertisement unless the power of relaxation is duly reserved in the relevant rules and/or in the advertisement – Even if

power of relaxation is provided in the rules, it must still be mentioned in the advertisement – Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 – On facts, perusal of the advertisement clearly shows that there was no power of relaxation – High Court erred in directing that the condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of respondent No. 1; and in concluding that the Authorities had not treated the condition with regard to the submission of the certificate along with the application or before appearing in the preliminary examination, as mandatory which is contrary to the record – Thus, order passed by the High Court is set aside – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act,1995 – Constitution of India, 1950 – Articles 14 and 16.

Karnataka Public Service Commission & Ors. Vs. B.M. Vijaya Shankar & Ors **(1992) 2 SCC 206 – referred to.**

Case Law Reference:

(1992) 2 SCC 206	**Referred to.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8343-8344 of 2011.

From the Judgment & Order dated 4.3.2010 & 20.7.2010 of the High Court of Guwahati, Assam in WP Nos. 950 and 3382 of 2010.

Jayant Bhushan and V. Hazarika, Manish K. Bishnoi, Gautam Talukdar, Shakunt Saumihra, R.B. Phookan, Goodwill Indeevar, Rajiv Mehta, Vartika Sahay and Deepika (for Corporate Law Group) for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. These appeals are directed against the impugned judgment and order dated 4th March, 2010 in Writ Petition (C) No. 950 of 2010 and impugned judgment and order dated 2nd July, 2010 in Writ Petition (C) No.3382 of 2010 passed by the High Court of Guwahati, allowing the writ petitions filed by the respondent No.1 whereby Assam Public Service Commission (hereinafter referred to as "respondent No. 3") was directed to examine the entitlement of respondent No.1 by taking into account the identity card produced by him.

3. We may notice the bare essential facts necessary for the determination of the controversy involved in these appeals .

4. The respondent No. 3 issued an advertisement on 10th August, 2006 bearing advertisement No.6/2006, announcing its intention to hold the preliminary examination of the Combined Competitive Examination, 2006 for screening candidates for the Main Examination for recruitment to various posts educated in the advertisement. The last date for the receipt of the completed application forms was fixed as 11th September, 2006. In this advertisement, although, posts had been reserved for various categories such as OBC/MOBC, SC, ST(P) and ST(H), but there was no reservation in favour of the disabled candidates as required under the Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation], Act,1995.

5. Consequently, a Public Interest Litigation being P.I.L. No.61/2006 was filed in the High Court by Order dated 13th March, 2007. The High Court by an interim order directed respondent No.3 not to conduct any examination during the

pendency of the petition. By order dated 13th March, 2007, the High Court directed respondent No.3 to make a fresh advertisement on the basis of the requisitions to be received from the Government of Assam (respondent No.2) incorporating reservation of 3% for persons with disabilities.

6. In compliance with the orders of the High Court dated 13th March, 2007, respondent No. 3 issued a corrigendum on 5th June, 2007 reserving three per cent vacancies for Physically Handicapped persons, in terms of Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation], Act,1995. Applications were invited for one post in the Assam Civil Service Class-I (Jr. Grade) from persons suffering from Locomotor Disability, in connection with the conduct of Combined Competitive (Preliminary) Examination, 2006 for screening candidates for the Main examination for the posts already mentioned in the earlier advertisement No. 6/2006. It is evident that this corrigendum was issued in continuation of advertisement No. 6/2006 dated 10th August, 2006. It was provided therein that candidates, who had applied earlier to the advertisement No. 6/2006 dated 10th August, 2006, need not apply again but the candidates with Locomotor Disability must produce supporting documents in the office of the Assam Public Service Commission or in the examination hall before the commencement of the examination. The Last date for submission of the applications under the corrigendum was 6th July, 2007.

7. Respondent No.1 had applied in response to the advertisement dated 10th August, 2006. Since there was no requirement for submission of any details with regard to any disability, he had not submitted any disability certificate. Although, in view of the corrigendum, respondent No.1 was not required to make an application afresh, he was required to produce necessary supporting documents in the office of the Commission or in the examination hall before the commencement of the preliminary examination. Respondent

No.1 had been certified by the District Medical Board, Dhubri, to be physically disabled to the extent of 50% on 21st January, 2004. On the basis of this certificate, respondent No.1 was issued an identity card by the District Social Welfare Officer, Dhubri on 18th February, 2004 which specified his disability to be Locomotor Disability to the extent of 50%. The preliminary examination was held on 23rd September, 2007.

8. We may notice here that respondent No.1 did not submit the mandatory documents, to substantiate his candidature in the seat reserved for candidates with "Locomotor Disability", on or before 6th July, 2007, i.e., the last date for submission of applications. He also did not submit the mandatory documents even at the time when he appeared in the preliminary examination. Therefore, he appeared in the examination as a general category candidate.

9. Both the appellant and respondent No.1 successfully participated in the preliminary examination. The advertisement had clearly specified that "candidates who are declared by the Commission to have qualified for admission to the Main examination will have to apply again in the prescribed application form, which will be supplied to them." It was the claim of respondent No.1, that he had specifically indicated in Column No. 11 of his application in the prescribed form for the Main examination that he suffers from Locomotor Disability upto 50%. According to him, he had submitted the certificate dated 21st January, 2004 issued by the District Medical Board, Dhubri. Being satisfied Respondent No.3 had permitted him to appear in the Main examination.

10. Having successfully completed the written examination, both the candidates, i.e., appellant and respondent No.1, were called for interview on 1st December, 2008. It was the case of respondent No.1 that he had produced the necessary documents in support of his claim of Locomotor Disability to the extent of 50%, along with the other certificates and testimonials at the time of interview. The Commission,

respondent No. 3, published the list of selected candidates on 15th June, 2009. The name of respondent No.1 did not appear in the said list. In fact, the appellant was shown to have been selected for appointment in the Assam Public Service Commission as a physically handicapped candidate.

11. Respondent No.1 made an application under the provisions of Right to Information Act, 2005 before the appropriate authority seeking the details of the marks scored by him as well as the details of the marks obtained by other physically handicapped candidates called for the interview. From the information supplied to him, respondent No. 1 came to know that he had scored 817 marks, whereas the appellant had scored 695 marks. Respondent No. 1 thereafter made a representation dated 14th September, 2009 addressed to the Chairman of respondent No.3 as well as the Secretary of the Commission making a grievance that his candidature had been arbitrarily rejected, even though, he had scored more marks than appellant in the examination. It appears that respondent No. 1 had also reiterated that his claim for being considered in the Locomotor Disability category, was duly supported by the necessary documents, i.e., certificate issued by the District Medical Board, Dhubri dated 21st January, 2004 and the identity card issued by the District Social Welfare Officer.

12. He had further stated that at the time of interview, he had produced the necessary documents in support of his claim. According to respondent No. 1, on 4th December, 2009, the Deputy Secretary of the Commission (respondent No.3) had informed him that the identity card showing respondent No. 1 to be suffering from Locomotor Disability was not submitted alongwith the application form for the Main examination, though the same was a compulsory document. Respondent No. 1 was accordingly asked to submit the same to the Commission as early as possible on receipt of the communication dated 4th December, 2009. Respondent No. 1 replied vide his letter dated 10th December, 2009 addressed to the Deputy

Secretary of the Commission, stating that all necessary documents showing that he is a physically handicapped person suffering from Locomotor Disability were submitted alongwith the application form of the Main examination. Respondent No. 1 also reiterated his claim that all documents were verified by the Commission at the time of interview on 1st December, 2008. In the letter dated 10th December, 2009, respondent No. 1 also mentioned that as directed by the Deputy Secretary of the Commission, an attested copy of the ID card issued to him by the District Social Welfare Officer, Dhubri is being forwarded.

13. It would be relevant to notice here that the select list dated 15th June, 2009 was challenged in Writ Petition No. 2755 of 2009 and other connected cases. The aforesaid writ petition was disposed of by the High Court by remitting the matter back to respondent No.3 to take a fresh decision and publish a revised list. The reservation in the category of Locomotor Disability was not the issue before the Court in the aforesaid writ petition. The procedural anomaly related to women candidates.

14. Subsequently, respondent No. 1 filed Writ Petition No. 67 of 2010 seeking a direction to include his name in the fresh list to be issued by the respondent No.3, Commission. This writ petition was dismissed by the High Court being premature on 7th January, 2010. Thereafter, on 5th February, 2010, the Commission published a revised list, wherein name of respondent No. 1 was again not included in the list of candidates selected for the appointment.

15. Respondent No. 1, therefore, challenged the select list by Writ Petition No. 950 of 2010. The writ petition was filed on 8th February, 2010. The High Court granted an ex-parte order on 11th February, 2010 directing respondent No.3 not to issue the appointment / posting orders to the appellant.

16. In the counter affidavit filed to this writ petition,

respondent No.3 specifically stated that the documents had not been submitted by the respondent No. 1 within the prescribed time. On 14th March, 2010, the writ petition filed by respondent No. 1 was allowed. A direction was issued to respondent No.3 to reconsider the matter afresh based on the identity card submitted on 10th December, 2009. We may notice here that this direction had been issued by the High Court in spite of the categoric assertion made by the respondent No.3 that the candidature of the respondent No. 1 had been rejected on the basis of the resolution dated 8th January, 2010. In its meeting dated 8th January, 2010, respondent No.3 had resolved that respondent No. 1 did not submit the identity card along with the form. This was vital to support the claim of respondent No.1 to be considered for the post reserved for the candidates having Locomotor Disability. Therefore, his candidature was rejected for non-fulfillment of an essential condition. However, pursuant to the directions issued by the High Court in its order dated 4th March, 2010, respondent No.3 in its meeting held on 21st May, 2010 again thoroughly examined the matter relating to the entitlement of respondent No. 1 for final selection as a physically handicapped (Locomotor Disability) candidate. Upon a thorough scrutiny and re-examination of the facts and the material on record, the claim of respondent No. 1 was not accepted. The name of appellant was duly reiterated as the candidate selected for appointment. A communication to that effect was sent to the appellant as well as respondent No. 1 on 31st May, 2010.

17. At this stage, respondent No. 1 filed Writ Petition No. 3382 of 2010 challenging the minutes dated 21st May, 2010 and the communication dated 31st May, 2010. The aforesaid writ petition has been allowed by the High Court with observations that respondent No.3 was under a legal obligation to examine the petitioner's entitlement for selection by taking into account his identity card. The High Court notices that the resolution of the respondent No.3 contained in the minutes of the meeting dated 21st May, 2010 would indicate that the

Commission had resolved not to consider the case of respondent No. 1 for selection for appointment against the solitary post earmarked for physically handicapped candidates on the ground that the identity card, which was required to be submitted by respondent No. 1 at different stages. The High Court has held that the aforesaid decision, is not rendered in the light of the directions given by the High Court in Paragraph 13 of the order dated 4th March, 2010 passed in Writ Petition (C) No. 950 of 2010. It has been observed by the High Court that the question of belated submission of the identity card having been already answered by the Court and directions having been issued to take into account the same, the Public Service Commission could not have acted in the manner it has done. This writ petition was, therefore, allowed with the following observations:-

> "For the aforesaid reasons, we set aside the resolution dated 21.5.2010 of the Commission as well as the communication dated 31.5.2010 and direct that the Public Service Commission will now examine the entitlement of the petitioner by taking into account the identity card produced by him. For the purpose of clarification, we deem it appropriate to add that while considering the case of the petitioner the acceptability, veracity or otherwise of the contents of the identity card and the effect of the said contents, if found to be acceptable, would be considered by the Commission."

These directions are challenged by the appellant in these appeals.

18. We have heard the counsel for the parties.

19. Mr. Jayant Bhushan, learned senior counsel, appearing for the appellant herein submits that in the advertisement dated 5th June, 2007, one post was reserved for person suffering from Locomotor Disability only. The advertisement also further provided that those who applied earlier in response to

advertisement No.6/2006 dated 10th August, 2006 need not apply again, but the candidates with Locomotor Disability must produce supporting documents in the office of Assam Public Service Commission or in the examination hall before commencement of the examination. The advertisement further provided that candidates who are declared by the Commission to have qualified for admission to the main examination will have to apply again in prescribed application form, which will be supplied to them. All candidates applying in the category of persons with Locomotor Disability upto 50% were required to send a certificate of Locomotor Disability from the appropriate authority. According to Mr. Bhushan, respondent No. 1 did not submit the necessary certificate in the office of the respondent No. 3 or in the examination hall before commencement of the examination. In fact, he did not submit even the ID card till after the interview. By the time, he submitted the ID card, even the Select List of the successful candidates had been published. Since respondent No. 1 had not submitted the requisite disability certificate within the stipulated period as provide in the advertisement, respondent No. 3 rejected his candidature for valid reasons in its resolution dated 8th January, 2010.

20. Mr. Bhushan submits that direction issued by the High Court are contrary to the settled principle of law that there can be no variation in the conditions of eligibility as laid down in the advertisement, unless a specific stipulation is made about any particular condition being relaxable at the discretion of the concerned authority. Learned senior counsel submits that the High Court has erred in holding that the rigour of Article 14 would not be automatically applicable "to the domain of appointment in public office where the employer must strive to pick the best talent available. To achieve such result, the employer must be conferred a wide discretion to act in relaxation of the rigour of the terms of an advertisement. The requirements spelt out in an advertisement for appointment in public service must, therefore, not to be understood to be

inflexible leaving no room for elasticity". Learned senior counsel further submitted that the High Court failed to appreciate that claim of respondent No. 1 had been rejected upon due consideration by respondent No. 3 after according him an adequate opportunity by resolution dated 8th January, 2010.

21. According to the learned senior counsel, the High Court has proceeded on the erroneous assumption that the Commission had itself treated candidature of many candidates to be provisional on account of the fact that requisite certificates of age or educational qualifications had not been submitted along with the application form. According to Mr. Bhushan, the High Court has wrongly concluded that the Public Service Commission had itself treated the condition about the submission of necessary certificates to be not mandatory and inflexible requirements. According to the learned senior counsel, the aforesaid conclusion of the High Court is factually incorrect.

22. The learned senior counsel submits that respondent No.3 had in fact rejected the candidature of respondent No.1 strictly in accordance with the instructions issued in the "Information to the candidates on the Combined Competitive (Main) Examination". Instruction No. 13 clearly stipulates that "any application form received without all or some of the enclosures is liable to be summarily rejected. Any enclosure which was not sent along with the application earlier but sent subsequently by the candidates will not be entertained. Thus candidates must ensure that the application form is properly filled in and is accompanied by all the relevant documents." Mr. Bhushan submits that in the case of respondent No. 1, he was required to submit an attested copy of certificate of Locomotor Disability. The High Court records that the necessary certificate was not submitted by respondent No. 1 before the last date of receipt of applications, which was 11th September, 2006. Learned senior counsel has also relied on a judgment of this

Court in the case of *Karnataka Public Service Commission & Ors. Vs. B.M. Vijaya Shankar & Ors*[1].

23. On the other hand, Mr. V. Hazarika, learned senior counsel submits that the respondent No.3 reconsidered the entire issue after the High Court set aside the resolution passed by respondent No.3 on 8th January, 2010. Respondent No. 1 had to file W.P. (C) No. 950 of 2010 as respondent No.3 again illegally rejected his candidatures. He, therefore, challenged the selection of the appellant.

24. In the aforesaid writ petition, it was stated that in the application, respondent No.1 had specifically mentioned against Column No. 11 of the application form that he suffers from Locomotor Disability upto 50%. He had submitted a certificate issued by the District Medical Board, Dhubri dated 21st January, 2004 in support of his claim to be a physically handicapped person along with the identity card issued by the District Social Welfare officer. It was further his claim in the writ petition that he had qualified in the main examination and was called for interview by call letter dated 1st December, 2008. It was further the case of the respondent No. 1 that he had produced the necessary documents in support of his claim of Locomotor Disability to the extent of 50% along with the other certificates and testimonials at the time of interview. However, when the select list was published on 15th June, 2009, the name of respondent No.1 was not included therein. It was in fact the appellant, who had been selected for appointment. It was also the case of the respondent No. 1 that the appellant had scored 695 marks whereas respondent No.1 had scored 817 marks in the examination. In spite of having scored higher marks, he was illegally and arbitrarily not selected.

25. The respondent No.1 had, therefore, submitted a representation on 14th September, 2009 to respondent No. 3, seeking to question the selection of the appellant, who had

1. (1992) 2 SCC 206.

scored lesser marks. In the representation, respondent No.1 had specifically stated that he had submitted the necessary supporting documents along with the application form. The said documents were verified at the time of interview on 11th December, 2008. The documents were also enclosed with the representation dated 14th September, 2009. Therefore, on 4th December, 2009, the Deputy Secretary of the Commission had informed respondent No. 1 that the identity card showing him to be suffering from Locomotor Disability was not submitted along with the application form for the main examination. Though the same is a compulsory document. Respondent No.1 was, therefore, asked to submit the same to the Commission as early as possible. On receipt of the communication dated 4th December, 2009, respondent No.1 through his letter dated 10th December, 2008 addressed to the Deputy Secretary of the Commission reiterated that the documents had already been submitted and verified by the Commission. However, he again sent an attested copy of the identity card issued to him by the District Social Welfare Officer, Dhubri.

26. Learned senior counsel submits that taking into consideration the aforesaid facts, the High Court correctly came to the conclusion that respondent No. 3 had not specifically denied the claim of the appellant that he had produced the identity card at the time of interview on 11th December, 2008. The High Court had also taken into consideration that the candidature of three other candidates, who had not submitted the necessary documents was treated as provisional. These candidates were included in the select list. Therefore, the High Court has rightly concluded that the condition with regard to submission of certificates and testimonials along with the application or before the preliminary examination was not mandatory. The action of the respondent No.3 in rejecting the candidature in the resolutions dated 8th January, 2010 and 21st May, 2010 were rightly quashed by the High Court.

27. Mr. Bhushan, in reply, submitted that upon a thorough examination of the entire fact situation, respondent No.3 in its

resolution dated 21st May, 2010 has clearly observed that respondent No.1 was treated as a general candidate all along in the examination process and was not treated as physically handicapped with Locomotor Disability. The respondent No.3 also looked into the question whether any other candidate, who had not furnished any essential document with the application or at the time of interview but submitted them after the interview were accepted or not. Upon examination of the issue, respondent No.3 has observed that in fact the candidature of one applicant namely Smt. Anima Baishya was specifically rejected as she had submitted the application before the Chairperson of respondent No.3 on 26th February, 2009, claiming herself to be a SC candidate for the first time. In the case of respondent No. 1, the identity card was submitted for the first time with the letter dated 10th December, 2009 much after the examination process was over.

28. We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There can not be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant Statutory Rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the Rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in

advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India.

29. A perusal of the advertisement in this case will clearly show that there was no power of relaxation. In our opinion, the High Court committed an error in directing that the condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of respondent No. 1. Such a course would not be permissible as it would violate the mandate of Articles 14 and 16 of the Constitution of India.

30. In our opinion, the High Court was in error in concluding that the respondent No.3 had not treated the condition with regard to the submission of the certificate along with the application or before appearing in the preliminary examination, as mandatory. The aforesaid finding, in our opinion, is contrary to the record. In its resolution dated 21st May, 2010, the Commission has recorded the following conclusions:-

> "Though Shri S. Khan had mentioned in his letter dated 10.12.2009 that he was resubmitting the Identity Card with regard to Locomotor Disability he, in fact, had submitted the documentary proof of his Locomotor Disability for the first time to the office of the A.P.S.C. through his above letter dated 10.12.2009. However, after receiving the Identity Card the matter was placed before the full Commission to decide whether the Commission can act on an essential document not submitted earlier as per terms of advertisement but submitted after completion of entire process of selection.
>
> The Commission while examining the matter in details observed that Shri S. Khan was treated as General candidate all along in the examination process and was not treated as Physically Handicapped with Locomotor

> Disability. Prior to taking decision on Shri S. Khan it was also looked into by the Commission, whether any other candidate's any essential document relating to right/ benefits etc. not furnished with the application or at the time of interview but submitted after interview was accepted or not. From the record, it was found that prior to Shri S. Khan's case, one Smt. Anima Baishya had submitted an application before the Chairperson on 26.2.2009 claiming herself to be a S.C. candidate for the first time. But her claim for treating herself as a S.C. candidate was not entertained on the grounds that she applied as a General candidate and the caste certificate in support of her claim as S.C. candidate was furnished long after completion of examination process."

31. In the face of such conclusions, we have little hesitation in concluding that the conclusion recorded by the High Court is contrary to the facts and materials on the record. It is settled law that there can be no relaxation in the terms and conditions contained in the advertisement unless the power of relaxation is duly reserved in the relevant rules and/or in the advertisement. Even if there is a power of relaxation in the rules, the same would still have to be specifically indicated in the advertisement. In such circumstances, the High Court could not have issued the impugned direction to consider the claim of respondent No.1 on the basis of identity card submitted after the selection process was over, with the publication of the select list.

32. In view of the above, the appeals are allowed and the impugned judgment and order dated 4th March, 2010 passed in W.P.(C) No.950 of 2010 and impugned judgment and order dated 2nd July, 2010 passed in W.P.(C) No.3382 of 2010 of the High Court are set aside.

N.J. Appeals allowed.

M/S NTPC LTD.
v.
M.P. STATE ELECTRICITY BOARD & ORS.
(Civil Appeal No. 2451 OF 2007)

SEPTEMBER 29, 2011

[J. M. PANCHAL AND H.L. GOKHALE, JJ.]

Electricity Act, 2003 – s. 62 – Determination of Tariff – Power supplied by NTPC to Electricity Boards from its power station – Tariff payable by the Electricity Board to NTPC – Determination of, by Central Electricity Regulatory Commission – Final tariff determined at a rate lesser than the pre-existing tariff – Collection of excess amount by NTPC during the intervening period – Payment of interest on the differential amount – Claim of Electricity Board – Rejected by the Central Commission – Appeal to Appellate Tribunal u/s. 111 – Appellate Tribunal rejected the interest on the differential amount to the concerned Electricity Boards u/s. 62 (6), however, allowed interest on differential amount on basis of justice, equity and fair-play – On appeal held: s. 62 (6) cannot be pressed into service to claim interest on the differential amounts – It does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount – It is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined u/s. 62 (6), such person can claim the excess price or charge paid by him alongwith interest – Instant case was not where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat – NTPC was not in any way responsible for the delay in process of determination of tariff – Once the tariff was finalized subsequently, NTPC adjusted the excess amount which it

received – Tariff charged at the relevant time was as per the previous notifications – Interest came to be provided subsequently by a Notification under the Regulations of 2004 – Thus, the principles of equity, justice and fair-play could not have been brought in, to award interest to the Electricity Boards.

Interest – Payment of interest on differential amounts – On the ground of justice, equity and fair play – Collection of excess amount of tariff by NTPC from Electricity Board during the intervening period – Appellate tribunal awarding interest on differential amounts on the ground of justice, equity and fair play – Justification of – Held: The instant case was not where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat or in an unjust way – Thus, the principles of equity, justice and fair-play could not have been brought in to award interest to the Electricity Boards – More so, the terms of the supply agreement, the governing regulation and notifications as also the industry practice did not contain any provision for interest – Thus, interest could not be claimed either on the basis of equity or on the basis of restitution.

Madhya Pradesh State Electricity Board (MPSEB), Punjab State Electricity Board (PSEB) and Delhi Vidyut Board (DVB) receive the power generated from the thermal power plants of NTPC situated at Kawas, Gandhar and Rehand. NTPC filed petitions before the Central Electricity Regulatory Commission for determining the tariff with respect to the power supplied by it during the period 1.4.2001 to 31.3.2004 to MPSEB, PSEB, Delhi Vidyut Board and others from the Power Stations. The Central Commission by orders dated 1.4.2005, 7.4.2005 and 2.6.2005 determined the final tariff payable by the Electricity Boards to NTPC at a rate lesser than the pre-existing tariff, and found that NTPC had collected excess amounts during the intervening period,

and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts. However, the Central Commission disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between the tariff finally determined by the Central Commission and the pre-existing tariff continued by the Central Commission until the final determination of the tariff. Thereafter, NTPC adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills. MPSEB, PSEB and DVB filed appeals before the Appellate Tribunal under Section 111 of the Electricity Act, 2003 against the orders of the Central Commission. The Appellate Tribunal rejected the claim of the Electricity Boards for interest as being payable under Section 62(6) of the Electricity Act, 2003, however, held that NTPC was liable to pay interest on the differential amounts on the grounds of justice, equity and fair-play. Therefore, the instant cross appeals were filed.

Allowing the appeals filed by the NTPC and dismissing those filed by the Electricity Board, the Court

HELD: 1.1 Sub-section (6) of Section 62 of the Electricity Act, 2003 lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this Section, the excess amount shall be recoverable by the person who has paid such excess price or charge alongwith interest at bank rate. The earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter, sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words 'tariff determined under this Section' indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections. It was submitted that this

sub-section should be applied even during the period when the tariff was being determined (as in the instant case), and if in the final determination the price fixed is lesser than what was charged during the intervening period, then interest should be read as recoverable for the excess amount collected during the intervening period. Sub-section does not refer to the period during which the tariff is being determined. It also does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount. This sub-section further states that this right to claim interest is without prejudice to any other liability incurred by the licensee. Besides what is prohibited is recovery of price or charge exceeding the tariff determined under this Section and then only, the generating company will have to pay the interest on the difference. That is why the Appellate Tribunal observed that it is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under Section 62 (6), that such person can claim the excess price or charge paid by him alongwith interest. The view taken by the Appellate Tribunal that Section 62 (6) cannot be pressed into service to claim interest on the differential amounts in the instant case, is accepted. [Para 15] [667-E-H; 668-A-D]

1.2 Prior to 1.6.2006 there was no such specific provision for claiming interest for the intervening period. The very fact that such a regulation was required to be issued, indicates the necessity for having such a regulation, but at the same time it is not possible to make it applicable retrospectively. The provision for charging interest is a substantive provision which has to be specifically provided and would become operative when provided. In the circumstances, the submission based on

the new regulation, Regulation 5A of the 'Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulation, 2004, inserted by a Notification dated 01.06.2006 which recognized the appropriateness of allowing interest on the differential amount between the provisional tariff and final tariff also cannot help the Electricity Boards to claim interest on the differential amounts. [Para 18] [669-H; 670-A-B]

1.3 The Appellate Tribunal awarded interest at an average of the prevailing lending rates (PLR) of the Reserve Bank of India to the Banks during the relevant period. The Central Commission, by issuing notifications continued the tariff existing on 31.3.2001 as an interim measure until the final tariff was determined, and the notifications did not provide in any way for interest. The Appellate Tribunal commented that the notifications were issued mechanically without bestowing any prima facie consideration as to what should be the tariff as an interim arrangement. The Appellate Tribunal was of the view that in passing an interim or provisional order, an examination of all the pros and cons was necessary. The interim arrangement continued for over a period of four years and according to the Appellate Tribunal, it resulted into an undue monetary benefit to the NTPC. [Para 19] [670-C-F]

1.4 In the instant case, the second proviso to Regulation 79(2) of 1999 permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz. that interest was not

payable earlier. It is difficult to appreciate as to how the Appellate Tribunal could bring in either the principles of justice, equity and fair-play or that of restitution in the instant case. What is important to note is that the Appellate Tribunal specifically observed in terms that this was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat. This being the position the principles of equity, justice and fair-play could not have been brought in to award interest to the Electricity Boards. There was delay in the process of determination of the tariff. The Commission became functional only on 15.5.1999. NTPC had filed the tariff petitions duly as required by the Central Commission. The delay in the case of Kawas and Gandhar Power Stations was because of the Commission requiring them to appropriately devise norms and parameters. As far as Rihand Station is concerned, one of the beneficiaries, namely Rajasthan Rajya Vidyut Vitaran Nigam Limited had obtained stay of proceedings before the Commission from the High Court of Rajasthan. NTPC was not in any way responsible for these factors. Ultimately, the tariff was reduced, but the tariff charged by the NTPC in the meanwhile was in accordance with the rates permitted under the notifications issued by the Commission. It cannot, therefore, be said that NTPC had held on to the excess amount in an unjust way to call it unjust enrichment on the part of NTPC, so as to justify the claim of the Electricity Boards for interest on this amount. [Paras 22, 26 and 27] [672-B-C; 674-D-H; 675-A]

BSES Ltd. v. Tata Powers Co. Ltd. **2004 (1) SCC 195;** *South Eastern Coalfields Ltd. v. State of M.P. and Ors.* **2003 (8) SCC 648;** *Union of India v. Rallia Ram* **AIR 1963 SC 1685;** *Bengal Nagpur Railway Co. v. Ruttanji Ramji* **AIR 1938 PC 67;** *Union of India v. Watkins Mayor and Co.* **AIR 1966 SC 275;** *Commissioner of Sales Tax v. Hindustan Aluminum*

Corporation **2002 (127) STC 258;** *Kavita Trehan and Anr. v. Balsara Hygiene Products Ltd.* **1994 (5) SCC 380 – referred to.**

1.5 Price fixation is really legislative in character, but since an appeal is provided under Section 111 of the Act, it takes a quasi-judicial colour. That by itself cannot justify the claim for interest during the period when the proceedings were pending for the tariff fixation. The tariff that was being charged at the relevant time was as per the previous notifications. Once the tariff was finalized subsequently, NTPC has adjusted the excess amount which it has received. It cannot be said that during this period the NTPC was claiming the charges in an unjust way, to make a case in equity. The industry practice which also shows that on all such occasions interest has never been either demanded or paid when the price fixation takes place. The claim for interest could not be covered under Section 62 (6). The provision for interest has been introduced by regulations subsequent to the period which was under consideration before the Commission. The terms of the supply agreement, the governing regulation and notifications did not contain any provision for interest. The industry practice did not provide for it as well. In view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution. [Para 30] [677-A-E]

West Bengal Electricity Regulatory Commission v. CESC **2002 (8) SCC 715;** *Shri Sitaram Sugar Mills v. UOI* 1990 3 SCC 223; *Saraswati Industrial Syndicate v. UOI* **1974 (2) SCC 630;** *Malaprabha Sugars v. UOI* 1994 (1) SCC 648; *Mahalakshmi Sugar Mills v. UOI* **2009 (16) SCC 569;** *Pallavi Refractories v. Singareni Collieries* **2005 (2) SCC 227;** *ONGC v. Assn. of Natural Gas Consuming Industries of Gujarat* **1990 Supp. (1) SCC 397;** *Prag Ice and Oil Mills v. UOI* **1978 (3) SCC 459;** *PTC India Ltd. v. Central Electricity Regulatory Commission* **2010 (4) SCC 603 – referred to**

1.6 In the circumstances, it cannot be said that the Appellate Tribunal erred in any way in declining to award interest under Section 62 (6) of the Act. There was however, an error on its part in granting the same under the concept of equity, justice and fair-play. [Para 31] [677-F]

Case Law Reference:

2004 (1) SCC 195	**Referred to**	**Para 20**
2003 (8) SCC 648	**Referred to**	**Para 21**
AIR 1963 SC 1685	**Referred to**	**Para 23**
AIR 1938 PC 67	**Referred to**	**Para 23**
AIR 1966 SC 275	**Referred to**	**Para 24**
2002 (127) STC 258	**Referred to**	**Para 25**
1994 (5) SCC 380	**Referred to**	**Para 26**
2002 (8) SCC 715	**Referred to**	**Para 28**
1990 (3) SCC 223	**Referred to**	**Para 28**
1974 (2) SCC 630	**Referred to**	**Para 28**
1994 (1) SCC 648	**Referred to**	**Para 28**
2009 (16) SCC 569	**Referred to**	**Para 28**
2005 (2) SCC 227	**Referred to**	**Para 28**
1990 Supp. (1) SCC 397	**Referred to**	**Para 28**
1978 (3) SCC 459	**Referred to**	**Para 28**
2010 (4) SCC 603	**Referred to**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2451 of 2007.

From the Judgment & Order dated 20.4.2007 of the Appellate Tribunal for Electricity in Appeal No. 64 of 2006.

WITH

Civil Appeal No. 2452, 2493, 3972 and 4231 OF 2007

A.K. Ganguly, Shail Kr. Dwivedi, AAG, M.G. Ramachandran, K.V. Mohan, Anand K. Gansesan, Ranjitha Ramachandran, Pradeep Misra, Sakesh Kumar, K.V. Bharathi Upadhyaya, Yogmaya Agnihotri, Ashok Kumar Singh, Suraj Singh and T. Mahipal for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J.1. All these five appeals arise out of a common order dated 20.4.2007 passed by Appellate Tribunal for Electricity ('Appellate Tribunal' for short) while deciding the First Appeals to the Appellate Tribunal under Section 111 of the Electricity Act, 2003 against the orders of the Central Electricity Regulatory Commission ('The Central Commission' for short), dated 1.4.2005, 7.4.2005 and 2.6.2006 passed under Section 62 of the Electricity Act, 2003. While admitting these appeals, this Court has stayed the operation of the impugned order until further orders.

(a) First three of these three Civil Appeals are filed by M/s NTPC Ltd. The Madhya Pradesh State Electricity Board ('MPSEB' for short) and others are respondents to Civil Appeal No.2451/2007. The Punjab State Electricity Board ('PSEB' for short), Delhi Vidyut Board and others are the respondents to the other two appeals being Civil Appeal No.2452/2007 and Civil Appeal No.2493/2007.

(b) Civil Appeals Nos. 3972 and 4231 of 2007 are filed by the PSEB and Delhi Vidyut Board. The Central Commission, M/s NTPC Ltd. and others are the respondents to these two appeals.

2. M/s NTPC Ltd. is a power 'generating company' within the definition of the concept under Section 2 (28) of the Electricity Act, 2003. The Electricity Boards concerned, receive the power generated from the thermal power plants of NTPC situated at Kawas, Gandhar and Rihand. The Central Commission had determined the tariff payable by the Electricity Boards to NTPC by the above referred orders dated 1.4.2005, 7.4.2005 and 2.6.2006.

(i) The orders dated 1.4.2005 and 7.4.2005 were on the Petitions No.33 of 2001 and 31 of 2001 respectively filed by NTPC for determining the tariff with respect to the power supplied by it during the period 1.4.2001 to 31.3.2004 to MPSEB and others from Gandhar and Kawas power stations.

(ii) The order dated 2.6.2006 was on Petition No.38 of 2001 by NTPC for the determination of tariff with respect to power supplied during the same period from the Rihand power station to PSEB, Delhi Vidyut Board and others.

3. The Central Commission while determining the tariff, had determined the final tariff at a rate lesser than the pre-existing tariff, as a result of which NTPC was found to have collected excess amounts during this intervening period, and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts. Thus, the amount overcharged in respect of Gandhar power station is to the tune of Rs.460.52 crores and the one in respect of Kawas power station is Rs.254.47 crores. The Central Commission had however disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between (i) the tariff finally determined by the Central Commission and (ii) the pre-existing tariff continued by the Central Commission until the final determination of the tariff. There is no dispute that thereafter NTPC has duly and immediately adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills.

4. The MPSEB, PSEB and Delhi Vidyut Board, therefore, invoked Section 111 of the Electricity Act, 2003 and filed appeals against the above three orders of the Central Commission before the Appellate Tribunal which were numbered as Appeal Nos.64, 212 and 237 of 2006. The Appellate Tribunal rejected the claim of the Electricity Boards for interest as being payable under Section 62(6) of the Electricity Act, 2003. It however, held by its impugned common order dated 20.4.2007, that NTPC was liable to pay interest on the differential amounts on the grounds of justice, equity and fair-play. The NTPC has therefore, filed three Civil Appeals being Civil Appeal Nos. 2451/2007, 2452/2007 and 2493/2007 to challenge this order. As against that, PSEB and Delhi Vidyut Board have filed Civil Appeal Nos. 3972/2007 and 4231/2007 to challenge the same order of the Appellate Tribunal to the extent it rejected their claim for interest under Section 62(6) of the Electricity Act.

Main questions for determination –

5. These Civil Appeals therefore raise two principle questions for determination, (a) whether the Appellate Tribunal erred in denying the interest on the differential amounts to the concerned Electricity Boards under Section 62 (6) of the Electricity Act, 2003, and (b) whether the Appellate Tribunal was justified in allowing interest on the differential amounts on the basis of justice, equity and fair-play.

6. Shri M.G. Ramachandran, learned counsel appeared for NTPC Ltd.. Shri A.K. Ganguli, Senior Advocate and Mr. Pradeep Misra, learned counsel have appeared for the concerned Electricity Boards.

7. Before we deal with these issues which arise with these appeals, we must note that the law concerning the determination of tariff of electricity has undergone changes from time to time.

(i) Earlier the Electricity (Supply) Act, 1948 was governing

the field. The Central Government was then determining the tariff for the power supplied by NTPC under Section 43 A (2) of the Act, since NTPC is a Government of India enterprise.

(ii) The Electricity Regulatory Commissions Act 1998 was enacted for distancing of the Government from determination of tariffs. It created the Central Commission. The act, came into force on 25.4.1998. Tariff determination and other Regulatory functions as far as power generation of NTPC was concerned, no longer remained with the Central Government, and came to be vested in the Central Commission.

(iii) The Electricity Act, 2003, came into force from 10.6.2003 as a comprehensive piece of legislation. Section 185 of this Act, repealed the Electricity Supply Act, 1948 and the Electricity Regulatory Commissions Act, 1988 as well as the Indian Electricity Act, 1910. In view of the proviso to Section 61 of the Electricity Act, 2003, however the act became available for the determination of tariff of NTPC from 1.4.2004. The Central Commission constituted under the Electricity Regulatory Commissions Act continued to exercise its functions under the Electricity Act, 2003 in view of Section 76 of the Electricity Act, 2003.

8. As noted above earlier, under the Electricity Supply Act, 1948, the Central Government was the tariff determining authority for NTPC, since it is a wholly owned corporation of the Central Government. This was on account of proviso of Section 43A (2) of the Electricity Supply Act 1948, which reads as follows:-

"*43A.* ***Terms, conditions and tariff for sale of electricity by Generating Company***

(1).....

(2) .....

Provided that the terms, conditions and tariffs for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the Government or Governments concerned."

9. The NTPC has been making bulk supply of power to the concerned Electricity Boards from these Power Generating Stations. The bulk power supply agreements mostly provided that the tariff will be as per the notification issued by the Government of India under Section 43A of the Electricity Supply Act, 1948. We may refer to the bulk power supply agreement for Rihand Power Station. The power supply agreement with respect to Rihand Station dated 2.11.1992 provided that the tariff as per those notifications will be applicable for a specified period but it also added thereafter as follows:-

"In case a new tariff for the period beyond above is not finalized before that date, the Beneficiary (ies) shall continue to pay to NTPC for the power supplied from the STPC beyond this date on adhoc basis in the manner detailed in this notification."

Similar was the position with respect to power supply agreements concerning Kawas and Gandhar Power Stations.

10. After the Central Commission was constituted with the authority for determining the tariff fixation, the Central Commission published Central Electricity Regulatory Commission (Conduct of Business) Regulation 1999. Second proviso to Regulation 79 (2) thereof provided as follows:-

"Provided further that the existing tariff being charged by generating companies owned by or controlled

by the Central Government shall continue to be charged after the date of the notification as referred to in the above regulation for such period as may be specified in the notification without prejudice to the powers of the Commission to take up any matter relating to tariff falling within the scope of the Section 13 of the Act."

Accordingly, the Central Commission issued notifications from time to time on 12.5.1999, 4.4.2001 and 21.10.2003 continuing the existing tariff as on 31.3.2001 until further orders to be passed by the Commission. NTPC raised the monthly invoices as per the existing tariff and the Electricity Boards honoured the same.

11. NTPC duly filed the tariff petitions as required by the Central Commission for the tariff determination, however the proceedings before the Central Commission took their own time and the petitions were ultimately decided on 1.4.2005, 7.4.2005 and 2.6.2006. . As stated earlier when the tariff was finalised, the rates were in fact reduced, and the Electricity Boards became entitled to receive the excess amounts paid in the meanwhile. We must note at this stage that while determining the tariff, the appropriate Commission has to safeguard the consumer's interest as well as recovery of cost of electricity in a reasonable manner under Section 61(d) of the Act which is what is done by the Commission. Subsequently, NTPC adjusted the excess amount which it had received in the intervening period in the subsequent bills to the Electricity Boards.

12. As stated earlier, when the tariff was determined, the Central Commission did not award any interest on the excess amounts which were collected by the NTPC in the meanwhile, and therefore, the Electricity Boards filed appeals before the Appellate Tribunal by invoking Section 111 of the Electricity Act 2003. The Appellate Tribunal has taken the view that the claim of the Electricity Boards could not be entertained under Section 62 (6) of the Electricity Act though they are entitled to it on the

basis of justice, equity and fair-play. It is this order which is under consideration in this matter.

Consideration of rival submissions

13. For deciding the issue of applicability of Section 62(6), we may refer to the relevant Section 62 of the Electricity Act, 2003, which reads as follows:-

"Section 62 - Determination of tariff

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—

(a) supply of electricity by a generating company to a distribution licensee:

PROVIDED that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as

may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

14. If we look to this Section 62, sub-section (1) thereof lays down the authority of the Appropriate Commission to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee. It also permits the appropriate commission to fix the minimum and maximum ceiling of tariff in certain situations. Sub-section (2) lays down that the Appropriate Commission in its process of determining the tariff may call upon the licensee or a generating company to furnish particulars with respect to

generation, transmission and distribution of power. Sub-section (5) permits the commission to require the licensee or the generating company to comply with the procedure to be specified by the commission for calculating the expected revenue from the tariff which it is permitted to recover. Sub-section (3) lays down that while determining the tariff the commission will take into consideration consumer's load factor, power factor, voltage, total consumption of electricity during any specified period, the geographical position of any area, the nature of supply and the purpose for which it is sought. It may differentiate in the matter of determining the tariff on such basis, though ofcourse it is not expected to show any undue preference to any consumer of electricity. Sub-section (4) lays down that the tariff once fixed will normally operate for a financial year, and will not be amended more frequently than once in a financial year.

15. On this background sub-section (6) lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this section, the excess amount shall be recoverable by the person who has paid such excess price or charge alongwith interest at bank rate. We have noted that the earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words 'tariff determined under this section' indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections. The counsel for the Electricity Boards submitted that this sub-section should be applied even during the period when the tariff was being determined (as in the present case), and if in the final determination the price fixed is lesser than what was charged during the intervening period, then interest should be read as recoverable for the excess amount collected during the intervening period. In this connection, we must note that this sub-section does not refer

to the period during which the tariff is being determined. It also does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount. This sub-section further states that this right to claim interest is without prejudice to any other liability incurred by the licensee. Besides what is prohibited is recovery of price or charge exceeding the tariff determined under this section and then only, the generating company will have to pay the interest on the difference. That is why the Appellate Tribunal has observed that it is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under section 62 (6), that such person can claim the excess price or charge paid by him alongwith interest. For the reasons stated above we are unable to accept the submission on behalf of the Electricity Boards, and are in agreement with the view taken by the Appellate Tribunal that Section 62 (6) cannot be pressed into service to claim interest on the differential amounts in the present case.

16. The learned counsel for the Electricity Boards pointed out that the Central Commission has amended the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 by a notification dated 01.06.2006 and has recognized the appropriateness of allowing interest on the differential amount between the provisional tariff and final tariff by inserting Regulation 5A which reads as under:-

> "*5A. Provisional tariff or provisional billing of charges, wherever allowed by the Commission based on the application made by the generating company or the transmission licensee of by the Commission on its own motion or otherwise, shall be adjusted against the final tariff approved by the Commission.*
>
> Provided that where the provisional tariff charged exceeds the final tariff approved by the Commission under these regulations, the generating company or the

transmission licensee, as the case may be, shall pay simple interest at the rate of 6% per annum, computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment.

Provided further that where the provisional tariff charged is less than the final tariff approved by the Commission, the beneficiaries shall pay simple interest at the rate of 6% per annum, computed on monthly basis on the deficit amount from the date on which final tariff will be applicable up to the date of billing of such deficit amount.

Provided also that excess/deficit amount alongwith simple interest at the rate of 6% shall be adjusted within three months from the date of the order failing which the defaulting utility/beneficiary shall be liable to pay penal interest on excess/deficit amount at the rate as may be decided by the Commission."

It was submitted that the principle contained in this regulation should be applied during the period covered in the present case also.

17. The counsel for NTPC on the other hand pointed out that the price determined in the present case is for the period 1.4.2001 to 31.3.2004 and even the orders passed by the Central Commission are dated 1.4.2005, 7.4.2005 and 2.6.2006, and that this regulation of 1.6.2006 cannot have a retrospective effect. What was prevalent at the relevant time was regulation 79(2), the second proviso of which has been quoted above, and it did not contain any such provision for interest during the intervening period.

18. We have noted the submissions of both the counsel. It is very clear that prior to 1.6.2006 there was no such specific provision for claiming interest for the intervening period. The very fact that such a regulation was required to be issued,

indicates the necessity for having such a regulation, but at the same time it is not possible to make it applicable retrospectively. The provision for charging interest is a substantive provision which has to be specifically provided and would become operative when provided. In the circumstances, the submission based on this new regulation also cannot help the Electricity Boards to claim interest on the differential amounts.

19. Now, we come to the issue as to whether the Appellate Tribunal was right in awarding the interest on the differential amounts on the basis of justice, equity and fair-play. The Appellate Tribunal has awarded interest at an average of the prevailing lending rates (PLR) of the Reserve Bank of India to the Banks during the relevant period. In this connection, we must note that the Central Commission had, by issuing notifications continued the tariff existing on 31.3.2001 as an interim measure until the final tariff was determined, and the notifications did not provide in any way for interest. The Appellate Tribunal has commented that the notifications were issued mechanically without bestowing any prima facie consideration as to what should be the tariff as an interim arrangement. The Appellate Tribunal was of the view that in passing an interim or provisional order, an examination of all the pros and cons was necessary. The interim arrangement continued for over a period of four years and according to the Appellate Tribunal, it resulted into an undue monetary benefit to the NTPC.

20. In coming to its conclusion, the Appellate Tribunal relied upon the judgment of this Court in *BSES Ltd. Vs. Tata Powers Co. Ltd.* reported in [2004 (1) SCC 195] wherein it was observed that an interim arrangement is normally based on a prima facie consideration of the matter and on broad principles without examining the matter in depth. In this matter the Court held that payment by way of interim arrangement to the generating company would be subject to the final adjustment

by awarding interest. However, it is material to note that in this matter the dispute regarding the standby charges was referred for the determination of the commission, and since the same were not paid during the pendency of various proceedings, the payment of interest was directed in that context.

21. The counsel for the Electricity Boards laid stress on the judgment of this Court in *South Eastern Coalfields Ltd. Vs. State of M.P. and others* reported in [2003 (8) SCC 648] wherein this Court had held that a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by the award of interest which would also be payable in equity. In this matter, the appellants were operating coal mines in the State of Madhya Pradesh. The Central Government enhanced the royalty payable on coal, and the State Government was entitled to recover the same from the appellant who would pass on the burden to their purchasers. The appellant, however, challenged the hike in royalty in the High Court of M.P. Initially an interim order was passed and subsequently the notification was quashed. On appeal, the order of the High Court was set-aside. Subsequently, the State Government claimed interest from the appellant at the rate of 24% per annum in regard to the period when the enhanced royalty was delayed. The appellant passed on this claim to their consumers who challenged the same and succeeded in the High Court in reducing the interest from 24% to 12%. While dismissing the appeal filed by the appellant, this Court held that the interest would be payable even in equity and on the basis of the principle of restitution which is recognized in Section 144 of Code of Civil Procedure.

22. In this connection, it is material to note that the claim in *South Eastern Coalfields* was essentially covered under Section 61 of Sale of Goods Act 1930, and the interest by way of damages was payable as per this statutory provision itself. The liability had been crystallized and the interest had become payable because of the failure to pay the amount as per the

liability. Besides, there was nothing in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79(2) of 1999 (supra) which permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz. that interest was not payable earlier.

23. *Union of India Vs. Rallia Ram* reported in AIR 1963 SC 1685 was one of the earliest cases where the principles concerning payment of interest by way of restitution came up for consideration. In August 1946, the Government had entered into a contract with the respondent for sale of a stock of American cigarettes lying at different places. After some deliveries were taken by the respondent, he found part of the stock unfit for use. The Government cancelled the contract and asked the respondent to return the cigarettes which were unfit for use. An arbitration followed and compensation was awarded for the loss suffered by the supplier alongwith interest. This Court noted that there was no provision for interest in the contract or in the Act, and set-aside the award to the extent it granted interest. The Court laid down the proposition that interest is payable in equity only if there are circumstances attracting equitable jurisdiction or under the Interest Act and quoted with approval the propositions laid down in *Bengal Nagpur Railway Co. Vs. Ruttanji Ramji* reported in [AIR 1938 PC 67].

24. In *Union of India Vs. Watkins Mayor and Co.* reported in [AIR 1966 SC 275], the plaintiff had entered into a contract with the defendant Union of India for supply of drums made out

of iron sheets to be supplied by latter. Though the iron sheets were initially supplied to the plaintiff, subsequently the defendant cancelled the contract and removed the iron sheets in small quantities from time to time for a period of nearly five years. Plaintiff claimed the compensation under various heads, claiming that they had acted as bailee for the defendants. This included (a) godown rent, (b) chowkidar's salary, (c) terminal tax, (d) cartage, (e) unloading charges, (f) cooliage and (g) interest. This Court accepted the claim of the plaintiff with regards to items (a) to (f) but rejected the claim with respect to interest. The Court relied upon the observations of Judicial Committee of the Privy Council in *Bengal Nagpur Railway Co. Vs. Ruttanji Ramji* (supra) to the following effect :-

> "*As observed by Lord Tomlin in Maine and New Brunswick Electrical Power Co. v. Hart (1929) AC 631, at p. 640: (AIR 1929 PC 185 at p. 188), 'In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."*

It also referred to the judgment and ratio in *Union of India Vs. Rallia Ram* (supra) and then held that interest would be claimable only if there is an agreement or when the interest is payable by the usage of the trade having force of law or there is some substantive statutory provision. Thus, rule of equity could not be brought in to justify the claim of interest.

25. In *Commissioner of Sales Tax Vs. Hindustan Aluminum Corporation* reported in (2002 (127) STC 258), the dispute was regarding the classification of certain products of a dealer for payment for sales tax. After the dispute was resolved by this Court, the dealer made the payment of the differential amount of tax. The department claimed interest only from the date of filing of return. This Court held that there was no liability on the dealer for the amount of tax unpaid which was

the subject matter of dispute until the dispute was resolved. Ideas of equity could not be brought in such manner and there could be no liability for interest until assessment was finalised.

26. It is true that the power to make restitution is inherent in every Court as observed by this Court in *Kavita Trehan and Anr. Vs. Balsara Hygiene Products Ltd.* reported in (1994 (5) SCC 380) which was relied upon by the council for the Electricity Boards. Thus, restitution will apply even where the case does not strictly fall under Section 144 of CPC . However, we must note that Kavita Trehan was a case where the submission was made to the effect that termination of the contract was wrong and an injunction was sought in a civil suit to restrain the respondent from interfering with the disposal of goods. It was in this context that the principle of restitution was applied. It is therefore, difficult to appreciate as to how the Appellate Tribunal could bring in either the principles of justice, equity and fair-play or that of restitution in the present case. What is important to note is that in paragraph 16 of its order the Appellate Tribunal has specifically observed in terms that this was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat. This being the position the principles of equity, justice and fair-play could not have been brought in to award interest to the Electricity Boards.

27. It is true that there was delay in the process of determination of the tariff. We are informed that the Commission became functional only on 15.5.1999. NTPC had filed the tariff petitions duly as required by the Central Commission. The delay in the case of Kawas and Gandhar Power Stations was because of the Commission requiring them to appropriately devise norms and parameters. As far as Rihand Station is concerned, one of the beneficiaries, namely Rajasthan Rajya Vidyut Vitaran Nigam Limited had obtained stay of proceedings before the Commission from the High Court of Rajasthan. NTPC was not in any way responsible for these factors.

Ultimately, the tariff was reduced, but the tariff charged by the NTPC in the meanwhile was in accordance with the rates permitted under the notifications issued by the Commission. It cannot, therefore, be said that NTPC had held on to the excess amount in an unjust way to call it unjust enrichment on the part of NTPC, so as to justify the claim of the Electricity Boards for interest on this amount.

28. Submissions were advanced before us on the question as to whether the tariff determination under Section 62 was in any way legislative or quasi-judicial. The counsel for NTPC drew our attention to a number of judgments concerning price fixation.

a. In *West Bengal Electricity Regulatory Commission V. CESC* (2002 (8) SCC 715), the court noted, in the context of electricity tariff determination under the Electricity Regulatory Commissions Act, 1998, that price fixation is in the nature of a legislative function, and hence, generally, no hearing is required. However, as the statute provides for a hearing opportunity, the same must be provided.

b. Similar view was taken in this context in the following cases:

(i) Levy sugar pricing under the Essential Commodities Act, 1955 has been held to be a legislative function in *Shri Sitaram Sugar Mills Vs. UOI* (1990 3 SCC 223), *Saraswati Industrial Syndicate V. UOI* (1974 (2) SCC 630), *Malaprabha Sugars V. UOI* (1994 1 SCC 648) and *Mahalakshmi Sugar Mills V. UOI* (2009 (16) SCC 569).

c. Coal price fixation has been held to be a legislative function under the Essential Commodities Act, 1955 in *Pallavi Refractories V. Singareni Collieries* (2005 (2) SCC 227).

d. Fixation of the price of Natural Gas under the Essential Commodities Act, 1955, is held to be legislative function in *ONGC V. Assn. of Natural Gas Consuming Industries of Gujarat* (1990 Supp. (1) SCC 397).

e. In *Prag Ice and Oil Mills V. UOI* (1978 (3) SCC 459), the court in the context of price fixation of oil under Essential Commodities Act, 1955, observed as under-

"*We think that unless by the terms of particular statute or order, price fixation is made a quasi judicial function for specified purposes or cases, it is really legislative in character. The legislative measure does not concern itself to the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind of class.*"

29. The counsel for the Electricity Boards, however, drew our attention to a recent judgment of a Constitution Bench of this Court in *PTC India Ltd. Vs. Central Electricity Regulatory Commission* reported in (2010 (4) SCC 603), wherein this Court has observed in para 50 as follows:-

"50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff……"

30. In the facts of the present case, however, this

controversy as to whether tariff fixation is legislative or quasi-judicial need not detain us any further. As held by the Constitution Bench, price fixation is really legislative in character, but since an appeal is provided under Section 111 of the Act, it takes a quasi-judicial colour. That by itself cannot justify the claim for interest during the period when the proceedings were pending for the tariff fixation. The tariff that was being charged at the relevant time was as per the previous notifications. Once the tariff was finalized subsequently, NTPC has adjusted the excess amount which it has received. It cannot be said that during this period the NTPC was claiming the charges in an unjust way, to make a case in equity. Our attention has been drawn to the industry practice which also shows that on all such occasions interest has never been either demanded or paid when the price fixation takes place. As held by us hereinabove, claim for interest could not be covered under Section 62 (6). The provision for interest has been introduced by regulations subsequent to the period which was under consideration before the Commission. If we apply the propositions in *Rallia Ram* (supra) and *Watkins Mayor* (supra), we find that the terms of the supply agreement, the governing regulation and notifications did not contain any provision for interest. The industry practice did not provide for it as well. In view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution.

31. In the circumstances, it is not possible to accept the submission that the Appellate Tribunal erred in any way in declining to award interest under Section 62 (6) of the Act. There was however, an error on its part in granting the same under the concept of equity, justice and fair-play. Hence, we allow the appeals filed by the NTPC and dismiss those which are filed by the Electricity Boards. Civil Appeal Nos. 2451, 2452 and 2493/2007 are allowed. Civil Appeal Nos. 3972 and 4231/2007 are dismissed. Parties will bear their own costs.

N.J. Appeals disposed of.

STATE OF MADHYA PRADESH

v.

NARMADA BACHAO ANDOLAN & ANR.

I.A. NOS. 256-270 & 271-285 OF 2011

IN

CIVIL APPEAL NOS. 2083-2097 of 2011

SEPTEMBER 29, 2011

[J.M. PANCHAL, DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Adverse remarks: Expunction of – In a land acquisition case, the State Authorities took a decision to abandon the land acquisition proceedings – Before High Court, applicant-respondent pleaded that order of the Authorities to abandon the proceedings was void ab initio as possession of the land in dispute had already been taken – High Court held that as the possession of land had already been taken, it was not permissible for the Authorities to resort to withdrawal of the proceedings – Before Supreme Court, applicant took stand that the tenure holders of the land had already been dispossessed and, therefore, the question of abandoning the land acquisition proceedings could not arise – Authorities pleaded that actual physical possession was still with the tenure holders and the stand taken by applicant was not factually correct – The Supreme Court directed appointment of Local Commissioner to find out who was in possession – Local Commissioner recorded the statements of tenure holders in the presence of representative of the applicant and filed the report that the tenure holders were in actual physical possession of the said land – The applicant was given opportunity to file objections – Thereafter, the Court held that since the finding of the Local Commissioner was recorded in the presence of representative of applicant, the same was worth acceptance and in view thereof the claim made by

applicant regarding the physical possession of land was not factually correct and passed certain adverse remarks in the judgment – Application seeking expunction of remarks on the ground that the word 'possession' denoted different meaning so far as 1894 Act and Resettlement and Rehabilitation Policy were concerned and, therefore, adverse marks were made under total misconception – Held: In the instant case, the Court had not to decide the issue of justification of the tenure-holders for retaining the possession of the land rather the question was, as to who was in actual physical possession of the land – Had it been the case of justification of retaining the possession of the land by the tenure-holders without being rehabilitated, the question of appointing the Commissioner would not have arisen – The applicant cannot be permitted to make out a new case to justify expunging of adverse remarks – More so, while making certain observation against the applicant, the guidelines laid down by the Supreme Court in ***Mohd. Naim*** *had strictly been observed – Remarks were made as it was necessary to do so while deciding the controversy involved therein – However, submission made by the applicant that it has rendered great service for down trodden and poor farmers and thus applicant should not be deprived of the opportunity to represent poor peasants – In view thereof, para 145 of the earlier judgment modified to the extent that although the applicant had not acted with a sense of responsibility and not taken appropriate pleadings as required in law, however, in a PIL, the court has to strike a balance between the interests of the parties and thus it is desirable that in future the court must view presentation of any matter by the applicant with caution and care, insisting on proper pleadings, disclosure of full facts truly and fairly and should insist for an affidavit of some responsible person in support of facts contained therein – Land Acquisition Act, 1894.*

Administration of Justice: Adverse remarks – Held: Court may not be justified in making adverse remarks/strictures against a person unless it is necessary for the disposal of the case to animadvert to those aspects in regard to the remarks that were made – Adverse remarks should not be made lightly as it may seriously affect the character, competence and integrity of an individual in purported desire to render justice to the other party.

State of U.P. v. Mohammed Naim **AIR 1964 SC 703: 1964 SCR 636;** *Jage Ram, Inspector of Police and Anr. v. Hans Raj Midha* **AIR 1972 SC 1140: 1972 2 SCR 409;** *R.K. Lakshmanan v. A.K. Srinivasan & Anr.* **AIR 1975 SC 1741: 1976 (1) SCR 204;** *Niranjan Patnaik v. Sashibhusan Kar & Anr.* **AIR 1986 SC 819: 1986 (2) SCR 470;** *Major General I.P.S. Dewan v. Union of India & Ors.* **(1995) 3 SCC 383: 1995 (2) SCR 532;** *Dr. Dilip Kumar Deka & Anr. v. State of Assam and Anr.* **(1996) 6 SCC 234: 1996 (5) Suppl. SCR 763;** *State of Maharashtra v. Public Concern for Governance Trust and Ors.* **AIR 2007 SC 777: 2007 (1) SCR 87 – relied on.**

Case Law Reference:

1964 SCR 636	**relied on**	**Para 10, 15**
1972 2 SCR 409	**relied on**	**Para 11**
1976 (1) SCR 204	**relied on**	**Para 11**
1986 (2) SCR 470	**relied on**	**Para 11**
1995 (2) SCR 532	**relied on**	**Para 11**
1996 (5) Suppl. SCR 763	**relied on**	**Para 11**
2007 (1) SCR 87	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : I.A. Nos. 256-270 & 271-285 of 2011 in Civil Appeal No. 2083-2097 of 2011.

From the Judgment & Order dated 23.9.2009 of the High Court of Madhya Pradesh at Jabalpur in IA Nos. 4679/09, 4804/

09, 10476/08, 10973/08, 7009/09, 8103/09, 8890/09, 8955/09, 7010/09, 8078 of 2007, 8079/09, 8211/08, 5249/09, 7599/09 and 6407/09 in W.P. No. 4457 of 2007.

WITH

I.A. NOS. 31-45 & 46-60 of 2011

Civil Appeal Nos. 2098-2112 of 2011

C.D. Singh, Ram Swarup Sharma for the Appellant.

Nikhil Nayyar for the Respondents.

The Order of the Court was delivered by

O R D E R

J.M. PANCHAL, J. 1. The respondent Narmada Bachao Andolan (hereinafter called as NBA) has filed the aforesaid applications for expunging certain adverse remarks made in paragraphs 129-132 and 145 of the judgment and order in the aforesaid civil appeals dated 11.5.2011.

2. These applications have been filed on the grounds that adverse remarks made against the applicants are unwarranted and uncalled nor based on any material/evidence on record. More so, they were not necessary to adjudicate upon the controversy involved in the appeals. Thus, the same may be expunged.

In the said appeals, a large number of factual and legal issues had arisen. However, this court was concerned with acquisition of land to the extent of 284.03 hectares falling in 5 villages named therein for the reason that the State authorities had taken a decision to abandon the land acquisition proceedings and not to conclude the same. Before the High Court the applicants had pleaded that order of the Authorities to abandon the proceedings was void ab-initio as possession of the land in dispute had already been taken. The High Court

came to the conclusion that as the possession of the land in dispute had already been taken it was not permissible for the appellants herein to resort to the provisions of Section 48 of the Land Acquisition Act, 1894 (hereinafter called 1894 Act).

3. When the matter came in appeal before this Court, the factual controversy arose as to who was in actual physical possession of the land. The NBA had taken a stand that as the tenure holders of the said land had already been dispossessed the question of abandoning the land acquisition proceedings could not arise. The State authorities submitted that actual physical possession is still with the tenure holders and the stand taken by the NBA was not factually correct. It was in view thereof that this court on 24.2.2011 passed the following order:

> "The learned counsel appearing for the parties would be at liberty to submit their written submissions within 10 days from today in SLP(C) Nos. 31047-31061/2009 & SLP(C) Nos. 34195-34209/2009. However, during the course of hearing it has been seriously contended by the State of M. P. that actual physical possession of the land ad-measuring 284.03 hect. falling in five villages viz. Dharadi, Kothmir, Narsinghpura, Nayapura and Guwadi has not been taken by the State, in spite of resorting to acquisition proceedings to a certain extent. This fact has been seriously refuted by respondent No.1 i.e. Narmada Bachao Andolan and it has been contented that actual physical possession has been taken, which is projected in various documents including the affidavits sworn by the oustees/ cultivators of the said land. They have also placed reliance on the entries in the revenue records which reflected the position that the Executive Engineer of the Company was in possession of the said land measuring 284.03 hect. also. In the light of serious contentions raised by both the parties it is in fact not possible for us to come to a definite conclusion as to who is in actual possession of the land today. In view of this, we deem it fit and proper to request

the learned District Judge, Indore to make a spot inspection and submit his report with regard to the land admeasuring 284.03 hect. situated in the aforesaid five villages. Before going to the spot, he will inform the parties concerned so that they may, if so desire, remain present at the time of inspection and render proper assistance in identifying the land in question. We clarify that we are not concerned with the total land of those villages, rather the controversy is limited to 284.03 hect., which the State does not want to acquire. It may also be mentioned in the report as to whether there is any crop standing on the said land or part of it and if it is so, who had sown the crop. If the crop has recently been removed or land has been tilled, who has done so. Let the report be submitted by the District Judge within a period of 15 days from the date of communication of this order."

4. Such an order was necessary for the reason that the affidavit filed on behalf of `NBA' dated 1.7.2010 clearly provided that the order passed by the authorities dated 2.4.2009, not to acquire the land of the 5 villages was a nullity and void ab-initio because the possession of the land had already been taken in December 2007.

5. In pursuance of the said order, the District Judge, Indore videographed the entire land in dispute and recorded the statements of the tenure-holders in the presence of the representative of `NBA' and came to the conclusion that the tenure-holders were in actual physical possession of the said land.

6. The copy of the report along with CDs were supplied to the parties. They were given opportunity and they availed the same by filing objections thereto and advanced their arguments. It was after considering the same, the matter was decided, wherein finding has been recorded that as the report was prepared in presence of the representative of `NBA', the

same was worth acceptance and it was in view thereof, further a finding was recorded that the claim made by the `NBA' regarding the physical possession of the land was not factually correct. The `NBA' had been afforded full opportunity to make out the case. Their past conduct was also pointed out and dealt with in paragraph 133 of the judgment dated 11.5.2011.

7. In fact the application filed by the State under Section 340 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) was at a later stage, i.e. on 31.3.2011 and this court has not decided the same. Therefore, the contents of that application or issuance of notice on the same did not have any bearing so far as the main judgment is concerned.

8. It is in this background the submissions have been advanced by Shri Rajinder Sachar, Shri Rajiv Dhavan, learned senior counsel and Shri Sanjay Parikh that there was no occasion for the court to pass the adverse remarks in the aforesaid paragraphs of the judgment as it amounts to black listing the NBA. The NBA had taken a consistent stand throughout the proceedings that the word 'possession' denotes different meanings so far as the 1894 Act and R & R Policy are concerned. In law it may be permissible under the 1894 Act that a person may be dispossessed but he may continue in possession because of the R & R Policy. Therefore, adverse remarks have been made by this court under total misconception and the same be expunged.

9. On the contrary, Shri P.S. Patwalia, learned senior counsel has vehemently opposed the applications contending that NBA cannot be permitted to make a totally new case. The only issue involved had been as who was in actual physical possession of the land and had it been the case of NBA that the tenure holders were not in possession of the land, question of appointing the Commissioner i.e. District Judge, Indore would not have arisen. Accepting the submissions made by the applicants would render the order dated 24.2.2011 insignificant/ meaningless as a futile exercise. Thus, the applications are

liable to be rejected.

10. In *State of U.P. v. Mohammad Naim,* AIR 1964 SC 703, this Court was asked by the State of U.P. – the appellant, to quash the adverse remarks made by the High Court of Allahabad against the police department as a whole e.g.- "That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force."

This Court held that the court in its inherent jurisdiction can expunge the adverse remarks suo moto or even on application of a party. However, there must be a ground for expunging as such remarks were not justified, or were without foundation, or were wholly wrong or improper and expunging thereof is necessary to prevent abuse of the process of the court or otherwise to secure the ends of justice. However, the court must bear in mind that such jurisdiction being of exceptional nature must be exercised only in exceptional cases. The cardinal principle of the administration of justice requires for proper freedom and independence of Judges and such independence must be maintained and Judges must be allowed to perform their functions freely and fairly and without undue interference by anybody, even by this Court. However, it is also equally important that in expressing their opinions the Judges must be guided by consideration of justice, fair play and restraint. It should not be frequent that sweeping generalisations defeat the very purpose for which they are made. Thus, it is relevant to consider:

(a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;

(b) whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) whether it is necessary for the decision of the case, as

an integral part thereof, to animadvert on that conduct.

11. This view has been persistently approved and followed by this Court as is evident from the judgments in *Jage Ram, Inspector of Police & Anr. v. Hans Raj Midha,* AIR 1972 SC 1140; *R.K. Lakshmanan v. A.K. Srinivasan & Anr.,* AIR 1975 SC 1741; *Niranjan Patnaik v. Sashibhusan Kar & Anr.,* AIR 1986 SC 819; *Major General I.P.S. Dewan v. Union of India & Ors.,* (1995) 3 SCC 383; *Dr. Dilip Kumar Deka & Anr. v. State of Assam & Anr.,* (1996) 6 SCC 234; and *State of Maharashtra v. Public Concern for Governance Trust & Ors.,* AIR 2007 SC 777.

12. Thus, the law on the issue emerges to the effect that the court may not be justified in making adverse remarks/ passing strictures against a person unless it is necessary for the disposal of the case to animadvert to those aspects in regard to the remarks that have been made. The adverse remarks should not be made lightly as it may seriously affect the character, competence and integrity of an individual in purported desire to render justice to the other party.

13. In the case, at hand, the Court had not to decide the issue of justification of the tenure-holders for retaining the possession of the land rather the question was, as who is in actual physical possession of the land. Had it been the case of justification of retaining the possession of the land by the tenure-holders without being rehabilitated, the question of appointing the Commissioner i.e. District Judge, Indore, would not have arisen.

14. Observations/remarks made in the judgment dated 11.5.2011 are based on the pleadings taken into consideration as has been taken note of in paras 114 and 115 which mainly read as under:

"114. The High Court while dealing with the said applications did not deal with the issue specifically as to

whether the possession of the land has actually been taken or even symbolic possession has been taken by the State; as to whether the persons interested have been evicted from the said land; or they have voluntarily abandoned their possession; or they are still in physical possession of the land; or as to whether after being evicted they had illegally encroached upon the land in dispute. A direction has been issued observing as under:

> "The lands in these 5 villages of the oustees were acquired by notifications issued under the Land Acquisition Act, and the NVDA has now passed an order on 2.4.2009 saying that the land/property of these 5 villages shall not be acquired and the action taken till now be dropped as per the provisions of law…….The respondents, therefore, will have to provide all the rehabilitation benefits to the villagers of the 5 villages and for the purpose of rehabilitation, the order dated 2.4.2009 of the NVDA is of no consequence. The two IAs stand disposed of."

115. The appellants herein have raised an objection that the tenure holders of the said land are still in actual physical possession and they had never been evicted. However, on behalf of the respondent i.e. Narmada Bachao Andolan, Shri Alok Agrawal, Chief Activist of the organisation, has filed the counter affidavit dated 1.2.2010 before this Court, wherein it has specifically been mentioned as under:

(a) ……..

(b) The order dated 2.4.2009 as not to acquire the land of the five villages is a nullity and void ab initio because the possession of the lands has already been taken. The land has already vested in the State. This may be seen from the judicial orders of Reference Courts Devas; the land record of the revenue authorities of the State Government,

the order of the Land Acquisition Officer and the affidavits of the concerned oustees which were placed on record before the said authorities.

(c) …..

(d) …..

(e) ……

(f) ……

(g) ……

(h) The oustees of the five villages had filed a large number of affidavits before the authorities/courts concerned stating that possession of their lands/properties acquired had been taken in December 2007.

(Emphasis added)

15. Thus, in view of the above, the arguments advanced on behalf of the applicants are not justified. The applicants cannot be permitted to make out a new case to justify expunging of adverse remarks. More so, while making certain observation against the `NBA' the guidelines laid down by this Court in *Mohd. Naim* (Supra) had strictly been observed. Remarks have been made as it was necessary to do so while deciding the controversy involved therein. The submissions so made are not worth acceptance.

However, learned counsel appearing for the applicants have submitted that the NBA has rendered great service for a long number of years to the down trodden and poor farmers and thus NBA should not be deprived of the opportunity to represent poor peasants. Mr. Sanjay Parikh learned counsel has expressed remorse on behalf of the applicants that the applicants ought to have acted with more responsibility.

16. In view of the above, para 145 of the judgment stands modified to the extent as under:

> "In view of the above, we reach the inescapable conclusion that the NBA has not acted with a sense of responsibility and not taken appropriate pleadings as required in law. However, in a PIL, the court has to strike a balance between the interests of the parties. The court has to take into consideration the pitiable condition of oustees, their poverty, inarticulateness, illiteracy, extent of backwardness, unawareness also. It is desirable that in future the court must view presentation of any matter by the NBA with caution and care, insisting on proper pleadings, disclosure of full facts truly and fairly and should insist for an affidavit of some responsible person in support of facts contained therein."

17. With these observations, the applications stand disposed of.

D.G. Applications disposed of.

JAMALUDDIN

v.

STATE OF JAMMU & KASHMIR AND ORS.

(Civil Appeal No. 8093 of 2004)

SEPTEMBER 29, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

Social Status certificate – Candidates belonging to Scheduled Castes or Scheduled Tribes – Seeking age relaxation – On facts, appellant's application for the post of Munsif in the Scheduled Tribe Category rejected since the appellant was overage – High Court not relaxing the age of appellant – Held: Order passed by the High Court is justified – If there is no age relaxation in the Rules, the same cannot be brought in by any judicial interpretation – Advertisement of the Public Service Commission issued in the year 2002, required the persons concerned to be of less than thirty five years of age at the relevant time – There was no age relaxation in favour of the candidates belonging to the Scheduled Castes or Scheduled Tribes, though there was a q antum of reservation provided for them – Jammu and Kashmir Civil Services (Judicial) Recruitment Rules, 1967.

Appellant belongs to Scheduled Tribe. He was appointed as an adhoc Munsif in the Jammu & Kashmir Judicial Service. A Notification was issued by the Jammu & Kashmir Public Service Commission on 04.12.2001 for regular appointment whereby person should not be more than thirty five years of age as on the 1st January of the year in which the Notification was issued. The appellant applied for the post of Munsif in the Scheduled Tribe Category. The appellant's application was rejected since he was overage by eleven months. The appellant filed a writ petition. The Single Judge dismissed the petition

since he was overage. The Division Bench also dismissed the appeal. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 In the instant case the advertisement of the Public Service Commission issued in the year 2002, required the persons concerned to be of less than thirty five years of age at the relevant time. That age limit applied to all the candidates. There was no age relaxation in favour of the candidates belonging to the Scheduled Castes or Scheduled Tribes, though there was a quantum of reservation provided for them. Therefore, the earlier resolution of the Full Court of the High Court passed in February 1982 has to be read as providing only for the quantum and not for any age relaxation. If there is no age relaxation in the Rules, the same cannot be brought in by any judicial interpretation. In the circumstances, there is no error in the judgment of the Single Judge or that of the Division Bench of the High Court. [Para 15] [700-C-E]

1.2 There is some kind of anomaly in the sense that there is no age relaxation at the level of Munsifs, though it is so provided at the level of entry into the Higher Judicial Service. Although, there is no inclination to interfere with the order passed by the High Court on the judicial side, it is felt that the High Court on its administrative side should examine the issue as to whether age relaxation should be provided to the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes appearing for the Judicial Service Examination at the Munsif level as is provided to the candidates appearing for the Higher Judicial Service Examination. [Paras 13 and 16] [699-A; 700-F-G]

State of Bihar vs. Bal Mukund Sah and Ors. **AIR 2000**

SC 1296: 2000 (2) SCR 299; *Umesh Chandra Shukla vs.Union of India and Ors.* **1985 (3) SCC 721: 1985 (2) Suppl. SCR 367 – referred to.**

Riyaz Ahmad Gada vs. State of Jammu and Kashmir JKJ **(HC)(Suppl.) 2009 600;** *Syed Shamim Rizvi and Ors. vs. State of Jammuand Kashmir* **2010 (1) SLJ 281 – cited.**

Case Law Reference:

JKJ (HC) (Suppl.) 2009 600	**Cited**	**Para 9**
2010 (1) SLJ 281	**Cited**	**Para 9**
2000 (2) SCR 299	**Referred to.**	**Para 13**
1985 (2) Suppl. SCR 367	**Referred to.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8093 of 2004.

From the Judgment & Order dated 24.2.2004 of the High Court of Jammu & Kashmir in LPA No. 133 of 2003 arising out of S.W.P. No. 994 of 2002.

Ambrish Kumar, Dr. Pooja Jha, M.A. Rahman and Rameshwar Prasad Goyal for the Appellant.

Gaurav Pachnanda, Sr. AAG, Sunil Fernandes, Sidhant Goel, Yawar Ali, Bharat Sangal, R.R. Kumar Vernica Tomer, Srijana Larra, G.M. Kawoosa and N. Ganpathy for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This appeal seeks to challenge the order passed by a Division Bench of the High Court of Jammu and Kashmir dated 24.2.2004 in LPA No. 133/2003, confirming the order dated 8.9.2003 passed by a learned Single Judge dismissing the Writ Petition No. SWP 994/2002 filed by the appellant.

Facts leading to this appeal are this wise –

2. The appellant belongs to a Scheduled Tribe. He is born on 31.1.1965. He was appointed as an adhoc Munsif in the Jammu & Kashmir Judicial Service on 13.8.2001. Subsequently, he applied for the post of Munsif in the Scheduled Tribe category when a notification was issued by the Jammu and Kashmir Public Service Commission on 4.12.2001 for the regular appointments. The notification required the person to be of not more than thirty five years of age as on the 1st January of the year in which the notification was issued. In view thereof, the Commission informed him by communication dated 21.5.2002 that his application was rejected since he was overage by eleven months.

3. Being aggrieved by that order the appellant filed the above referred Writ Petition. A Single Judge who heard the matter, noted that as per rule 7 of Jammu and Kashmir Civil Services (Judicial) Recruitment Rules 1967 (Judicial Services Recruitment Rules for short), the appellant was in fact overage. This rule reads as follows:-

> "7. Age. No person shall be recruited to the service who is more than 35 years of age on the first day of January preceding the year examination is conducted by the Commission for Recruitment to the Service."

While dismissing the petition, the Single Judge noted that by the time that matter was heard, the appellant had crossed the age of 37 years which he claimed as the permissible age for the Scheduled Tribe candidates. The Division Bench which heard the Letters Patent Appeal also accepted the view taken by the learned Single Judge, and therefore dismissed the appeal.

4. Shri Ambrish Kumar, learned counsel appeared for the appellant, and Shri Gaurav Pachnanda, learned Senior Additional Advocate General of Jammu and Kashmir appeared

for the respondents. The State of Jammu and Kashmir, the Public Service Commission of Jammu and Kashmir and the High Court of Jammu and Kashmir through its Registrar General are joined as the respondents to this appeal.

5. It is pointed out on behalf of the appellant that earlier there was no appropriate reservation for the Scheduled Castes and Scheduled Tribes in the services of State of Jammu and Kashmir, and also in the services of the High Court. Hence, the then Minister of Law and Justice, Union of India wrote to the Chief Justice of the High Court on 15.5.1979 drawing his attention to this position. The Union Law Minister stated in his letter as follows:-

> "1….
>
> 2. From the information received from the Jammu and Kashmir High Court last year, it transpires that there is no provision for reservation for Schedule Castes and Scheduled Tribes in direct recruitment to the State Judicial and Higher Judicial Services.
>
> 3. ….. You will appreciate that in their present stage of development, it would be difficult for the Scheduled Castes and Scheduled Tribes to be represented adequately in the State Judicial and Higher Judicial Services unless special measures like reservation are undertaken. Since such reservation exists in other services, there does not seem to be sufficient reason why it should not be there in the State Judicial and Higher Judicial Services of the State……."

6. In view of this letter from the Union Law Minister, this subject was taken up in the Full Court Meeting of the High Court held from 23rd February to 26th February, 1982, wherein following decision was taken:-

PREAMBLE	RESOLVED
14. Reservation of Seats for Schedule castes and Scheduled Tribes in the Judicial Service and Minister Services.	14. Considered the report of Registrar and also the relevant record. We are of the opinion that the general rules framed by the Government of J&K in this behalf are also applicable to the Judicial Service as also to the Ministerial services of the Judicial Department; and such reservation are made accordingly. The Government be informed accordingly.

7. Based on this resolution, it is submitted on behalf of the appellant, that whatever are the general rules applicable to the Government employees in Jammu and Kashmir ought to be deemed as applicable to the Judicial Services as also the Ministerial Services of the Judicial Department. The age limit for entering into Government Service was upto thirty eight years of age for Schedule Castes and Schedule Tribes, and therefore the appellant ought to have been allowed to give the examination for recruitment to the post of Munsif since at that time his age was less than thirty eight years. It was submitted that the Public Service Commission was therefore in error in rejecting his application, and so also were the learned Single Judge and the Division Bench of the High Court.

8. As far as this submission is concerned, it was pointed out on behalf of the respondents that firstly at the time when this resolution was passed by the High Court in February 1982, no age relaxation was provided for entering into the services of the State of Jammu and Kashmir also, and therefore it cannot be deemed that by passing of this resolution the High Court also brought in the provision for age relaxation. At that time, the recruitment to the services under the State Government was

governed under SRO No. 394/1981. It provided only for a quantum of reservation which was 8% for the Scheduled Castes. On 28.6.1994 the State Government increased the reservation for Schedule Tribes to 10%, for Schedule Castes to 8%, and for Other Backward Classes to 25%. The appellant had appeared for the selection held in the year 2002, and at that time the same percentage with respect to the quantum of reservation was applied. Under the Judicial Services Recruitment Rules the age limit for Schedule Castes or Schedule Tribes candidates was thirty five years, but there was no further age relaxation for them, and that is how the rejection of the candidature of the appellant was justified by the Public Service Commission.

9. The learned counsel for the appellant pointed out that if we look to the letter of the Union Law Minister, the intention therein was to request the High Court to see to it that the rules in the State Judiciary are brought on par with the rules which exist in rest of India. The resolution passed by the Full Court ought to be looked at from that perspective. In view of this submission on behalf of the appellant, the respondent pointed out that the Union Law Minister's letter dated 15.5.1979 led the High Court to move in the matter. On 24.5.1979, the High Court directed the Registrar to examine the relevant rules and put up the proposal. The Registrar reported on 2.6.1979 that according to Rule 13 of the Jammu and Kashmir Schedule Castes and Backward Classes Reservation Rules 1970, the seats required to be reserved for Scheduled Castes were to the extent of 8%. There was however, no such provision in the Judicial Services Recruitment Rules. He therefore suggested that the State Government may be approached to provide for 8% reservation for the Scheduled Castes by incorporating a specific rule therein. The High Court in its subsequent meeting held on 16.6.1979 asked the Registrar to inquire with the State Government as regards the prevailing position regarding reservation, which he did. By way of a reply, the High Court received a copy of the letter dated 18.6.1979 sent by the State

Government to the Secretary Government of India, Law Department, marked for the Registrar of High Court. In this reply it was pointed out that 8% vacancies were reserved for the candidates belonging to the Schedule Castes under the Jammu and Kashmir Schedule Castes and Backward Classes Reservation Rules 1970. It was however, stated that *"these Rules are applicable to all the services under the Government except judicial services as the judiciary has since been separated from the executive."*

10. Shri Pachnanda, learned counsel appearing for the respondents pointed out that the resolution passed by the Full Court in February 1982 will have to be looked at in this background. When some other Writ Petitions were filed in the High Court concerning these rules, the Government took a stand that whatever are the rules applicable for entry into the Government Service will apply for the entry into the High Court Service. However, the High Court administration did place a conscious view before the bench that on principle the judicial services under the High Court were separate from other services under the State Government, and the rules governing recruitment to the Government Service cannot be applied for entry into the High Court Service. The stand taken by the High Court administration has been accepted in two Division Bench judgments of the High Court. First is the judgment in the case of *Riyaz Ahmad Gada Versus State of Jammu & Kashmir,* decided on 29.9.2009 and reported in [JKJ (HC) (Suppl.) 2009 600]. The second judgment is in the case of *Syed Shamim Rizvi & Ors. Versus State of Jammu and Kashmir* reported in 2010 (1) SLJ 281. In the second judgment the High Court has relied upon the judgment of this Court in *State of Bihar Vs. Bal Mukund Sah and Ors.* reported in [AIR 2000 SC 1296]. In that matter this Court has held that rules made by the Government cannot be brought into or forced upon the recruitment of persons in the judicial services. The rules framed under Article 309 by the State Government should be treated as general rules, whereas those under Article 233 to 225 should be treated as special rules applicable for the High Court.

The learned counsel for the respondents pressed into service the same submission before us by pointing out that the provision of section 110 of the Jammu and Kashmir Constitution is similar to Article 234 of the Indian Constitution concerning the subordinate judicial service.

11. The counsel for the appellant pointed out that Jammu and Kashmir Higher Judicial Service Rules 1983, provided for a relaxation of two years for the candidates belonging to Scheduled Castes and Scheduled Tribes, and therefore, similar relaxation should be made available for the entry to the Subordinate Judicial Service. Shri Pachnanda accepted that there was an anomaly in that since such relaxation of two years was provided only for the Higher Judicial Service. The age group expected for the Higher Judicial Service from the general category was 35 to 45 years, but for the Scheduled Castes and Scheduled Tribes and Other Backward Classes a relaxation in age of two years was permissible. He submitted that, this was because the candidates from these categories were not easily available for the Higher Judicial Services. That difficulty was however, not there at the Munsif level. Therefore, no such relaxation was provided at the level of entry of Munsifs into the judicial service.

12. It was pointed out on behalf of the appellant that the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, specifically provide in Rule 3 (2) that they apply to all Government employees except to the extent excluded. On this Shri Pachnanda pointed out that Judicial Services Recruitment Rules came in force subsequently in 1967, and under Rule 1(3) thereof, all previous rules stand repealed. Rule 2 thereof, specifically states that these rules will apply to the selection of Munsifs. They are specific rules, and therefore, Civil Services (CC & A) Rules of 1956 will not apply to the entry of the Munsifs in the Judicial Services.

Consideration of the rival submissions -

13. We have noted the submissions of both the counsels. We quite appreciate the submission made on behalf of the

appellant, and we quite see that there is some kind of anomaly in the sense that there is no age relaxation at the level of Munsifs, though it is so provided at the level of entry into the Higher Judicial Service. The respondents have already given their explanation as to why this distinction is made and according to them the same stands to reason. That apart, the rules made by the High Court will govern the recruitment at the Munsif level as well as at the level of the Higher Judicial Service, and they have the force of law in view of the provision of Article 234 of the Constitution of India as interpreted by this Court in *Bal Mukund Sah* (supra) which is comparable to section 110 of Constitution of Jammu and Kashmir.

14. Shri Ambrish Kumar, learned counsel for the appellant had contended that the provision for age relaxation available for recruitment to the services in the State Government should be deemed to be included in the Judicial Services Recruitment Rules. Shri Pachnanda on the other hand submitted that such a course of action was not permissible. Our attention has been drawn in this behalf, to a judgment of this Court in *Umesh Chandra Shukla Versus Union of India & Ors.* reported in [1985 (3) SCC 721]. That matter was concerning the candidates who did not qualify for the viva-voce test in the selection to the posts of Subordinate Judges in Delhi Judicial Service, since they fell short in the written examination by one or two marks only. After the finalisation of the list of candidates who had qualified for viva-voice test, a moderation of the marks in the written test was done so that such candidates with less marks become eligible. This Court held that no such ideas outside the Rules can be brought in. The Court held that these rules are to be read strictly. At the end of paragraph 13 the Court held as follows:-

> "…….Exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad law. In the circumstances, we lean in favour of a strict construction of the Rules and hold that the High Court has no such power under the Rules. We are of the opinion that the list prepared by the High Court after adding the moderation marks is liable to be struck down……"

15. In the present case the advertisement of the Public Service Commission issued in the year 2002, required the persons concerned to be of less than thirty five years of age at the relevant time. That age limit applied to all the candidates. There was no age relaxation in favour of the candidates belonging to the Scheduled Castes or Scheduled Tribes, though there was a quantum of reservation provided for them. The earlier resolution of the Full Court of the High Court passed in February 1982, will therefore, have to be read as providing only for the quantum and not for any age relaxation. If there is no age relaxation in the rules, the same cannot be brought in by any judicial interpretation. In the circumstances we do not find any error in the judgment of the Single Judge or that of the Division Bench.

16. Although, we are not inclined to interfere with the order passed by the High Court on the judicial side, we do feel that the High Court on its administrative side should examine the issue as to whether age relaxation should be provided to the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes appearing for the Judicial Service Examination at the Munsif level as is provided to the candidates appearing for the Higher Judicial Service Examination. We hope that this will be done without much delay.

17. For the reasons stated above the appeal stands dismissed, though there will be no order as to the costs.

N.J. Appeal dismissed.

M/S. ROYAL ORCHID HOTELS LIMITED AND ANOTHER
v.
G. JAYARAM REDDY AND ORS.
(Civil Appeal No. 7588 of 2005

SEPTEMBER 29, 2011.

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

CONSTITUTION OF INDIA, 1950:

Article 226 read with Article 136 – Limitation for filing of writ petition – Held: Though no period of limitation has been provided for filing a petition under Article 226, but one of the several rules of self-imposed restraint is that the High Court may not enquire into a belated or stale claim and may deny relief to the petitioner if he is found guilty of laches – Further, during the intervening period, rights of third parties may have crystallized – Interference by Supreme Court in such matters would be warranted only if it is found that the exercise of discretion by High Court was totally arbitrary or was based on irrelevant consideration – In the instant case, the High Court in earlier writ petitions had nullified the acquisition on the ground of fraud and misuse of the provisions of the Act as instead of using the acquired land for the public purpose specified in the notifications u/ss 4 and 6 of Land Acquisition Act, it was transferred to private persons - When the writ petitioner-respondent came to know that his land has also been transferred to a private entity, he made a grievance and finally approached the High Court – During the intervening period, he pursued his claim for higher compensation – Therefore, it cannot be said that he was sleeping over his right and was guilty of laches –Therefore, the discretion exercised by the High Court to entertain and decide the writ petition filed by the respondent on merits and allowing his claim cannot

be said to be vitiated by any patent legal infirmity – Land Acquisition Act, 1894 – ss. 4 and 6.

LAND ACQUISITION ACT, 1894:

ss. 4 and 6 – Land acquired for public purpose – Diversified to private persons and entities – Land owners approaching High Court challenging the acquisition proceedings and for restoring the land to them – Held: The power of eminent domain to compulsorily acquire the land of private persons cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the land owners of their constitutional right to property with a view to favour private persons – Therefore, the Corporation did not have the jurisdiction to transfer the land acquired for a public purpose to the companies and thereby allow them to bypass the provisions of Part VII of the Act – The diversification of the purpose for which the land was acquired u/s 4(1) read with s. 6, clearly amounted to fraud on the power of eminent domain – High Court, therefore, quashed the notifications u/ss 4(1) and 6 in their entirety and that judgment has become final – In the instant case, the land owner has succeeded in convincing the Division Bench of the High Court that the action taken by the Corporation to transfer his land to the private entity was wholly illegal, arbitrary and unjustified and there is no valid ground to interfere with the impugned judgment – Administrative Law – Power of eminent domain.

The State Government, at the instance of the Karnataka State Tourism Development Corporation (Corporation), issued notification dated 29.12.1981 u/s 4(1) and declaration u/s 6 of the Land Acquisition Act, 1894 acquiring the land admeasuring 37 acres 4 guntas of land comprised in various survey numbers including Survey No.122, for public purpose, namely, construction of Golf-cum-Hotel Resort near Bangalore Airport, Bangalore to be raised by the Corporation. The Special

Land Acquisition Officer passed the award dated 7.4.1986. However, in the meeting of senior officers of the Bangalore Development Authority and the Corporation held on 13.1.1987, the Managing Director of the Corporation gave out that the Corporation did not have necessary finances for deposit of cost of the acquisition and in furtherance of the decision taken in that meeting, agreements were executed by the Corporation conveying the land to private entities. This was challenged by the land owners, namely, *Mrs. Behroze Ramyar Batha, Annaiah and Smt. H.N. Lakshmamma,* before the High Court in writ petitions which were dismissed by the Single Judge of the High Court on the ground of delay. However, on appeal, the Division Bench of the High Court, allowed the claim of the land-owners and directed their lands to be returned to them subject to certain conditions.

As regards the land admeasuring 2 acres 30 guntas comprised in Survey No.122, respondent No.1 and his brothers filed applications u/s 18 of the Act for making reference to the court for enhancement of the compensation. During the pendency of reference, the Corporation invited bids for allotment of 5 acres of land including 2 acres 30 guntas belonging to respondent No.1 and his brothers for putting up a tourist resort and executed a registered lease deed dated 9.1.1992 in favour of M/s. 'URL' (predecessor of appellant no.1 in C.A. No. 7588 of 2005) purporting to lease out 5 acres of land for a period of 30 years on an annual rent of Rs.1,11,111/- per acre for the first 10 years. The brothers of respondent No.1 filed Writ Petition Nos.2379 and 2380 of 1993 seeking to quash the acquisition of land measuring 0.29 guntas and 0.38 guntas respectively, which came to their share in the family partition effected in 1968. They relied upon the judgments of the Division Bench in the cases of *Mrs. Behroze Ramyar Batha* and *Smt. H. N.*

A *Lakshmamma* and pleaded that once the acquisition had been quashed at the instance of other landowners, the acquisition of their land was also liable to be annulled. The Single Judge distinguished the cited cases and dismissed the writ petitions holding that the petitioners did not question the acquisition for a period of almost two years and approached the High Court after long lapse of time counted from the date of acquisition. The writ appeals filed by the brothers of respondent no. 1 were summarily dismissed by the Division Bench of the High Court and their special leave petitions were also dismissed by Supreme Court.

Respondent no. 1 filed a separate writ petition seeking to quash the notifications dated 29.12.1981 and 16.4.1983 insofar as the same related to the land admeasuring 1 acre 3 guntas comprised in Survey No.122 and for issue of a mandamus to the appellants to redeliver possession of the said land to him. The Single Judge, ultimately, dismissed the writ petition holding that respondent no.1 approached the court after a long lapse of time. The Division Bench of the High Court allowed the writ appeal of respondent no. 1 and quashed the acquisition of land measuring 1 acre 3 guntas comprised in Survey No.122.

In the instant appeals the questions for consideration before the Court were: (i) whether the land acquired by the State Government at the instance of the Karnataka State Tourism Development Corporation (Corporation) for the specified purpose i.e. Golf-cum-Hotel Resort near Bangalore Airport, Bangalore could be transferred by the Corporation to a private individual and corporate entities (ii) whether the Division Bench of the High Court committed an error by granting relief to respondent No.1 despite the fact that he filed writ petition after long lapse of time and the explanation given by him

was found unsatisfactory by the Single Judge, who decided the writ petition after remand by the Division Bench; (iii) whether the discretion exercised by the Division Bench of the High Court to ignore the delay in filing of writ petition is vitiated by any patent error or the reasons assigned for rejecting the appellants' objection of delay are irrelevant and extraneous; and (iv) whether the High Court was justified in directing restoration of land to respondent No.1.

Dismissing the appeals, the Court

HELD: 1.1. Although, framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution of India and the power conferred upon the High Court to issue to any person or authority including any Government, directions, orders or writs is not hedged with any condition or constraint, the superior Courts have evolved several rules of self-imposed restraint including the one that the High Court may not enquire into belated or stale claim and may deny relief to the petitioner if he is found guilty of laches. The principle underlying this rule is that the one who is not vigilant and does not seek intervention of the High Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the court after long lapse of time and there is no cogent explanation for the delay. However, no hard and fast rule can be laid down and no straightjacket formula can be evolved for deciding the question of delay/laches and each case has to be decided on its own facts. [para 17] [734-B-F]

Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur **1992 (2) SCR 155 = (1992) 2 SCC 598;** *Ramchandra Shankar Deodhar v. State of Maharashtra* **1974 (2) SCR 216 = (1974) 1 SCC 317; and** *Shankara Cooperative Housing Society Limited v. M. Prabhakar and others* **(2011) 5 SCC 607 – relied on.**

Industrial Development & Investment Company Private Limited v. State of Maharashtra **AIR 1989 Bombay 156 – referred to.**

Administrative Law by W.H.R. Wade and De Smith and Ker **– referred to**

1.2. Another principle of law is that in exercise of power under Article 136 of the Constitution, this Court would be extremely slow to interfere with the discretion exercised by the High Court to entertain a belated petition under Article 226 of the Constitution of India. Interference in such matters would be warranted only if it is found that the exercise of discretion by the High Court was totally arbitrary or was based on irrelevant consideration. [para 21] [737-H; 738-A]

Smt. Narayani Debi Khaitan v. State of Bihar **(C.A. No.140 of 1964 decided on 22.9.1964) – 1964 SCJ (Blue Print) September 283 – relied on.**

1.3. In the instant case, in the writ petition filed by respondent No.1, he had not only prayed for quashing of the acquisition proceedings, but also prayed for restoration of the acquired land on the ground that instead of using the same for the public purpose specified in the notifications issued u/ss 4(1) and 6 of the Land Acquisition Act, 1894 the Corporation had transferred the same to private persons. Respondent No.1 and other landowners may not be having any serious objection to the acquisition of their land for a

public purpose and, therefore, some of them not only accepted the compensation, but also filed applications u/s 18 of the Act for determination of market value by the court. However, when it was discovered that the acquired land has been transferred to private persons, they sought intervention of the court and in the three cases, the Division Bench of the High Court nullified the acquisition on the ground of fraud and misuse of the provisions of the Act. [para 22] [739-B-D]

1.4. Insofar as the land of respondent No.1 is concerned, the same was advertised in 1987 along with other parcels of land (total measuring 5 acres) and the Corporation executed lease in favour of the predecessor of appellant No.1 in 1992. However, no material has been placed on record to show that the said exercise was undertaken after issuing notice to the landowners. When respondent No.1 discovered that his land has been transferred to private entity, he made grievance and finally approached the High Court. During the intervening period, he pursued his claim for higher compensation. Therefore, it cannot be said that he was sleeping over his right and was guilty of laches. [para 23] [739-F-G]

1.5. A reading of the impugned judgment shows that the Division Bench of the High Court adverted to all the facts, which had bearing on the issue of delay including the one that on the advice given by an advocate, respondent No.1 had availed other remedies; and opined that the delay had been adequately explained. Thus, it cannot be said that the discretion exercised by the High Court to entertain and decide the writ petition filed by respondent No.1 on merits is vitiated by any patent legal infirmity. [para 24] [739-H; 740-A-B]

1.6. It is true that the writ petitions filed by the brothers of respondent No.1 had been dismissed by the

Single Judge on the ground of delay and the writ appeals and the special leave petitions filed against the order of the Single Judge were dismissed by the Division Bench of the High Court and this Court respectively, but that could not be made the basis for denying relief to respondent No.1 because his brothers had neither questioned the diversification of land to private persons nor did they pray for restoration of their respective shares. Besides, summary dismissal of special leave petitions did not amount to this Court's approval of the view taken by the High Court on the legality of the acquisition and transfer of land to private persons. [para 24] [740-C-D; 741-A]

Kunhayammed v. State of Kerala **2000 (1) Suppl. SCR 538 = (2000) 6 SCC 359 – relied on.**

2.1. It is pertinent to mention that the Committee of the Karnataka Legislature on Public Undertakings had in its Fifty-Second Report severely criticized the exercise undertaken by the Corporation in the matter of acquisition of 39 acres 27 guntas land. [Para 15] [731-B]

Fifty-Second report of Committee of the Karnataka Legislature on Public Undertaking **– referred to.**

2.2. In Mrs. *Behroze Ramyar Batha's* **case, the Division Bench of the High Court categorically held that the exercise undertaken for the acquisition of land was vitiated due to fraud. The Division Bench was also of the view that the acquisition could not be valid in part and invalid in other parts, but did not nullify all the transfers on the premise that other writ petitions and a writ appeal involving challenge to the acquisition proceedings were pending. In *Annaiah's* case the same Division Bench specifically adverted to the issue of diversification of purpose and held that where the landowners are**

deprived of their land under the cover of public purpose and there is diversification of land for a private purpose, it amounts to fraudulent exercise of the power of eminent domain. [para 25] [741-C-E]

2.3. The pleadings and documents filed by the parties clearly show that the Corporation had made a false projection to the State Government that the land was needed for execution of tourism related projects. In the meeting of officers held on 13.1.1987, i.e. after almost four years of the issue of declaration u/s 6, the Managing Director of the Corporation candidly admitted that the Corporation did not have the requisite finances to pay for the acquisition of land and that a developer who had already entered into agreements with some of the landowners for purchase of land, was prepared to provide funds subject to certain conditions including transfer of 12 acres 34 guntas land to him for house building project. After 8 months, the Corporation passed resolution for transfer of over 12 acres land to the said developer. The Corporation also transferred two other parcels of land in favour of Bangalore International Centre and the predecessor of appellant No.1. These transactions reveal the true design of the officers of the Corporation, who first succeeded in persuading the State Government to acquire huge chunk of land for a public purpose and then transferred major portion of the acquired land to private individual and corporate entities by citing poor financial health of the Corporation as the cause for doing so. [para 26] [741-F-H; 742-A-B]

2.4. The Courts have repeatedly held that in exercise of its power of eminent domain, the State can compulsorily acquire land of the private persons but this proposition cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to

property with a view to favour private persons. It needs no emphasis that if land is to be acquired for a company, the State Government and the company is bound to comply with the mandate of the provisions contained in Part VII of the Act. [para 26] [742-C-D]

2.5. Therefore, the Corporation did not have the jurisdiction to transfer the land acquired for a public purpose to the companies and thereby allow them to bypass the provisions of Part VII. The diversification of the purpose for which the land was acquired u/s 4(1) read with s. 6 clearly amounted to fraud on the power of eminent domain. This is precisely what the High Court has held in the judgment under appeal and this Court does not find any valid ground to interfere with the same more so because in *Annaiah's* case the High Court had quashed the notifications issued u/ss 4(1) and 6 in their entirety and that judgment has become final. [para 26] [742-E-F]

2.6. In the instant case, respondent No.1 independently questioned the acquisition proceedings and transfer of the acquired land to the predecessor of appellant No.1. He approached the High Court for vindication of his right and succeeded in convincing the Division Bench that the action taken by the Corporation to transfer his land to the private entity was wholly illegal, arbitrary and unjustified. [para 27] [743-A-B]

Om Parkash v. Union of India **2010 (2) SCR 447 = (2010) 4 SCC 17 – distinguished.**

Case Law Reference:

AIR 1989 Bombay 156	**referred to**	**para 4**
1992 (2) SCR 155	**relied on**	**para 18**
1974 (2) SCR 216	**relied on**	**para 19**

(2011) 5 SCC 607	**relied on**	**para 19**
1964 SCJ (Blue Print) September 283	**relied on**	**para 21**
2000 (1) Suppl. SCR 538	**relied on**	**para 24**
2010 (2) SCR 447	**distinguished**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7588 of 2005.

From the Judgment & Order dated 13.4.2005 of the High Court of Karnataka at Bangalore in W.A. No. 7772 of 1999 (LA-RES).

WITH

Civil Appeal No. 7589 of 2005

S.S. Naganand, Basava Prabhu S. Patil, Mahendra Anand, Rajesh Mahale, Raghavendra S. Srivastava, B. Subramonium Prasad, Anirudh Panganeria (for A.S. Bhasme), G.V. Chandrashekar, N.K. Verma and T.N. Vishwanatha (for P.P. Singh) for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether land acquired by the State Government at the instance of the Karnataka State Tourism Development Corporation (for short, 'the Corporation') for the specified purpose i.e. Golf-cum-Hotel Resort near Bangalore Airport, Bangalore could be transferred by the Corporation to a private individual and corporate entities is the question which arises for determination in these appeals filed against the judgment of the Karnataka High Court whereby the acquisition of land measuring 1 acre 3 guntas comprised in Survey No.122 of Kodihalli village, Bangalore South Taluk was quashed.

The facts relating to the acquisition of land and details of the 3 cases decided by the High Court in 1991:

2. On a requisition sent by the Corporation, the State Government issued notification dated 29.12.1981 under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act') for the acquisition of 39 acres 27 guntas land comprised in various survey numbers including Survey No.122 of Kodihalli and Challaghatta villages, Bangalore South Taluk. After considering the reports submitted by the Special Deputy Commissioner, Bangalore under Section 5A(2) and Section 6(1A) (added by the Karnataka Act No.17 of 1961), the State Government issued declaration under Section 6 in respect of 37 acres 4 guntas land. A combined reading of the two notifications makes it clear that the public purpose for which land was sought to be acquired was to establish Golf-cum-Hotel Resort near Bangalore Airport, Bangalore by the Corporation. The Special Land Acquisition Officer passed award dated 7.4.1986. However, as will be seen hereinafter, instead of utilizing the acquired land for the purpose specified in the notifications or for any other public purpose, the Corporation transferred the same to private parties.

3. One Dayananda Pai, a real estate developer, who is said to have entered into agreements with the landowners for purchase of land comprised in Survey Nos.160/1, 160/2, 160/3, 160/4, 163/1, 163/2, 164/1, 164/2, 165/1, 165/2, 165/3, 165/4, 165/6, 166/1, 166/2, 166/3, 166/4, 153, 159, 167 for putting up a group housing scheme and obtained approval from the Bangalore Development Authority appears to be the person behind the move made by the Corporation for the acquisition of land for execution of tourism related projects including Golf-cum-Hotel Resort. This is the reason why his role prominently figured in the meeting of senior officers of the Bangalore Development Authority and the Corporation held on 13.1.1987 to discuss the steps to be taken for securing possession of the acquired land. In that meeting, Managing Director of the

Corporation gave out that the Corporation does not have necessary finances for deposit of cost of the acquisition and Dayananda Pai had agreed to provide funds subject to the furnishing of bank guarantee by the Deputy Commissioner on behalf of the Corporation and release of 12 acres 34 guntas in his favour for the purpose of implementing the group housing scheme. In furtherance of the decision taken in that meeting, an agreement dated 8.5.1987 was executed by the Corporation in favour of Dayananda Pai conveying him 12 acres 34 guntas of the acquired land. Likewise, 6 acres 8 guntas land was transferred to Bangalore International Centre and 5 acres including 2 acres 30 guntas land belonging to respondent No.1 and his brothers, G. Ramaiah Reddy and G. Nagaraja Reddy, was leased out to M/s. Universal Resorts Limited (predecessor of appellant No.1 in Civil Appeal No.7588 of 2005).

4. Mrs. Behroze Ramyar Batha and others, who owned different parcels of land which were transferred by the Corporation to Dayananda Pai filed writ petitions questioning the acquisition proceedings. The learned Single Judge dismissed the writ petitions on the ground of delay. The Division Bench of the High Court reversed the order of the learned Single Judge and quashed the acquisition proceedings qua land of the appellants in those cases. The Division Bench referred to the minutes of the meeting held on 13.1.1987, resolution dated 10.9.1987 passed by the Corporation and observed:

> "……..We have made our comments then and there. Nevertheless we cannot refrain our feelings in commenting upon the same once over again. We cannot think of anything more despicable than the candid admission by the Tourism Development Corporation that they did not have the necessary funds required to meet the cost of acquisition. If really there was no amount available, how the acquisition was embarked upon, we are left to the

realm of guess. Not only that, this particular resolution makes it appear that respondent-5 Dayanand Pai was the only saviour of the Karnataka State Tourism Development Corporation from the difficult situation. For our part we do not know what exactly was the difficulty then, Land acquisition proceedings were complete in all material respects. All that required was possession to be taken. Merely because there are Writ Petitions or some cases pending, does it mean that the Tourism Development Corporation must plead helplessness? Does not it have the wherewithal to contest these litigations? Is it not a part of the Government although it be a Corporation? What is it that it wants to do? In consideration of the withdrawal of the cases which were thorns in the flesh of the Tourist Development Corporation, he is given of a silver salver an extent of 12 acres 31 guntas of land. *To say the least, it appears right from the beginning respondent-5 Dayananda Pai had an eye on these lands. That would be evident because though he entered into an agreement on 30-9-1981 with the land-owners it never occurred to him to put forth any objection during Section 5A Enquiry, nor again at any point of time did he take any interest. He was patiently waiting for somebody to take chestnut out of the fire so that he could have the fruits thereof. That is also evident from the Resolution dated 13-1-1987 wherein it is stated as under:*

> "*Sri Dayananda Pai was very particular that the block of land comprising of 12 acres 34 guntas comprising the following Sy.Nos. 160/1, 160/2, 160/3, 160/4, 163/1, 163/2, 164/1, 164/2, 165/1, 165/2, 165/3, 165/4, 165/6, 166/1, 166/2, 166/3, 166/4, 153, 159, 167 should be released to him as he has got a firm commitment for putting up a Group Housing Scheme on this land."*

Yes. He might have had a commitment. What then is the

purpose of eminent domain? Eminent domain, as we consider and as it is settled law as was said by Nichols, is an attribute of sovereignty. Where the Deputy Commissioner is convinced that the lands are to be acquired for a public purpose notwithstanding the fact that the rights of the private parties might be interfered with, the acquisition will have to be gone through. In other words, the private purpose must be subservient to public purpose. Forget all that. *In order to enable Dayananda Pai to fulfil his commitment if valuable portion of the lands acquired viz., 12 acres 31 guntas is transferred in his favour we cannot find a more vivid case of fraud on power than this. We hold so because the apparent object as evidenced by Section 4(1) Notification is a public purpose. If really as was sought to be made out by the Resolution dated 13-1-1987 the Tourism Development Corporation was anxious to have these lands and the delay was telling upon it, certainly selling away the lands is not the solution as we could see. Therefore, there has been a clear diversification of purpose. Not only an extent of 12 acres 31 guntas have been sold away in favour of respondent-5 Dayanand Pai as has been noted in the narration of facts, 8 acres had come to be leased for Bangalore International Centre and another 5 acres had come to be leased for the amusement park. Why all these if the Tourism Development Corporation does not have funds to meet the cost of acquisition? Therefore it appears to us this is nothing more than a conspiracy to deprive the owners of the lands by use of the power of the eminent domain which is to be used for an avowedly public purpose and for strong compelling reasons and not whimsically or to satisfy the private needs of an individual."*

(emphasis supplied)

The Division Bench then referred to some judicial

precedents including the judgment in *Industrial Development & Investment Company Private Limited v. State of Maharashtra* AIR 1989 Bombay 156 and observed:

> "…….But, in the case on hand what is most striking is negotiations took place even before taking possession of lands. On 8-5-1987 agreement was entered into and in the wake of taking possession on 12-11-1987, transfers are made on 23-3-1988 and 24-3-1988. This is where we consider that with the motive of securing lands to respondent-5 Dayanand Pai, acquisition had come to be embarked upon. This was the reason why we conclude that this is a case of fraudulent exercise of power. It is no consolation to say that the owners of lands have accepted the compensation because in *Industrial Development & Investment Co. Pvt. Ltd. v. State of Maharashtra* it is stated thus:
>
> > "...The State itself which has acted illegally and without jurisdiction cannot plead that it should be allowed to retain the sum awarded in its favour by the Land Acquisition Officer. Respondent 5 who is described as the owner of the land has conveyed to us that it would submit to the order of the Court. We also record the submission of Mr. Dhanuka, learned Counsel for the appellants, that in the event the other awardees who were awarded paltry sums by the award under Section 11 Land Acquisition Act, do not refund sums withdrawn, the appellants are prepared to refund and/or deposit the said sums. Therefore, we conclude that on the ground of delay the appellants could not be deprived of the relief to which they were otherwise entitled."

The ratio of this case squarely applies here. Nor again, in our considered opinion, the previous Decisions upholding the validity of the acquisitions would be of any value because as we have observed earlier the causes of action

arose only on 23-3-1988 and 24-3-1988 when the transfers came to be effected, or on subsequent days when-leases had come to be effected. Therefore, where in ignorance of these transactions if compensation had come to be accepted we should not put that against such of those land owners. But that question does not arise in this case. Therefore, we shall relegate the same to the other cases.

Lastly, what remains to be seen is what is the effect of fraud. Does it render the entire acquisition bad or is it to be held to be bad only in so far as these appellants are concerned? We are of the view that if fraud unravels everything, it cannot be valid in part and invalid in other parts. But, we need not go to that extent because there are other Writ Petitions including a Writ Appeal in which this question may arise direct. We do not want to prejudice those petitioners/appellants. Therefore, this question we relegate to those cases."

(emphasis supplied)

5. Annaiah and others, who owned land comprised in Survey Nos.146/1, 156/1, 147/1, 147/2 and 156, filed Writ Petition Nos.9032 to 9041 of 1988 questioning the acquisition of their land. The same were dismissed by the learned Single Judge on the ground of delay. Thereafter, they filed Writ Petition Nos.19812 to 19816 of 1990 for issue of a mandamus to the State Government and the Corporation to return the land by asserting that the same had been illegally transferred to private persons. They pleaded that the acquisition proceedings were vitiated due to mala fides and misuse of power for oblique and collateral purpose. Those petitions were allowed by the Division Bench of the High Court vide order dated 18.9.1991, the relevant portions of which are extracted below:

"In our considered view, it is one thing to say that acquisition is actuated by legal malafides, but it is totally

different thing to say that acquisition for all intents and purposes is embarked on an apparent public purpose and ultimately that purpose is not served. In other words, what we mean is their where the lands have been acquired, undoubtedly for public purpose for the benefit of the Karnataka State Tourism Development Corporation and after acquisition, even before taking possession, if agreements were entered into on the ground that the Karnataka State Tourism Development Corporation did not have enough money to meet the cost of acquisition and that it would be better to get rid of the litigation by selling away the same or leasing away the properties and thereby give it to private individuals. *We are of the view that it is a clear case of diversification of purpose. It requires to be carefully noted that it is not for any public purpose. But it is a diversification to a private purpose. Therefore, to the extent the acquisition proceeded with even up to the stage of declaration under Section 6 or to certain point beyond that, it could not be validly challenged on the ground that it is not for public purpose. But where under the cover of public purpose, the owners are dispossessed and there is diversifications, we hold that it is fraudulent exercise of the power of eminent domain.* This is exactly the view we have taken in W.A. Nos.1094 to 1097 of 1987. This aspect of the matter was not before our learned brother Justice Bopanna. All that was stated was the acquisition, namely, Notification under Section 4(1) culminating in Declaration under Section 6 of the Act was not actuated by legal malafides. That is far different from diversification for public purpose. It might be that agreements dated 23.03.1988 and 24.03.1988 might have been buttressed in respect of legal malafides. On that score we cannot conclude that the issue as dealt with by us in W.A. Nos. 1094 to 1097 of 1987 was ever before Justice Bopanna. Therefore, we are unable to agree with Mr. Datar that the earlier ruling of Justice Bopanna in W.P. Nos.9032 to 9041 of 1988 dated 8th July 1988 would

constitute res judicata so as to deprive the Petitioners of the benefit of the Judgment.

The cause of action challenging the validity of acquisition arose not after issue of final notification under section 6 but after the alienation of lands in favour of third parties and thus the Corporation in whose favour the lands have been acquired have been deviated. In my opinion the decision rendered in Mrs. Behroze Ramyar Batha is fully applicable to the facts of this case. It is true that acquisition is challenged after quite a long time to final notification. But challenge is not made to the legality of the acquisition. The challenge is to deviation of the purpose for which the land was acquired. That then is the eminent domain was the question posed by the Division Bench and answered in the words of Nichols as an attribute of sovereignty. Acquisition in this case is actuated by malafides. *Though lands were acquired for public purpose as declared in 6(1) notification and possession was taken for the said public purpose, agreements were entered into even before possession was taken to part with substantial portion of the land. Where object of providing lands to a private individuals, if acquisition proceedings are reported to or power of eminent domain comes to be exercised, it would nothing more than fraud on power. There it is a case of fraud it would unreveal everything. It cannot be valid in part and invalid in other parts (See Lazarus Estates Ltd. VS. Gurdial Singh – AIR 1980 SC 319: Pratap Singh v. State of Punjab – AIR 1964 SC 73: Narayana Reddy v. State of Karnataka – ILR 1991 KAR. 2248.) Therefore the question of limitation does not arise in such cases. Where the actions are found to be mala fide, courts have not failed to strive down those actions as laid down by the Supreme Court in Pratap Singh v. State of Punjab's case cited supra."*

(emphasis supplied)

The operative portion of the order passed in that case is extracted below:

> "In the result, we allow these writ petitions quash the notification issued under Section 4(1) and the declaration under Section 6 of the Act and all subsequent proceedings."

6. Smt. H.N. Lakshmamma and others also questioned the acquisition of their land comprised in Survey Nos.165/3 and 166/4 of Kodihalli village. The writ petition filed by them was dismissed. On appeal, the Division Bench of the High Court framed the following question:

> "Whether in view of the judgment cited above, namely, W.A. Nos.1094 & 1095/87 and W.P. 19812 to 19816/90 wherein we have held that the land acquisition proceedings concerning the very same notification and declaration are liable to be set aside on the ground of fraudulent exercise of power, could be extended in favour of the appellants?"

The Division Bench relied upon the passages from Administrative Law by W.H.R. Wade and De Smith and Ker on Fraud and rejected the plea of the respondents (appellants herein) that by having accepted the amount of compensation, the writ petitioners will be deemed to have acquiesced in the acquisition proceedings. The Division Bench then referred to the judgment of the Bombay High Court in *Industrial Development & Investment Company Private Limited v. State of Maharashtra* (supra) and the order passed in Writ Petition Nos. 19812 – 19816 of 1990 and held that the appellants are entitled to return of land subject to the condition of deposit of the amount of compensation together with interest at the rate of 12% per annum.

Facts relating to transfer of land owned by respondent No.1 and his brothers and details of the cases filed by them:

7. After receiving compensation in respect of 2 acres 30 guntas land comprised in Survey No.122 of Kodihalli village, respondent No.1 and his brothers filed applications under Section 18 of the Act for making reference to the Court for determination of the compensation. During the pendency of reference, the Corporation invited bids for allotment of 5 acres land including 2 acres 30 guntas belonging to respondent No.1 and his brothers for putting up a tourist resort. M/s. Universal Resorts Limited gave the highest bid, which was accepted by the Corporation and lease agreement dated 21.4.1989 was executed in favour of the bidder. Thereafter, the Corporation approached the State Government for grant of permission under Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 for leasing out a portion of the acquired land to M/s. Universal Resorts Limited. The State Government granted the required permission vide order dated 17.6.1991. After 6 months, registered lease deed dated 9.1.1992 was executed by the Corporation in favour of M/s. Universal Resorts Limited through its Managing Director, Sri C.K. Baljee purporting to lease out 5 acres land for a period of 30 years on an annual rent of Rs.1,11,111/- per acre for the first 10 years.

8. In the meanwhile, Shri C.K. Baljee, Managing Director of M/s. Universal Resorts Limited filed suit for injunction against respondent No.1 and his brothers by alleging that they were trying to forcibly encroach upon the acquired land. He also filed an application for temporary injunction. By an ex parte order dated 29.10.1991, the trial Court restrained respondent No.1 and his brothers from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule property. After about two years, the brothers of respondent No.1 filed Writ Petition Nos.2379 and 2380 of 1993 for quashing the acquisition of land measuring 0.29 guntas and 0.38 guntas

respectively, which came to their share in the family partition effected in 1968. They relied upon the judgments of the Division Bench in *Mrs. Behroze Ramyar Batha and others v. Special Land Acquisition Officer* (supra) and Writ Appeal No.2605 of 1991 – Smt. H.N. Lakshmamma and others v. State of Karnataka and others decided on 3.10.1991 and pleaded that once the acquisition has been quashed at the instance of other landowners, the acquisition of their land is also liable to be annulled. The appellants, who were respondents in those cases, pleaded that the writ petitions should be dismissed because 5 acres land had been leased out by adopting a transparent method and there was no justification to nullify the acquisition after long lapse of time. The learned Single Judge did notice the judgments of the Division Bench on which reliance was placed by the writ petitioners but distinguished the same by making the following observations:

> "The dictum therein cannot be applied to the instant case. The land of the petitioners were acquired for the public purpose of Golf-cum-Hotel Resort near the Airport. The statement of objection filed by respondents 4 and 5 clearly shows that the land was transferred to them for the need of tourist industry namely construction of Hotel/Tourist Complex. The order passed by the Government exempting the 3rd Respondent from the purview of the Urban Land (Ceiling & Regulation) Act 1976 also shows the intended transfer being made by the 3rd respondent is for the establishing of Hotel/Tourist Complex. This is also borne out from the lease deeds executed by respondents 4 and 5. These materials are sufficient to hold that the land is being put by the 3rd respondent for the purpose for which it was acquired. These materials are sufficient for this court for the present and indeed from conducting any further rowing enquiry on the basis of the allegation made by the petitioners in this writ petition. Without anything more it can be held that the dictum of the decision of this Court referred to supra is inapplicable to the facts of the present

case. Hence, the petitioners cannot take shelter under the said decision viz. ILR 1991 Karnataka 3556 and successfully challenge the land acquisition proceedings."

The learned Single Judge finally dismissed the writ petitions by observing that even though the writ petitioners were aware of the order of injunction passed by the Civil Court in the suit filed by the Managing Director, M/s. Universal Resorts Limited – C.K. Baljee, they did not question the acquisition for a period of almost two years and approached the Court after long lapse of time counted from the date of acquisition. Writ Appeal Nos.4536 and 4541 of 1995 filed by G. Ramaiah Reddy and G. Nagaraja Reddy were dismissed by the Division Bench of the High Court on 1.1.1996 by a one word order and the special leave petitions filed by them were summarily dismissed by this Court vide order dated 26.2.1996.

9. In a separate petition filed by him, which came to be registered as Writ Petition No.34891 of 1995, respondent No.1 prayed for quashing notifications dated 29.12.1981 and 16.4.1983 insofar as the same related to 1 acre 3 guntas land comprised in Survey No.122/1 of Kodihalli village and for issue of a mandamus to respondent Nos.3 to 5 (the appellants herein) to redeliver possession of the said land. He pleaded that in the garb of acquiring land for a public purpose, the official respondents have misused the provisions of the Act with the sole object of favouring private persons. In the counter affidavits filed on behalf of the appellants, it was pleaded that the writ petition was highly belated and that by having accepted the compensation determined by the Special Land Acquisition Officer, respondent No.1 will be deemed to have waived his right to challenge the acquisition proceedings.

10. The writ petition filed by respondent No.1 was decided in two rounds. In the first round, the learned Single Judge rejected the objection of delay raised by the appellants. He referred to the judgments of the High Court in *Mrs. Behroze Ramyar Batha and others v. Special Land Acquisition Officer*

(supra) and Writ Appeal No.2605 of 1991 – *Smt. H.N. Lakshmamma and others v. State of Karnataka and others* (supra) declined to follow the course adopted by the coordinate Bench, which had dismissed the writ petitions filed by the brothers of respondent No.1 and observed:

"……The cause of action challenging the validity of acquisition arose not after issue of final notification under section 6 but after the alienation of lands in favour of third parties and thus the Corporation in whose favour the lands have been acquired have been deviated. In my opinion the decision rendered in Mrs. Behroze Ramyar Batha is fully applicable to the facts of this case. It is true that acquisition is challenged after quite a long time to final notification. But challenge is not made to the legality of the acquisition. The challenge is to deviation of the purpose for which the land was acquired. That then is the eminent domain was the question posed by the Division Bench and answered in the words of Nichols as an attribute of sovereignty. Acquisition in this case is actuated by malafides. Though lands were acquired for public purpose as declared in 6(1) notification and possession was taken for the said public purpose, agreements were entered into even before possession was taken to part with substantial portion of the land. Where object of providing lands to a private individuals, if acquisition proceedings are reported to or power of eminent domain comes to be exercised, it would nothing more than fraud on power. There it is a case of fraud it would unreveal everything. It cannot be valid in part and invalid in other parts (See *Lazarus Estates Ltd. v. Gurdial Singh* – AIR 1980 SC 319: *Pratap Singh v. State of Punjab* – AIR 1964 SC 73: *Narayana Reddy v. State of Karnataka* – ILR 1991 Kar. 2248). Therefore the question of limitation does not arise in such cases. Where the actions are found to be mala fide, courts have not failed to strive down those actions as laid down by the Supreme

Court in *Pratap Singh v. State of Punjab's* case cited supra."

11. The writ appeals filed by the appellants were allowed by the Division Bench on the ground that the learned Single Judge was not justified in ignoring the order passed by the coordinate Bench. The Division Bench observed that merits of the case could have been considered only if he was convinced that the writ petitioner had given cogent explanation for the delay and, accordingly, remitted the matter for fresh disposal of the writ petition.

12. In the second round, the learned Single Judge dismissed the writ petition by observing that even though fraud vitiates all actions, the Court is not bound to give relief to the petitioner ignoring that he had approached the Court after long lapse of time. Writ Appeal No.7772 of 1999 filed by respondent No.1 was allowed by the Division Bench of the High Court. While dealing with the question whether the learned Single Judge was justified in non suiting respondent No.1 on the ground of delay, the Division Bench referred to the explanation given by him, took cognizance of the fact that even after lapse of more than a decade and half land had not been put to any use and observed:

"……..It is the definite case of the appellant that he came to know of the fraud committed by the 3rd respondent in diverting the acquired land clandestinely in favour of Respondents 4 and 5 and certain others, that too, for the purpose other than the purpose for which the land was acquired, only in the year 1993. It is his further case that even then, he did not approach this Court for legal remedies immediately after he came to know of the fraud committed by the 3rd respondent and also the judgment of this Court in the case of *Batha* (supra), because, under a wrong legal advice, he filed I.A.I. in L.A.C. No. 37 of 1988. In other words, even after the appellant came to know of the fraud committed by the 3rd respondent, under

a wrong advice, he was prosecuting his case before a wrong forum. The question for consideration is whether that circumstance can be taken into account for condoning the delay. A three Judge Bench of the Supreme Court in the case of *Badlu and another. v. Shiv Charan and others.,* (1980) 4 SCC 401 where a party under a wrong advice given to them by their lawyer was pursuing an appeal bonafide and in good faith in wrong Court, held that the time taken for such prosecution should be condoned and took exception to the order of the High Court in dismissing the second appeal. Further, the Supreme Court in *M/s Concord of India Insurance Company Limited v. Smt. Nirmala Devi and Others.,* [1979] 11 8 ITR 507 (SC) has held that the delay caused on account of the mistake of counsel can be sufficient cause to condone the delay and the relief should not be refused on the ground that the manager of company is not an illiterate or so ignorant person who could not calculate period of limitation.

It is the further case of the appellant that only in the month of September, 1995 he was advised by another counsel that the appellant was wrongly prosecuting his case before the Civil Court by filing I.A.I. in L.A.C. No. 37 of 1988 and that the civil court has no jurisdiction to quash the notification issued under Section 4(1) and declaration under Section 6(1) of the Act and for that relief, he should necessarily file writ petition in this Court. The appellant on receiving such advice from the counsel, without any further loss of time, filed the present Writ Petition No. 34891 of 1995 in this Court on 18-9-1995. It further needs to be noticed that the pleading of the appellant would clearly demonstrate that but for the fraud committed by the 3rd respondent in diverting the acquired land in favour of respondents 4 and 5 and others clandestinely for the purposes other than the purpose for which it was acquired, perhaps, the appellant would not have challenged the land acquisition proceedings at all. It is his definite case that

he was approaching this Court under Article 226 for quashing the impugned notifications only because the acquired land was sought to be diverted by the 3rd respondent-beneficiary in favour of third parties, that too, for the purposes other than the one for which it was acquired and the acquisition of the entire extent of land under the same notification in its entirety is already quashed by this Court as fraud on power and tainted by malafide. Therefore, the Court has necessarily to consider the question of delay and laches in the premise of the specific case of the appellant and it will be totally unfair and unjust to take into account only the dates of Section 4(1) notification and Section 6(1) declaration. It is also necessary to take into account the fact that well before the appellant approached this Court, the Division Bench of this Court in Writ Appeal No. 2605 of 1991 and Writ Petition Nos. 19812 to 19816 of 1990 preferred by certain other owners of the acquired land vide its orders dated 18-9-1991 and 3-10-1991 had already quashed Section 4(1) Notification and Section 6(1) declaration in their entirety and directed the State Government and the LAO to handover the acquired land to the owners concerned on red positing of the compensation money received by the owners with 12% interest p.a. In that view of the matter, it is trite, the acquisition of the schedule land belonging to the appellant also stood quashed by virtue of the above judgments of the Division Bench. Strictly speaking, the State Government and the LAO even in the absence of a separate challenge by the appellant to the land acquisition proceedings, in terms of the orders made in the above writ appeal and writ petitions, ought to have handed over the schedule land to the appellant by collecting the amount of money received by him as compensation with interest at 12% p.a. Be that as it may, the appellant as an abundant caution separately filed writ petition for quashing of the notifications issued under Sections 4(1) and 6(1) of the Act with regard to the schedule land. The relief cannot be

refused to the appellant, because, the appellant herein and the appellants in Writ Appeal Nos. 1094-1097 of 1987 and W.A. No. 2065 of 1991 and the petitioners in Writ petition Nos. 19812 to 19816 of 1990 are all owners of the acquired land under the same notifications and all of them belong to a 'well-defined class' for the purpose of Article 14 of the Constitution. There is absolutely no warrant or justification to extend different treatment to the appellant herein simply, because, he did not join the other owners at an earlier point of time. It is not that all the owners of the acquired land except the appellant instituted the writ petitions jointly and the appellant alone sat on fence awaiting the decision in the writ petitions filed by the other owners. Some writ petitions were filed in the year 1987 and other writ petitions in the year 1990 as noted above. Since the appellant came to know of the fraud committed by the 3rd respondent only in the year 1993 after this Court delivered the judgment in *Batha's* case (supra) and since he was prosecuting his case before a wrong forum under a wrong legal advice and therefore, the time so consumed has to be condoned in view of the judgment of the Supreme Court already referred to above, we are of the considered opinion that the learned single Judge is not justified in dismissing the writ petition on the ground of delay and laches.

It needs to be noticed further that admittedly, no developments have taken place in the schedule land despite considerable passage of time. Further more, admittedly, no rights of third parties are created in the schedule land. The schedule land being a meagre extent of land compared to the total extent of land acquired for the public purpose, cannot be put to use for which it was originally acquired. Looking from any angle, we do not find any circumstance on the basis of which we would be justified in refusing the relief on the ground of delay and laches even assuming that there was some delay on the

part of the appellant before approaching this Court by way of writ petition in the year 1995."

The Division Bench then referred to orders dated 18.9.1991 and 3.10.1991 passed in Writ Petition Nos.19812 to 19816 of 1990 – *Annaiah and others v. State of Karnataka and others* and Writ Appeal No.2605 of 1991 – *Smt. H.N. Lakshmamma and others v. State of Karnataka and others* (supra) respectively and held:

"……..Since the appellant herein and the appellants and writ petitioners in W.A.No. 2605 of 1991 and W.P. Nos. 19812 to 19816 of 1990 are the owners of the acquired land under the same notification and similarly circumstanced in every material aspect, they should be regarded as the persons belonging to a 'well-defined class' for the purpose of Article 14 of the Constitution. In other words, the appellant herein is also entitled to the same relief which this Court granted in Writ Appeal No. 2605 of 1991 and W.P. Nos. 19812 to 19816 of 1990 to the owners therein. Apart from that, as already pointed out, the schedule land is a very meagre land compared to the total extent of land acquired and except the schedule land the acquisition of the remaining land has been set at naught and the possession of the land has been handed over to the owners. The schedule land being a meagre in extent, cannot be used for the purpose for which it was acquired. That is precisely the reason why the schedule land is kept in the same position as it was on the date of Section 4(1) notification without any improvement or development."

The arguments:

13. Shri Basava Prabhu S. Patil and Shri S.S. Naganand, learned senior counsel appearing for the appellants criticized the impugned judgment and argued that the Division Bench of the High Court committed serious error by entertaining and

allowing the writ appeal filed by respondent No.1 despite the fact that the writ petitions, the writ appeals and the special leave petitions filed by his brothers had been dismissed by the High Court and this Court. Learned counsel submitted that even though judgments and order passed by the Division Bench in other cases had become final, relief could not have been given to respondent No.1 by overlooking the unexplained delay of 12 years. They further submitted that the cause of action for challenging the transfer of land in favour of M/s. Universal Resorts Limited accrued to respondent No.1 in 1992 when registered lease deed was executed by the Corporation and the Division Bench of the High Court was not at all justified in entertaining the prayer of respondent No.1 after lapse of more than three years. Shri Naganand relied upon the judgment of this Court in *Om Parkash v. Union of India* (2010) 4 SCC 17 and argued that quashing of notifications by the High Court in three other cases would enure to the benefit of only those who approached the Court within reasonable time and respondent No.1, who had kept quiet for 12 years cannot take advantage of the same. Shri Naganand lamented that even though his clients had given highest bid in May, 1987 and lease deed was executed in January, 1992, they have not been able to utilize the land on account of pendency of litigation for last more than 16 years and have suffered huge financial loss.

14. Shri Mahendra Anand, learned senior counsel appearing for respondent No.1 supported the impugned judgment and argued that the Division Bench of the High Court did not commit any error by directing return of land to respondent No.1 because acquisition thereof was vitiated by fraud. Learned senior counsel emphasised that in view of the unequivocal finding recorded in *Mrs. Behroze Ramyar Batha and others v. Special Land Acquisition Officer* (supra) and other cases that land acquired for the specified public purpose, i.e. Golf-cum-Hotel Resort could not have been transferred to private persons and that there was conspiracy to deprive the

owners of their land by use of the power of eminent domain, the Division Bench rightly annulled the action of the Corporation.

15. Before dealing with the arguments of the learned counsel, we may mention that the Committee of the Karnataka Legislature on Public Undertakings had in its Fifty-Second Report severely criticized the exercise undertaken by the Corporation in the matter of acquisition of 39 acres 27 guntas land. This is evident from paragraph 2.24 of the Report, which is extracted below:

"2.24. After full examination, the Committee makes the follow-ing observations and recommendations.:

(i) Most of the projects envisaged to be taken up in 1981 and subsequently by the Company were farfetched and grandiose ones lacking in the basic sense of realism as regards details and specifies assured modes of financing, benefits and income to be derived and viability. By no stretch of imagination, could they be deemed to meet the main objectives of the Company to promote and maximise tourism by offering catering, lodging, recreational, picnic and other facilities to as broad a spectrum of tourists as possible. In fact, they were designed mainly to cater to the requirements of a small number of elitist and affluent tourists and could never have boosted tourism in the State. For these grave dereliction of duties, the Committee holds the then Managing Directors and the then Govern-ment nominees on the Board of Directors, as responsible.

(ii) The proper and sound objections raised by Government in August, 1984 went unheeded by successive Boards of Directors of the Company who pursued with reckless abandon their fanciful schemes and led the Company on a wild goose chase. As a result, ultimately, the Company has been left virtually holding the sack with none of these schemes materialising and the Company having been put to an infructuous expenditure of Rs.18.97 lakhs towards

interest on the bank borrowings to finance land acquisition, not to speak of the wasted precious time and effort of the whole Management and organi-sation of the Company for nearly 10 years. The then Managing Director of the Company, Sri K. Sreenivasan and the Boards of Directors of the Company at the relevant periods have to bear responsibility in this regard.

(iii) In the opinion of the Committee, the Company had an opportunity to reconsider and give up these unnecessary schemes when it encountered difficulties in acquiring the required land of 39 acres in 1986-87 as a result of the land owners/power of attorney holders moving the Courts for stay of the acquisition proceedings. Instead, the Company opted to pursue the acquisition of land even at the cost of surrendering 14 acres and 8 guntas of land (out of 23 acres 36 guntas acquired) to Sri Dayananda Pai, a power of attorney holder, for a group housing scheme for employees of public/private sector undertakings, which was a purpose/scheme not contemplated by the Company and in no way connected with the Company's objectives. The so-called compromise Agreement of March 1987 with Sri Dayananda Pai had the effect of only compromising the Company's interests in that it contained no provisions regarding commitment and penalties on Sri Dayananda Pai to assist the Company to acquire the entire lands of 39 acres 27 guntas while he was presented with 14 acres 8 guntas of land on a platter as it were for executing the group housing scheme for his purpose and pecuniary benefits.

Whether Sri Dayananda Pai has really implemented the Group Housing Scheme in Challaghatta for the employees of Public and Private Undertakings is not clear. The Committee wants Government to find out the true position in this regard and intimate the Committee.

In the end, with all this compromise, the Company could

acquire and take possession of only 23 acres and 36 guntas (as against 39 acres and 27 guntas envisaged) of which 14 acres and 8 guntas were parted to Sri Dayananda Pai, and the Company was left with only 9 acres 28 guntas for its schemes. Further, to go through with the acquisition, the Company has to borrow Rs. 43.54 lakhs from the Canara Bank for depositing with the land acquisition authorities and had to incur interest charges of Rs.18.97 lakhs, which have become infructuous. There were highly injudicious acts leading to avoidable loss of Rs.18.97 lakhs.

(iv) The Committee notes that out of more than seven projects envisaged in 1981, the Company, is a result of the tortuous and adverse developments, omissions, commissions and irregularities described in the preceding paragraphs, could manage to initiate only two schemes, viz., International Centre and Tourist Complex and, that too only to the extent of handing over land to the concerned parties, viz. Bangalore International Centre and M/s. Universal Resorts Limited. Even these two schemes have remained non-starters because in the first case the Board of Directors of the Company did not approve the leasing of land and in the second case the initial formalities like registration of sale deed, urban land clearance etc. have dragged on.

In this connection, the Committee takes serious note of the fact that possession of lands was given by the Company to Bangalore International Centre and M/s. Universal Resorts Ltd., prematurely without obtaining approval of the Board of Directors or completing even the initial formalities etc., as the case may be."

16. The first question which needs consideration is whether the High Court committed an error by granting relief to respondent No.1 despite the fact that he filed writ petition after long lapse of time and the explanation given by him was

found unsatisfactory by the learned Single Judge, who decided the writ petition after remand by the Division Bench.

17. Although, framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution of India and the power conferred upon the High Court to issue to any person or authority including any Government, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari is not hedged with any condition or constraint, in last 61 years the superior Courts have evolved several rules of self-imposed restraint including the one that the High Court may not enquire into belated or stale claim and deny relief to the petitioner if he is found guilty of laches. The principle underlying this rule is that the one who is not vigilant and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the Court after long lapse of time and there is no cogent explanation for the delay. We may hasten to add that no hard and fast rule can be laid down and no straightjacket formula can be evolved for deciding the question of delay/laches and each case has to be decided on its own facts.

18. In *Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur* (1992) 2 SCC 598, this Court set aside the judgment of the Patna High Court whereby the writ petition filed by the appellant against the demand notice issued for levy of cess for the period 1953-54 to 1966-67 was dismissed only on the ground of delay. The facts of that case show that the writ petition filed by the appellant questioning the demand for 1967-68 to 1971-72 was allowed by the High Court. However, the

writ petition questioning the demand of the earlier years was dismissed on the premise that the petitioner was guilty of laches. While dealing with the question of delay, this Court observed:

> "The question thus for consideration is whether the appellant should be deprived of the relief on account of the laches and delay. It is true that the appellant could have even when instituting the suit agitated the question of legality of the demands and claimed relief in respect of the earlier years while challenging the demand for the subsequent years in the writ petition. But the failure to do so by itself in the circumstances of the case, in our opinion, does not disentitle the appellant from the remedies open under the law. The demand is per se not based on the net profits of the immovable property, but on the income of the business and is, therefore, without authority. The appellant has offered explanation for not raising the question of legality in the earlier proceedings. It appears that the authorities proceeded under a mistake of law as to the nature of the claim. The appellant did not include the earlier demand in the writ petition because the suit to enforce the agreement limiting the liability was pending in appeal, but the appellant did attempt to raise the question in the appeal itself. However, the Court declined to entertain the additional ground as it was beyond the scope of the suit. Thereafter, the present writ petition was filed explaining all the circumstances. The High Court considered the delay as inordinate. *In our view, the High Court failed to appreciate all material facts particularly the fact that the demand is illegal as already declared by it in the earlier case.*
>
> The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It

> will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilokchand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for."
>
> (emphasis supplied)

19. In *Ramchandra Shankar Deodhar v. State of Maharashtra* (1974) 1 SCC 317, the Court overruled the objection of delay in filing of a petition involving challenge to the seniority list of Mamlatdars and observed:

> ".....Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Art. 16 is itself a fundamental right guaranteed under Art. 32 and this Court which has been assigned the role of a sentinel on the qui vive for protection of the fundamental rights cannot easily allow itself to be

persuaded to refuse relief solely on the jejune ground of laches, delay or the like."

20. In *Shankara Cooperative Housing Society Limited v. M. Prabhakar and others* (2011) 5 SCC 607, this Court considered the question whether the High Court should entertain petition filed under Article 226 of the Constitution after long delay and laid down the following principles:

"(1) There is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the Court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because Court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners.

(3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay."

21. Another principle of law of which cognizance deserves to be taken is that in exercise of power under Article 136 of

the Constitution, this Court would be extremely slow to interfere with the discretion exercised by the High Court to entertain a belated petition under Article 226 of the Constitution of India. Interference in such matters would be warranted only if it is found that the exercise of discretion by the High Court was totally arbitrary or was based on irrelevant consideration. In Smt. Narayani Debi Khaitan v. State of Bihar [C.A. No.140 of 1964 decided on 22.9.1964], Chief Justice Gajendragadkar, speaking for the Constitution Bench observed:

"It is well-settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. *No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably."*

(emphasis supplied)

22. In the light of the above, it is to be seen whether the

discretion exercised by the Division Bench of the High Court to ignore the delay in filing of writ petition is vitiated by any patent error or the reasons assigned for rejecting the appellants' objection of delay are irrelevant and extraneous. Though it may sound repetitive, we may mention that in the writ petition filed by him, respondent No.1 had not only prayed for quashing of the acquisition proceedings, but also prayed for restoration of the acquired land on the ground that instead of using the same for the public purpose specified in the notifications issued under Sections 4(1) and 6, the Corporation had transferred the same to private persons. Respondent No.1 and other landowners may not be having any serious objection to the acquisition of their land for a public purpose and, therefore, some of them not only accepted the compensation, but also filed applications under Section 18 of the Act for determination of market value by the Court. However, when it was discovered that the acquired land has been transferred to private persons, they sought intervention of the Court and in the three cases, the Division Bench of the High Court nullified the acquisition on the ground of fraud and misuse of the provisions of the Act.

23. Insofar as land of respondent No.1 is concerned, the same was advertised in 1987 along with other parcels of land (total measuring 5 acres) and Corporation executed lease in favour of M/s. Universal Resorts Limited in 1992. However, no material has been placed on record to show that the said exercise was undertaken after issuing notice to the landowners. When respondent No.1 discovered that his land has been transferred to private entity, he made grievance and finally approached the High Court. During the intervening period, he pursued his claim for higher compensation. Therefore, it cannot be said that he was sleeping over his right and was guilty of laches.

24. A reading of the impugned judgment, the relevant portions of which have been extracted hereinabove shows that

the Division Bench of the High Court adverted to all the facts, which had bearing on the issue of delay including the one that on the advice given by an advocate, respondent No.1 had availed other remedies and opined that the delay had been adequately explained. Thus, it cannot be said that the discretion exercised by the High Court to entertain and decide the writ petition filed by respondent No.1 on merits is vitiated by any patent legal infirmity. It is true that the writ petitions filed by the brothers of respondent No.1 had been dismissed by the learned Single Judge on the ground of delay and the writ appeals and the special leave petitions filed against the order of the learned Single Judge were dismissed by the Division Bench of the High Court and this Court respectively, but that could not be made basis for denying relief to respondent No.1 because his brothers had neither questioned the diversification of land to private persons nor prayed for restoration of their respective shares. That apart, we find it extremely difficult, if not impossible, to approve the approach adopted by the learned Single Judge in dealing with Writ Petition Nos. 2379 and 2380 of 1993 filed by the brothers of respondent No.1. He distinguished the judgments of the Division Bench in *Mrs. Behroze Ramyar Batha and others v. Special Land Acquisition Officer* (supra) and *Smt. H.N. Lakshmamma and others v. State of Karnataka and others,* without any real distinction and did not adhere to the basic postulate of judicial discipline that a Single Bench is bound by the judgment of the Division Bench. Not only this, the learned Single Judge omitted to consider order dated 3.10.1991 passed in Writ Petition Nos. 19812 to 19816 of 1990 – *Annaiah and others v. State of Karnataka and others* in which the same Division Bench had quashed notifications dated 28.12.1981 and 16.4.1983 in their entirety. Unfortunately, the Division Bench of the High Court went a step further and dismissed the writ appeals filed by the brothers of respondent No.1 without even adverting to the factual matrix of the case, the grounds on which the order of the learned Single Judge was challenged and ignored the law laid down by the coordinate Bench in three other cases. The

special leave petitions filed by the brothers of respondent No.1 were summarily dismissed by this Court. Such dismissal did not amount to this Court's approval of the view taken by the High Court on the legality of the acquisition and transfer of land to private persons. In this connection, reference can usefully be made to the judgment in *Kunhayammed v. State of Kerala* (2000) 6 SCC 359.

25. The next question which merits examination is whether the High Court was justified in directing restoration of land to respondent No.1. In *Mrs. Behroze Ramyar Batha and others v. Special Land Acquisition Officer* (supra), the Division Bench of the High Court categorically held that the exercise undertaken for the acquisition of land was vitiated due to fraud. The Division Bench was also of the view that the acquisition cannot be valid in part and invalid in other parts, but did not nullify all the transfers on the premise that other writ petitions and a writ appeal involving challenge to the acquisition proceedings were pending. In *Annaiah and others v. State of Karnataka and others* (supra), the same Division Bench specifically adverted to the issue of diversification of purpose and held that where the landowners are deprived of their land under the cover of public purpose and there is diversification of land for a private purpose, it amounts to fraudulent exercise of the power of eminent domain.

26. The pleadings and documents filed by the parties in these cases clearly show that the Corporation had made a false projection to the State Government that land was needed for execution of tourism related projects. In the meeting of officers held on 13.1.1987, i.e. after almost four years of the issue of declaration under Section 6, the Managing Director of the Corporation candidly admitted that the Corporation did not have the requisite finances to pay for the acquisition of land and that Dayananda Pai, who had already entered into agreements with some of the landowners for purchase of land, was prepared to provide funds subject to certain conditions including transfer of 12 acres 34 guntas land to him for house building project. After

8 months, the Corporation passed resolution for transfer of over 12 acres land to Dayananda Pai. The Corporation also transferred two other parcels of land in favour of Bangalore International Centre and M/s. Universal Resorts Limited. These transactions reveal the true design of the officers of the Corporation, who first succeeded in persuading the State Government to acquire huge chunk of land for a public purpose and then transferred major portion of the acquired land to p ivate individual and corporate entities by citing poor financ al health of the Corporation as the cause for doing so. The Cou ts have repeatedly held that in exercise of its power of eminent domain, the State can compulsorily acquire land of the private persons but this proposition cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to property with a view to favour private persons. It needs no emphasis that if land is to be acquired for a company, the State Government and the company is bound to comply with the mandate of the provisions contained in Part VII of the Act. Therefore, the Corporation did not have the jurisdiction to transfer the land acquired for a public purpose to the companies and thereby allow them to bypass the provisions of Part VII. The diversification of the purpose for which land was acquired under Section 4(1) read with Section 6 clearly amounted to a fraud on the power of eminent domain. This is precisely what the High Court has held in the judgment under appeal and we do not find any valid ground to interfere with the same more so because in *Annaiah and others v. State of Karnataka and others* (supra), the High Court had quashed the notifications issued under Sections 4(1) and 6 in their entirety and that judgment has become final.

27. The judgment in *Om Parkash v. Union of India* (supra) on which reliance has been placed by Shri Naganand is clearly distinguishable. What has been held in that case is that quashing of the acquisition proceedings would enure to the benefit of only those who had approached the Court within

reasonable time and not to those who remained silent. In this case, respondent No.1 independently questioned the acquisition proceedings and transfer of the acquired land to M/s. Universal Resorts Ltd. In other words, he approached the High Court for vindication of his right and succeeded in convincing the Division Bench that the action taken by the Corporation to transfer his land to M/s. Universal Resorts Limited was wholly illegal, arbitrary and unjustified.

28. In the result, the appeals are dismissed. Respondent No.1 shall, if he has already not done so, fulfil his obligation in terms of the impugned judgment within a period of 8 weeks from today. The appellant shall fulfil their obligation, i.e. return of land to respondent No.1 within next 8 weeks.

R.P. Appeals dismissed.

SHAM @ KISHOR BHASKARRAO MATKARI

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal No. 868 of 2006)

SEPTEMBER 30, 2011

[P. SATHASIVAM AND DR. B.S.CHAUHAN, JJ.]

PENAL CODE, 1860:

ss.. 302 and 307 – Accused causing death of his brother, sister-in-law and his nephew and attempting to murder two other children – Conviction by trial court – Upheld by High Court, but sentence of life imprisonment enhanced by it to death – Held: The evidence and the other material on record clearly establish the guilt of the accused and, as such, his conviction is upheld – As regards the sentence, though the accused caused three murders, he had no pre-plan or pre-meditation to eliminate the family of his brother – The quarrel started due to land dispute – Accused has unblemished antecedents – This is not a rarest of rare case – For the reasons stated in the judgment, the death penalty imposed by High Court is set aside and the life imprisonment awarded by trial court restored – Sentence.

The appellant-accused was prosecuted for committing murders of his brother, sister-in-law, and his nephew and attempting to murder his other nephew and the niece (PW 7). The accused was residing with his brother 'MK' (deceased) and his family consisting of MK's wife, 'M' (deceased) and their three children in a rented premises owned by PW-3. The prosecution case, as narrated by the complainant (PW 1) was that on 28.06.2001, at about 9.00 to 9.15 p.m., he noticed that some quarrel was going on between the accused and his brother in their house. He heard the accused saying to

his brother that as the latter raised hands on him, he would see him later. At about 3.00 to 3.30 a.m., the Complainant heard some hue and cry from the house of 'MK'. He also noticed the smell of leakage of gas and something burning from the house of 'MK'. Immediately, he informed PW-3 and also one 'PC', who was residing on the upper floor. Thereafter, all of them proceeded to the house of the deceased-'MK'. In the way they met the accused coming out of the house who told them that three thieves entered into their house and assaulted them. His hands and clothes were stained with blood. When they approached near the house of the deceased, they noticed smoke coming out of the house. The landlord (PW-3), telephoned the police. On receipt of the information, the Inspector of Police, (PW-14) reached the place of occurrence. He sent the accused to the hospital for treatment in a police jeep. When they entered into the house, they noticed smoke coming out of the room and found that 'MK', his wife 'M' and their both sons and the daughter (PW 7) were lying injured; 'M' 'was partially burnt and a stone of big size and a gas cylinder with tube were lying near her body. The two injured boys and the girl were sent to the Municipal Hospital. As 'MK' and his wife were dead, their bodies were sent for post-mortem. One of the sons of the deceased couple died in the hospital. The trial court convicted the accused u/ss 302 and 307 IPC and sentenced him to imprisonment for life and 7 years RI under the two counts respectively. The High Court dismissed the appeal of the accused and allowed that of the State for enhancement of sentence and while confirming the conviction, awarded the death sentence to the accused.

In the instant appeal filed by the accused, it was mainly contended for the appellant that in view of several mitigating circumstances, the extreme penalty of death sentence was not warranted in the facts and

circumstances of the case. Partly allowing the appeal, the Court

HELD: 1.1. PW-1 was residing as tenant in one of the premises adjoining to deceased 'MK' owned by PW-3, at the relevant time. He deposed about both the incidents, i.e., the first occurrence between 9.00 to 9.15 p.m., when some quarrel was going on between the accused and his brother 'MK' as also the second and the main incident which took place in the mid-night, at about 3.00 to 3.30 a.m., in the house of 'MK'. The doctors (PW-6) and (PW-11), who conducted the post-mortem, noted the injuries of all the three persons. There is also the statement of the accused made to the Executive Magistrate (PW-16) in the hospital, which has been treated as statement u/s. 164 of the Code of Criminal Procedure, 1973. Though the said statement is not a dying declaration, however, the accused knowing all the seriousness confessed about the killing of his brother, his wife and their child and causing injuries to other two children. There is no reason to disbelieve the version of PW-7 who witnessed the occurrence, neighbors and the landlord (PWs 1 and 3) as well as the confessional statement of the accused before the Executive Magistrate. Considering the opinion of the doctors, (PWs-6 and 11), cause of death and recovery of a stone inside the house of 'MK' where the dead bodies and the injured were lying, this Court is satisfied that the prosecution has established its case beyond reasonable doubt for an offence punishable u/s 302 IPC. [para 8] [754-C-D; 755-A-D]

1.2. When the matter was taken up before the High Court, both by the accused and the State, after thorough analysis, the High Court confirmed the conviction. As an appellate court, the High Court once again analysed the prosecution evidence and the defence taken by the accused and finally concurred with the conclusion

arrived at by the trial court recording conviction u/ss. 302 and 307 IPC. On going through all the materials, this Court upholds the said conclusion. [para 10] [756-F-G]

Sentence

2.1. It is pertinent to note that the trial court has recorded the finding that the murders were neither pre-meditated nor pre-planned on the part of the appellant, and it was a simple case of land dispute which led to altercation and murder of three persons. This Court, in series of decisions has indicated various aggravating and mitigating circumstances. Though the appellant caused death of three persons, he had no pre-plan to do away with the family of his brother. The quarrel started due to the land dispute and, in fact, on the fateful night, he was sleeping with the other victims in the same house. Only on account of property dispute, the appellant went to the extent of committing murders. No weapon much less a dangerous weapon was used in commission of offence. In these circumstances and in view of the other materials placed, it is clearly evident that the accused had no pre-plan or pre-determination to eliminate the family of his brother. [para 8 and 14] [755-E; 760-C-D]

2.2. At the time of the incident, i.e., in the year 2001, the accused was 28 years old and was jobless. He is in jail since 30.06.2001 and in the death cell since the date of the judgment of the High Court, that is, 03.05.2006. It is clear that he remained in jail for more than 10 years and more than five years in death cell. The materials placed on record show that the antecedents of the accused-appellant are unblemished as nothing is shown by the prosecution that prior to this incident, he indulged in criminal activities. There is no reason to disbelieve that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continued threat to the society. It cannot be

said that the accused would be a menace to the society. It is relevant to point out that the trial court which had the opportunity of noting demeanour of all the witnesses and the accused thought it fit that life sentence would be appropriate. However, the High Court, while enhancing the sentence from life to death, has not assigned adequate and acceptable reasons. It is not a rarest of rare case where extreme penalty of death is called for. Therefore, while maintaining the conviction of the accused u/s. 302 IPC, award of extreme penalty of death by the High Court is set aside and the sentence of life imprisonment as directed by the trial court restored. [760-F-H]

Ajitsingh Harnamsingh Gujral vs. *State of Maharashtra*, **JT 2011 (10) SC 465 – distinguished.**

Bachan Singh vs. *State of Punjab,* **(1980) 2 SCC 684,** *Machhi Singh and Others* vs. *State of Punjab,* **(1983) 3 SCC 470,** *C. Muniappan and Others* vs. *State of Tamil Nadu*, **2010 (10) SCR 262 = (2010) 9 SCC 567 – referred to.**

Case Law Reference:

JT 2011 (10) SC 465	**distinguished**	**Para 9**
(1980) 2 SCC 684	**referred to**	**Para 9**
(1983) 3 SCC 470	**referred to**	**Para 9**
2010 (10) SCR 262	**referred to**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 868 of 2006.

From the Judgment & Order dated 3.5.2006 of the High Court of Judicature of Bombay Bench at Aurangabad in Criminal Appeal No 183 of 2004.

Tara Chand Sharma, Mahabir Singh Mangla, Uma Datta, Kishan Datta and Neelam Sharma for the Appellant.

Sushil Karanjkar, Sachin Patil, Sanjay Kharde, Sankar

Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the common final judgment and order dated 03.05.2006 passed by the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal Nos. 183 of 2004 and 391 of 2003 whereby the High Court dismissed the appeal preferred by the appellant-accused and allowed the appeal preferred by the State of Maharashtra, respondent herein and enhanced the sentence of life imprisonment to death which was imposed by the First Ad-hoc Additional Sessions Judge, Jalgaon in Sessions Case No. 160 of 2001.

2. Brief facts:

(a) Sham @ Kishor Bhaskarrao Matkari, the appellant-accused was residing with his brother Manohar Matkari (since deceased) and his family consisting of his wife, Meena (since deceased) and three children, namely, Akhilesh (since deceased), Monika (PW-7) and Vishwesh in a rented premises owned by one Pandurang Patil (PW-3). Manohar, the deceased was serving in the Railway Mail Service, Bhusawal. Dipak Narayan Thakur (the Complainant) was their neighbour.

(b) On 28.06.2001, at about 9.00 to 9.15 p.m., when the Complainant came out of his house for collecting the clothes which were kept for drying, he noticed that some quarrel was going on between the appellant-accused and his brother Manohar in their house. He heard the accused saying to his brother Manohar that you raised hands on me today, I will see you later. Since it would be a dispute over the household matter, he neglected and went inside the house. In the midnight, at about 3.00 to 3.30 a.m., the Complainant heard some hue and cry from the house of Manohar. He also heard the cries of Meena, the wife of Manohar and the noise of beating and groaning of small child from the house. He also noticed the

smell of leakage of gas and something burning from the house of Manohar. Immediately, he informed Pandurang Patil (PW-3) – the landlord and also one Pitamber Choudhary, who was residing on the upper floor. Thereafter, all of them proceeded to the house of the deceased-Manohar. When they were going towards the house of the deceased, they saw the accused coming out of the house and when they enquired, the accused told that three thieves entered into their house and assaulted them. Thereafter, the accused demanded water for drinking. They also noticed that the hands and clothes of the appellant-accused were stained with blood. When they approached near the house of the deceased, they noticed smoke coming out of the house. Immediately, PW-3, the landlord, telephoned the police.

(c) On receipt of the information, the Inspector of Police, Dilip Shankarwar (PW-14) rushed to the place of occurrence immediately. He saw the appellant-accused sitting by the side of water tank and having suffered bleeding injury on his head. When enquired, the accused narrated the same story that 3 to 4 persons entered into their house and assaulted him, his brother, his brother's wife and children and they tried to burn his brother's wife and after taking household articles, they fled away. Since blood was oozing out from his head, PW-14 sent the accused to the hospital for treatment in a police jeep. When they entered into the house, they noticed smoke coming out of the room and Akhilesh, the son of Manohar, was lying in injured condition on the cot and blood was oozing from his head. They also noticed that Manohar, his wife Meena, daughter Monika and son Vishwesh were lying in injured condition on the floor of the house. They also noticed that Meena was partially burnt and a stone of big size and a gas cylinder with tube were lying near her body. PW-14 immediately sent the two injured boys and girl to the Municipal Hospital, Bhusawal in a police jeep. As Manohar and his wife were dead, their bodies were sent for post-mortem. At the same time, spot Panchanama (Ex.24) was drawn by PW-14 and he also seized the articles found lying

there including wooden rafter having stains of blood and a big stone. Since the condition of injured Akhilesh was deteriorating, he was shifted to Civil Hospital, Jalgaon and he expired on 29.06.2001. Injured Monika and Vishwesh were shifted to Civil Hospital, Jalgaon. Later on, both were shifted to a private hospital at Aurangabad.

(d) A crime was registered being Crime No. 41 of 2001 for the offences punishable under Sections 302, 307 and 201 of the Indian Penal Code, 1860 (in short "IPC"). During the course of investigation, the Investiating Officer recorded the statements of Pandurang Patil (PW-3) and others. He also seized clothes of the deceased, Manohar, Meena and Akhilesh. Since the accused was detected as perpetrator of the crime, he was arrested. His nail clippings and blood samples were collected. PW-14 also recorded the statements of Monika and Vishvesh, the injured children.

(e) After necessary investigation, charge-sheet was laid in the Court of Judicial Magistrate, First Class, Bhusawal, who committed the case to the Court of Sessions. The First Ad-hoc Additional Sessions Judge, Jalgaon, after examining 16 witnesses including Monika, an injured minor girl as PW-7, by judgment dated 04/05.03.2003 convicted the appellant-accused for the offence punishable under Section 302 IPC and sentenced him to imprisonment for life and to pay a fine of Rs.25,000/-, in default of payment of fine, to suffer rigorous imprisonment for two years and also sentenced him to suffer rigorous imprisonment for seven years for the offence under Section 307 IPC, and to pay a fine of Rs.1,000/-, in default of payment of fine, to suffer rigorous imprisonment for three months and acquitted him for the offence punishable under Section 201 IPC.

(f) Against the aforesaid judgment, the State of Maharashtra, respondent herein filed an appeal being Criminal Appeal No. 391 of 2003 before the High Court of Judicature of Bombay, Bench at Aurangabad for enhancement of sentence

from imprisonment for life to death and the appellant-accused also filed appeal being Criminal Appeal No. 183 of 2004. Both the appeals were heard together and by a common impugned judgment dated 03.05.2006, the High Court dismissed the appeal filed by the appellant-accused and allowed the appeal filed by the State and enhanced the sentence of life imprisonment to death. Aggrieved by the said judgment, the appellant-accused has filed this appeal before this Court by way of special leave petition.

3. Heard Mr. Tara Chand Sharma, learned counsel for the appellant-accused and Mr. Sushil Karanjkar, learned counsel for the respondent-State.

4. Learned counsel for the appellant though canvassed the ultimate conviction imposed by the trial Court and affirmed by the High Court mainly contended before us with regard to the death sentence awarded by the High Court. According to him, in view of several mitigating circumstances highlighted before the High Court, without adverting to the same, the High Court awarded the extreme penalty of death sentence which is not warranted in the facts and circumstances of the case. On the other hand, learned counsel for the State, by taking us through the relevant materials, submitted that in view of death of three persons and causing injuries to two, all in one family, the High Court was justified in awarding capital punishment (death sentence) to the appellant-accused. ı5. We have carefully perused all the relevant materials and considered the rival submissi ns.

6. Very briefly, let us consider the prosecution case and the ultimate conviction under Sections 302 and 307 IPC. The appellant-accused was the real brother of Manohar Matkari-the deceased and was residing with him in a rented premise owned by Pandurang Patil, (PW-3). The said Manohar and his wife Meena were having three children. The incident took place in the night intervening 28/29.06.2001. Dipak Narayan Thakur (PW-1) was the neighbour of Manohar in one of the premises

owned by Pandurang Patil, (PW-3) as tenant at the relevant point of time. According to PW-1, on the said night, at about 9.00 to 9.15 p.m., when he came out of his house to collect the clothes which were kept for drying, he noticed that some quarrel was going on between the accused and his brother Manohar in their house. In the mid-night, at about 3.00 to 3.30 a.m., PW-1 again heard some hue and cry from the house of Manohar. He also heard cries of the wife of Manohar and the noise of beating and groaning of small child from the house. He also noticed smell of leakage of gas and something burning in the house of Manohar. On noticing all these things, PW-1 rushed to his landlord, Pandurang Patil, (PW-3) and also woke up one Pitamber Choudhary, who was residing on the upper floor. It is further seen from his evidence that he then along with those persons proceeded towards the house of Manohar and saw the accused coming out of the house and when they enquired him, the accused told that three thieves had entered into their house and assaulted him, his brother, his brother's wife and their children. On hearing this, PW-3 informed the police over phone. The police arrived there within 10 minutes and took the accused to the hospital as he had sustained head injury. The police also took all the three children to the hospital in a police jeep. Thereafter, PW-1 entered the house of Manohar along with the police officers. They noticed that Manohar and his wife Meena were lying dead and Meena was partially burnt. PW-1 narrated the incident to the police which was reduced into writing and treated as FIR (Ex.P-22).

7. When the appellant-accused was undergoing treatment in the hospital, on 30.06.2001, the Police Officer, Zillapeth Police Station, Jalgaon thought that the accused may not survive and sent a requisition to Muralidhar Sapkale, (PW-16) who was the Executive Magistrate working in Treasury Office, Jalgaon to record his statement. Pursuant to the same, PW-16 visited the Civil Hospital, Jalgaon and recorded the statement of the accused which is Ex.73. All were under the impression that on the death of the accused, the said statement

will be treated as dying declaration. The said statement, Ex.73, contains confession on the part of the accused. The prosecution also relied on the statement of Monika, (PW-7), daughter of Manohar, who has stated to have seen the part of the occurrence.

8. Learned counsel for the appellant-accused has taken us through the evidence of PWs-1, 3, 7 and 16 and all other connected documents. We have already stated that Dipak Narayan Thakur, (PW-1) is residing in one of the premises adjoining to Manohar owned by one Pandurang Patil, (PW-3) as tenant, at the relevant time. PW-1 noticed the first occurrence, that is, between 9.00 to 9.15 p.m., namely, at the time of collecting his clothes which were kept for drying that some quarrel was going on between the accused and his brother Manohar. It was he who witnessed the second incident also, that is, in the mid-night, at about 3.00 to 3.30 a.m., in the house of Manohar. He not only heard the cries of Manohar but also heard noise of beating and groaning of small children from the house. He also noticed leakage of gas from the house of Manohar. It is further seen that on his informatio

, PW-3, their landlord, and one Pitamber Choudhary, also joined and noticed the occurrence in the early morning. When PW-1 and PW-3 proceeded towards the house of Manohar, they saw the accused coming out of the house and when they enquired, the accused told that three thieves had entered into their house and they assaulted him, his brother, his brother's wife and their children. They also noticed blood stains in the hands and clothes of the accused. PW-1 also informed that when they went inside the house in the morning along with the police and others, they noticed that Manohar and his wife Meena were lying dead and Meena was burnt to some extent. Th y also noticed a square sized stone weighing roughly 25 kgs. n ar the dead body. The two injured boys and girl were also taken to the hospital. Dr. Sandip Ingale (PW-6) and Dr. Sangram Narwade (PW-11), who conducted the post-mortem, were also examined. They also noted the injuries of all the three

persons. We have already noted the statement of accused himself to the Executive Magistrate (PW-16) at the time when he was admitted in the hospital. Since he was alive, the statement recorded by the Executive Magistrate had been treated as statement under Section 164 of the Code of Criminal Procedure, 1973 (in short "the Code") and proceeded further. Though the said statement is not a dying declaration, however, the accused knowing all the seriousness confessed about the killing of his brother, his wife and their child and causing injuries to other two children. There is no reason to disbelieve the version of Monika (PW-7) who witnessed the occurrence, neigbours and landlord of Manohar (PWs 1 and 3) as well as the confessional statement of the accused before the Executive Magistrate. Considering the opinion of the doctors, (PWs-6 and 11), cause of death and recovery of a stone inside the house of Manohar where three different bodies were lying, we are satisfied that the prosecution has established its case beyond reasonable doubt for an offence under Section 302 IPC. The trial Court considering the fact that the murders were neither pre-meditated nor pre-planned on the part of the appellant, and a simple case of land dispute which led to altercation and murdering of three persons, imposed life imprisonment under Section 302 IPC and rigorous imprisonment for seven years under Section 307 IPC. The said conclusion is acceptable.

About Sentence

9. Learned counsel for the respondent-State, by drawing our attention to the recent decision of this Court in *Ajitsingh Harnamsingh Gujral vs. State of Maharashtra,* JT 2011 (10) SC 465 submitted that the award of death sentence is appropriate in the facts and circumstances of this case. In that case, the accused was charged under Section 302 IPC for committing murders of his wife, his son and two daughters and the trial Court, after finding that four members from the same family were murdered and it was a rarest of rare case, imposed penalty of death upon the accused. The death sentence was

confirmed by the High Court and the matter was taken up before this Court by way of appeal. This Court, after adverting to the earlier decisions as regards to award of death sentence including the principles enunciated in *Bachan Singh vs. State of Punjab,* (1980) 2 SCC 684, *Machhi Singh and Others vs. State of Punjab,* (1983) 3 SCC 470, *C. Muniappan and Others vs. State of Tamil Nadu,* (2010) 9 SCC 567 and various other judgments, agreeing with the conclusion arrived at by the trial Court and the High Court and finding that all the requisites for death penalty as discussed and noted in the various decisions are satisfied, confirmed the same. Absolutely, there is no quarrel as to the propositions of law and principles laid down in those decisions and the ultimate conclusion in *Ajitsingh Harnamsingh Gujral* (supra). In the case on hand, the appellant-accused had no pre-meditated plan or mind to eliminate the entire family of his brother, he himself slept with the victims on the fateful night, due to land dispute quarrel started and ended with murdering three persons. In those circumstances and the background and no bad antecedents of the accused, the above decision relied on by the State is distinguishable and not helpful to the claim for retaining the death penalty.

10. When the matter was taken up before the High Court, both by the accused and the State, after thorough analysis, the High Court confirmed the conviction. As an appellate Court, the High Court once again analysed the prosecution evidence and the defence taken by the accused and finally concurred with the conclusion arrived at by the trial Court insofar as conviction under Sections 302 and 307 IPC are concerned. On going through all the materials, we are in entire agreement with the said conclusion.

11. In the appeal filed by the State for enhancement of sentence from life imprisonment to death sentence, from the evidence on record and considering the materials, the High Court identified the following circumstances for imposing

extreme penalty of death:

"(i) The date and place of incident not disputed.

(ii) In the incident that occurred, admittedly, victim Manohar, his wife Meenabai and son Akhilesh lost their lives and as has been established on medical evidence, undoubtedly, these three victims died homicidal death. In that, victim Manohar and his wife Meenabai died on the spot having suffered head injuries and in addition to that, so far as Meenabai is concerned, she suffered burn injuries, indicating that the assailant i.e. the respondent (original accused) before the Court, caused burns by setting her on fire by leaking the gas from Gas Cylinder.

(iii) The assault on victims by the respondent was aimed at midnight when the victims were fast asleep and as such they were defenceless, showing that the respondent acted dastardly and was completely depraved. The nature of the injuries, which were inflicted on the child, more particularly, the injuries on his head itself show that how the respondent acted brutally showing extreme depravity and ruthlessness.

(iv) The respondent was alone in the house during the time the occurrence took place at midnight. This is, in the sense, that there was no third person in the house, much less, having entered the house.

(v) As against this, the Respondent put forth a false story that 3 to 4 unknown persons entered the house and committed murders and murderous assault on the victims. This plea of the respondent (original accused) was found to be false and misguiding the investigating machinery.

(vi) The respondent (original accused), in his statement Ex.-73, has clinchingly stated that the victims were done to death by him, so also the injured children at the time and place of incident.

(vii) In the early morning, witnesses Dipak Narayan Thakur and Pandurang Patil noticed the respondent coming out of his house having his hands and clothes on his person stained with blood.

(viii) Though the respondent came up with the case that unknown persons assaulted the victims in the house, he remained silent in the house, though, in his presence, the victims were done to death and two small children suffered serious injuries.

(ix) The respondent did not raise hue and cry, though according to him, in his presence, unknown persons entered the house and assaulted the victims. He did not cause alarm to the persons in the vicinity, thereby exhibiting most queer and unnatural conduct.

(x) The witnesses, particularly, witness Dipak Thakur, in the Midnight, heard cries of a woman groaning in pain and early in the morning, saw the respondent coming out of the house with blood on his clothes and hands.

(xi) Both these witnesses Dipak Thakur and Pandurang Patil stated in their evidence that on that night, no third person from outside came to the premises, much le s, entered in the house of the victims.ı(xii) The respo

dent, in his statement Ex.-73, which is accepted and found to be truthful, candidly admitted to have assaulted the victims acting in a brutal manner out of vengeance arising out of the dispute over the property.

(xiii) The respondent did not deter, much less felt ashamed even while assaulting small children of his real brother when they were caught helpless, as they were sleeping when one of them was done to death and other two were injured.

(xiv) Admittedly, the earlier incident took place at about

08:30 p.m., which ended after quarrel and some beating by victim Manohar to the respondent. The later incident occurred at midnight when the victims were fast asleep. The respondent assaulted them one by one and what is shocking is that victim Monika had seen the respondent committing assault after assault on her father, mother and her brothers Akhilesh and Vishwesh.

(xv) It is seen that the murders have been committed and three persons were done to death in ruthlessness, showing that the respondent was totally depraved of and acted most beastly.

(xvi) Since the earlier incident took place at 08:30 p.m., and the accused, after taking meals at night, remained in the house and then at midnight, surreptitiously killed one by one and also caused murderous assault on the victims showing extreme brutality. This shows that the attack by the accused was predetermined, so also premeditated. Therefore, it is a case of cold-blooded murders."

12. With the above aggravating circumstances put forth against the accused, various mitigating circumstances were also pressed into service and pointed out that the extreme penalty of death is not warranted. It is pointed out that the accused is 38 years old and his antecedents are unblemished and not having any criminal tendency, there can be no apprehension even of danger to the society, it cannot be ruled out that rehabilitation of the accused is impossible and it is not a rarest of rare case causing for extreme penalty of death.

13. Taking into consideration of both aggravating and mitigating circumstances, the High Court, after finding that the accused having slept with the victims in the same house proceeded to assault one after another, it must be said that the assault was pre-meditated and the accused was determined to do the same, hence, it cannot be construed that the accused was on the spur of the moment, after having done to death his

brother, brother's wife, the accused also gave murderous assault on their children and noting that it is a case of extreme culpability concluded that the sentence awarded by the trial Court of imprisonment of life is inadequate and it is a rarest of rare case where extreme penalty of death is called for accepted the appeal preferred by the State and enhanced the penalty of death by hanging.

Conclusion:

14. Since this Court, in series of decisions starting from *Bachan Singh* (supra) indicated various aggravating and mitigating circumstances, there is no need to refer to all those decisions. Though the appellant caused death of three persons, he had no pre-plan to done away with the family of his brother and the quarrel started due to the land dispute and, in fact, on the fateful night, he was sleeping with the other victims in the same house. In those circumstances and other materials placed clearly show that he has no pre-plan or pre-determination to eliminate the family of his brother. At the time of the incident, i.e., in the year 2001, the accused was 28 years old and was jobless. He is in jail since 30.06.2001 and in the death cell since the date of the judgment of the High Court that is on 03.05.2006. It is clear that he remained in jail for more than 10 years and more than five years in death cell. The materials placed on record show that the antecedents of the accused-appellant are unblemished as nothing is shown by the prosecution that prior to this incident, he was indulged in criminal activities. The appellant had no bad antecedents. We have already concluded that the murders were not pre-planned or pre-meditated. No weapon much less dangerous was used in commission of offence. As pointed out earlier, only on account of property dispute, the appellant went to the extent of committing murders. This is clear from the prosecution evidence and the conclusion of the trial Court. As rightly pointed out by the counsel for the appellant, there is no reason to disbelieve that the appellant cannot be reformed or rehabilitated and that he is likely to

continue criminal acts of violence as would constitute a continued threat to the society. Considering the facts and circumstances, it cannot be said that the appellant-accused would be a menace to the society. We are satisfied that the reasonings assigned by the High Court for awarding extreme penalty of death sentence are not acceptable. It is relevant to point out that the trial Court which had the opportunity of noting demeanour of all the witnesses and the accused thought it fit that life sentence would be appropriate. However, the High Court while enhancing the same from life to death, in our view, has not assigned adequate and acceptable reasons. In our opinion, it is not a rarest of rare case where extreme penalty of death is called for instead sentence of imprisonment for life as ordered by the trial Court would be appropriate.

15. In the light of the above discussion, while maintaining the conviction of the appellant-accused for the offence under Section 302 IPC, award of extreme penalty of death by the High Court is set aside and we restore the sentence of life imprisonment as directed by the trial Court. The appeal is allowed in part to the extent mentioned above.

R.P. Appeal partly allowed.

STATE OF RAJASTHAN & ORS.
v.
SHANKAR LAL PARMAR
(Civil Appeal No. 8404 of 2011)

SEPTEMBER, 30 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Service Law:

Selection Grade – Grant of – Eligibility – Government of Rajasthan Office order dated 24.7.1995 providing that grant of selection grade to employees who have earned censure will be deferred by one year – HELD: The Office Order dated 24.7.1995 cannot be said to be illegal, arbitrary, unconstitutional or without authority of law – Devi Singh's case clarified – However, State Government would not be entitled to make recoveries from the employees concerned – Constitution of India, 1950 – Article 14 – Government of Rajasthan, Finance Department (Rules Division) Office Order dated

Constitution of India, 1950:

Article 14 – Equality before law – Concept – Explained – HELD: In the instant case, the State Government has permitted grant of Selection Grade to those who had good service record but for those who had earned censure, the same has been deferred by one year. Thus, there is a basic and fundamental difference between the two categories of the employees. It would clearly fall in the category of reasonable classification which is permissible – Service Law – Grant of Selection Grade.

The State Government of Rajasthan, in order to provide relief to employees due to stagnation in Class IV

and Ministerial Subordinate Services and those holding isolated posts, by the first Office Order dated 25.1.1992, prescribed Selection Grades for the lowest posts in these services. A subsequent Circular dated 23.7.1992 issued by the Office of the Director General of Police stated that 'censure' would not be taken into account as unsatisfactory service record for the purpose of grant of Selection Grade. By Office Order/letter dated 24.7.1995 issued by the Finance Department (Rules Division) to the Director General of Police, it was clarfied that if an employee had earned 'censure' then grant of Selection Grade would be deferred by one year. However, during the interregnum certain employees had been granted the benefit of the Selection Grades despite their having earned 'censure'. Since the State Government started recovery of the amounts from such employees, writ petitions were filed in the High Court and the first one decided by the High Court was *Devi Singh's*[1] *case*. On the strength of the said order several matters were filed by the employees and the High Court went on allowing the claims of the employees.

In the instant appeals filed by the State Government, the question for consideration before the Court was: "whether an employee would be entitled for the grant of 'Selection Grade', automatically, at the first instance, after the completion of 9 years, at the second instance, after the completion of 18 years and at the third and last instance, after the completion of 27 years of service, even when he has earned censure in the past years of service."

Allowing the appeals, the Court

HELD: 1.1. Clause 7 of the Order dated 25.01.1992 makes it clear that only those employees would be entitled for grant of Selection Grades, whose service

1. Devi Singh vs. State of Rajasthan & Ors. 2004(2) CDR 925 (Raj).

record has been satisfactory and are otherwise eligible for promotion on the basis of seniority but are not able to get the same as there might not be any channel of promotion or for want of sanctioned posts in the cadre. The doubts created by circular dated 23.07.1992, were clarified by the Office Order dated 24.07.1995 stating that for the purposes of grant of Selection Grade, in a case where an employee has earned censure, the same should not be treated either as an impediment or obstruction for consideration of his promotion, but his case for such a grant would be deferred by one year. [Para 7 and 11] [770-C; 772-B-E]

1.2. In view of the scheme of Selection Grade, earning of censure would be a bar for the employee to be granted Selection Grade for one year only. This is how it should have been interpreted, and the first office Order dated 25.01.1992 was to be understood. [para 12] [772-F-G]

1.3. In *Devi Singh's* **case what has been decided was that an employee who has already been granted the benefit of Selection Grade, such benefits could not be taken back by the State, without issuance of a show cause notice to him in this regard. Thus, primarily and basically, it was decided in favour of the employee on the ground of violation of principles of natural justice. However, the cases filed subsequently were not same, but on account of casual and general approach of counsel for the parties who argued and showed that the matters were squarely covered by** *Devi Singh's* ***case,*** **and, therefore, prayed that the said matters were to be disposed of accordingly, the courts in their wisdom proceeded to do so.** *Devi Singh's* **case was also followed in the matter of** *Bheem Singh Vs. State of Rajasthan* **(SBCWP No.3284/2005 decided on 17.01.2007) and the SLP of the State was dismissed by this Court on the**

ground of delay clearly leaving the question of law open. [para 14] [773-B-E]

Devi Sigh vs. State of Rajasthan & Ors. **2004(2) CDR 925(Raj) – referred to.**

2.1. It has not been disputed before this Court that censure is a minor penalty and has a minimum penalty as prescribed under the Rules. Thus, it cannot be said that an employee who has earned censure would automatically be entitled to promotion or respective Selection Grade after the completion of 9, 18 or 27 years of service. The subsequent Office Order/ letter dated 27.7.1995 further makes it clear that all those employees who have earned censure in service shall also be entitled for the Selection Grade but it would be deferred by one year. This appears to be an absolutely reasonable and perfect classification, as otherwise every employee who has a clear image and another employee, who has earned censure, would be treated at par. This is not permissible in the service jurisprudence and is also violative of Article 14 of the Constitution. It is settled principle of law that "like should be treated alike". This is the mandate and command of Article 14 of the Constitution, which is required to be followed. [para 18-20] [774-E-H; 775-A-D]

2.2. Article 14 has two essential ingredients: (i) Equality before Law; and (ii) Equal protection of law. Equality before Law is to attain justice: social, economic and political. While under Equal protection of Law it has to be ensured that amongst equals, the law could be equally administered and similarly placed persons could be placed in a similar manner. State still has the power to differentiate amongst different classes of people. It can positively discriminate on the basis of reasonable classification and distinction but this must be based upon an intelligible differentia, which inherently separates such persons from the others. [para 21] [775-E-H]

2.3. In the case in hand, it is a question of grant of Selection Grade. A Selection Grade has higher pay but in the same post. Selection Grade was created to remove stagnation in service and consequently leading to greater efficiency. State has permitted grant of Selection Grade to those who had good service record but for those who had earned censure, the same has been deferred by one year. Thus, there is a basic and fundamental difference between the two categories of the employees. It would clearly fall in the category of reasonable classification which is permissible in accordance with the mandate of the Constitution and also on account of various judgments pronounced by this Court on this topic from time to time. The appellant-State was fully justified in issuing the subsequent Office Order/ letter dated 24.07.1995, putting all controversies at rest. There is nothing to suggest that any case of discrimination has been made out against the respondents/ employees. The said Office Order/ letter cannot be said to be illegal, arbitrary, unconstitutional or without authority of law. [para 22-23] [776-A-F]

3. The impugned orders passed by the Division Benches of the High Court cannot be sustained in law and as such, are set aside and quashed. However, looking into the controversies which have been there in the State of since 1992, it is directed that (i) the appellant-State would not be entitled to recover financial benefits already extended to the employees, pursuant to the first Office order dated 25.01.1992; (ii) the appellant-State would also not be entitled to recover any amount which might have been paid to the employees even after issuance of the second clarificatory office Order/ letter dated 24.07.1995, as recovery of such amount would cause great hardships to the employees; (iii) the employees who have earned censure in the past years for their service record will not be entitled to be granted

'Selection Grade' alongwith those who have a clean and unblemished record; they would be granted 'Selection Grade' only one year thereafter. (iv) Any employee who has been promoted before the said period would not be entitled for the grant of 'Selection Grade'. [para 24] [776-H; 777-A-F]

Case Law Reference:

2004 (2) CDR 925 (Raj) referred to para 3

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8404 of 2011.

From the Judgment & Order dated 10.2.2010 of the High Court of Rajasthan at Jodhpur in DBCSA No. 22 of 2010 in SBCWP No. 8194 of 2008.

WITH

C.A. No. 8405, 8406, 8414, 8407, 8408, 8409, 8410-8411 of 2011.

Dr. Manish Singhvi, AAG, Irshad Ahmad, Ranji Thomas and V.N. Raghupathy for the Appellant.

Rishabh Sancheti, T. Mahipal, Dr. Monika Gusain, Hariom Yaduvanshi, H.D. Thanvi, Rishi Motolia, Sarad Kumar Singhania and Puneet Jain (for Pratibha Jain) for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J.1. Leave granted.

2. The solitary question that arises for our consideration in the instant and the connected appeals is whether an employee would be entitled for the grant of 'Selection Grade', automatically, at the first instance, after the completion of 9 years, at the second instance, after the completion of 18 years and at the third and last instance, after the completion of 27

years of service, even when he has earned censure in the past years of service.

3. In fact, on the strength of an Order pronounced by Division Bench on 12.12.2003 in the matter of *Devi Singh Vs. State of Rajasthan & Ors.* [reported in 2004 (2) CDR-925 (Raj)], several matters came to be filed in the High Court of Judicature of Rajasthan both at the Principal Bench at Jodhpur and at the Bench at Jaipur claiming entitlement for the Selection Grade. Unfortunately, the learned Judges, either sitting in Single Bench hearing Writ Petitions of the employees or in Division Bench, hearing Writ Appeals of the State, without properly appreciating or adverting to the ratio decidendi of the case, in a stereotype manner, went on allowing the Writ Petitions filed by the employees and dismissing the appeals preferred by the State. The approach adopted by the High Court in all such cases would reflect that the judgment in Devi Singh's case has not only been misread but has also been misinterpreted by them. In fact, it was the duty of the learned Advocate for the Appellants, who had appeared in the High Court to have pointed out the distinction, but apparently it appears that he failed to do so which has led to erroneous judgments. The controversy has been pending before this Court for quite some time, therefore, we deem it fit to decide it, by a reasoned judgment to iron out the creases and clear the clouds.

4. It is relevant to mention here that a Special Leave Petition filed by the State, against one Bheem Singh was dismissed by this Court on 06.01.2010 on the ground of delay. The Order reads as under:

"Heard learned Counsel for the Petitioners.

The Special Leave Petition is dismissed on the ground of delay as also on merits.

However, the question of law is kept open to be decided in an appropriate case."

Since the Special Leave Petition was dismissed on the ground of delay and the question of law was clearly left open, thus there is no difficulty in deciding these appeals on merits, because the said Special Leave petition was not decided on merit.

5. Brief facts material for deciding the instant case are given hereinbelow:

With a view to provide relief to employees, Class IV, Ministerial Subordinate Services and those holding isolated posts, Selection Grades were prescribed for the lowest posts in these services, so as to resolve the problem of stagnation. With this intention, first Office Order was issued by the State of Rajasthan on 25.01.1992. The salient and important features of the said Order, relevant for the purpose of these appeals are reproduced hereinbelow:

> "2.(i) The first selection Grade shall be granted from the day on which one completes service of nine years, provided that the employee has not got one promotion earlier as is available in his existing cadre.
>
> (ii) The Second Selection Grade shall be granted from the day following the day on which one completes service of eighteen years, provided that the employee has not got two promotions earlier as might be available on his existing cadre an the first selections grade granted to him was lower than the pay scale of Rs. 2200-4000.
>
> (iii) The third Selection Grade shall be granted from the day on which one completes service of twenty seven years, provided that the employee has not got three promotions earlier as first or the second Selection Grade granted to him, as the case may be was lower that the pay scale of Rs.2200-4000.

6. Another important and relevant Clause in the said Order

for our perusal is 7, which is also reproduced hereinbelow:

> "7. Selection Grades in terms of this Order shall be granted only to those employees whose record service is satisfactory. The record of service which makes one eligible for promotion on the basis of seniority shall be considered to be satisfactory for the purpose of grant of the Selection Grade."

7. Clause 7 makes it clear that only those employees would be entitled for grant of Selection Grades, whose service record has been satisfactory and is otherwise eligible for promotion on the basis of seniority but is not able to get the same as there might not be any channel of promotion or for want of sanctioned posts in the cadre.

8. Another Department of the Appellant-State, Office of Director General of Police (Rajasthan) in its wisdom, deemed it fit to further clarify the position and issued another Circular dated 23.07.1992. The relevant portion of the said circular is reproduced hereinbelow:

> "As far as there is question of censure, it shall be not taken into account as unsatisfactory service record for the purpose of grant of selection pay scale, and it shall not be obstructive in grant of selection pay-scale. The period of last seven years shall be counted from the year, for which he is to be given promotion."

On account of the first Office Order dated 25.01.1992 and the subsequent Circular dated 23.07.1992, as reproduced hereinabove, State started granting Selection Grades to all those employees, who had completed requisite number of years in service, even if they had earned censure in previous years but had not been promoted.

9. To remove the doubts which cropped up on account of the Circular dated 23.07.1992, which created confusion and

doubts in the mind of the Heads of Department, as to whether an employee would be automatically entitled to receive the Selection Grades, after completion of 9 years, 18 years and 27 years of service, irrespective of his earning censure or other such remarks, another Office Order/letter dated 24.07.1995 was sent, by the Finance Department (Rules Division) to the Director General of Police, Rajasthan. The relevant portion thereof is reproduced hereinbelow:

> "I am directed to refer to your letter No.F.15(10) P.F./Kani/90 dated 24.04.1995 on the above noted subject and to say that one of the conditions for grant of selection grade is that the service record of that employee should be satisfactory for the purpose of grant of Selection grade. The promotion of Government Servants, who have been awarded the penalty of censure, is postponed by one year. Since, penalty of censure effects promotion by one year, it effects grant of Selection Grade also by one year. In the second para of your Circular No. F.15 (10) P.Force/Const./90/3439 dated 23.07.1992 it has been clarified that penalty of censure shall have no effect for granting of selection grade. This is not in accordance with the rules/order."

This office order/ letter made it clear that if an employee has earned censure during his service, then his grant of Selection Grade would be deferred by one year. But this clarification was issued by the State after expiry of almost more than 3 years from the date of issuance of the first office order on 25.01.1992.

10. However, during the interregnum period between 25.01.1992 to 24.07.1995, certain employees were granted the benefit of the Selection Grades, despite having earned censure. But after issuance of the subsequent Office Order/letter dated 24.07.1995, Appellant-State started the recovery of the amounts from those employees who were granted Selection Grades even though they had earned censure. This

led to filing of several Writ Petitions in the High Court, the 1st being Devi Singh's case (supra) referred hereinabove. All the subsequent line of cases followed the same process.

11. To further clarify the Circular dated 23.07.1992 issued by Director General of Police, Rajasthan, relevant portion, reproduced at Para 8 hereinabove, another clarificatory Circular dated 24.08.1995 was issued. Thus, vide this subsequent Circular, the last paragraph containing the following words "as far as there is question of punishment of censure, it shall not be considered in service record as unsatisfactory in grant of selection grade and shall not be impediment in grant of selection grade" mentioned in last paragraphs of Circular No. V. 15(10)P.Force/Const./90/3439 dated 23.07.1992 issued by this office, being contrary to Rules, was withdrawn with immediate effect. This Circular alongwith the office order/letter of Finance Department (Rules Division) dated 24.07.1995, clearly stipulates that for the purposes of grant of Selection Grade, in cases where an employee has earned a censure, the censure should not be treated either as an impediment or obstruction for consideration of his promotion but his case for such a grant would be deferred by one year.

12. This earning of censure would be a bar for the employee to be granted Selection Grade for one year only. This is how it should have been interpreted, and the first office Order dated 25.01.1992 was to be understood. However, with regard to issuance of Office Orders from time to time and clarificatory Circular issued by the State, the things became much more complicated and confusing, leading to filing of many Writ Petitions and passing of several orders by Single Benches and Division Benches of the High Court. We are thus called upon to set the controversy at rest.

13. In the light of the aforesaid, we have heard Dr. Manish Singhvi, learned AAG and Mr. V.N. Raghupathy, Advocates for the Appellants and Mr. Puneet Jain, Mr. H.D. Thanvi, Dr. Monika Gusain and Mr. Rishabh Sancheti, Advocates for the

Respondents at length and have also perused the records.

14. As mentioned hereinabove, the first judgment that came for the benefit of the Respondent-employee was rendered on 12.12.2003, i.e., *Devi Singh's* case (supra). However, in the said case, what has been decided was that an employee who has already been granted the benefit of Selection Grade, such benefits could not be taken back by the Appellant-State, without issuance of a Show Cause Notice to him in this regard. Thus, primarily and basically, it was decided in favour of Devi Singh on the ground of violation of Principles of Natural Justice. However, the cases filed subsequently either before the Single Bench or Division Bench were not same, but on account of casual and general approach of learned counsel appearing on behalf of the parties who argued and showed that the matters were squarely covered by Devi Singh's case and hence prayed that these matters were to be disposed of accordingly, the courts in their wisdom proceeded to do so. It is relevant to further mention that the said case of Devi Singh was also followed in the matter of Bheem Singh Versus State of Rajasthan (SBCWP No.3284/2005) decided on 17.01.2007.

15. There is no doubt that an employee, who has completed 9 years of service, would be entitled for the grant of first Selection Grade and would further be entitled for the grant of second Selection Grade after the completion of 18 years of service and third Selection Grade would be granted to him after completion of 27 years of service, provided that during the interregnum period, he has not earned promotion as may be available in his existing cadre and has also not earned censure in the past years. This appears to be the main theme and the purpose for which the first office order was issued.

16. Clause 7 further makes it clear that only those/such employees would be entitled to be granted Selection Grade whose service record has been satisfactory. This implicitly shows that the person who has an untainted, unblemished,

clean and unpolluted record in service would be treated on a higher pedestal than those who have either tainted, blemished, unclean or polluted record. This obviously appears to be a reasonable classification and is under the ambit and touchstone of Article 14 of the Constitution. There is neither any ambiguity nor any doubt in the same.

17. However, with an intention to clarify the controversy, a subsequent office order/letter dated 24.07.1995 was sent by Finance Department (Rules Division) to Director General of Police, Rajasthan wherein it was provided that the record of service which made an employee eligible for promotion on the basis of seniority was also to be considered to be satisfactory for the purpose of granting 'Selection Grade'. It further laid down that if an employee has earned censure, then his case for grant of Selection Grade would be deferred by one year. In other words, he would be entitled to get it but after 1 year, i.e. to say on completion of 10 years of service as compared to others, who would get it on completion of 9 years of service.

18. It has not been disputed before us that censure is a minor penalty and has a minimum penalty as prescribed under the Rules of Rajasthan. Thus, it cannot be said that an employee who has earned censure would automatically be entitled for promotion or respective Selection Grade after the completion of 9, 18 or 27 years of service.

19. However, we need to clarify that during the interregnum period between the first Office Order, issued on 25.01.1992 and the subsequent clarificatory office order/ letter dated 24.07.1995, some of the employees were granted the benefit of Selection Grade. The Appellant – State would not be entitled to claim refund from such employees who have already been granted benefit in this period. The subsequent office Order/ letter further makes it clear that all those employees who have earned censure in service shall also be entitled for the selection grade but the grant of Selection Grade to them would be

deferred by one year. This appears to be an absolutely reasonable and perfect classification as otherwise every employee who has a clean image and another employee, who has earned censure would be treated at par. This is not permissible in the service jurisprudence and is also violative of Article 14 of the Constitution.

20. It is settled principle of law that "like should be treated alike". This is the mandate and command of Article 14 of the Constitution, which we are required to follow. In any case, those who have earned censure cannot be treated at par with those who have had a clean service record. As mentioned hereinabove, an employee with blemished, polluted, tainted, unclean service record cannot be equated with other employee who has enjoyed clean, unblemished, unpolluted, untainted and impeccable service record. Such differentiation would not be violative of Article 14 while dealing with the principles of equality.

21. Since the appeals are to be decided on the touch-stone of Article 14 of the Constitution, in short we would like to deal with it. This Article has two essential ingredients.

(i) Equality before Law

(ii) Equal protection of Law

The forefathers of our Constitution in their wisdom incorporated the provision of Equality before Law to attain justice: social, economic and political. While Equal protection of Law was incorporated so that amongst equals, the law could be equally administered and similarly placed persons could be placed in a similar manner. But this has a caveat. State still has the power to differentiate amongst different classes of people. That is to say, it can positively discriminate on the basis of reasonable classification and distinction but this must be based upon an intelligible differentia, which inherently separates such persons from the others.

22. In the case in hand, it is a question of grant of Selection Grade. A Selection Grade has higher pay but in the same post. A promotion post is a higher post with higher pay. A Selection Grade is intended to ensure that capable employees who may not be able to get a chance of promotion on account of limited outlets of promotion, should at least be placed in the Selection Grade to prevent stagnation at the maximum of the scale. Selection Grade was created to remove stagnation in service and consequently leading to greater efficiency. State has permitted grant of Selection Grade to those who had good service record but for those who had earned censure, the same has been deferred by one year. Thus, according to us, it would clearly fall in the category of reasonable classification which is permissible in accordance with the mandate of the Constitution and also on account of various judgments pronounced by this Court on this topic from time to time.

23. Thus, in our opinion, there is a basic and fundamental difference between the two categories of the employees. Appellant-State was fully justified in issuing the subsequent Office Order/ letter dated 24.07.1995, putting all controversies at rest. We do not find that any case of discrimination has been made out against the Respondents/ Employees. Subsequent Office Order/ letter cannot be said to be illegal, arbitrary, unconstitutional or without authority of law. We find merit in the arguments advanced by Dr. Manish Singhvi, Advocate for the Appellants and thus, have no hesitation in allowing these Appeals. It is also pertinent to mention here that Respondents/ Employees had not challenged the subsequent Office Order/ letter dated 24.07.1995, as being illegal, unconstitutional, arbitrary or without jurisdiction. As long as this Office Order/ letter holds good, it is to be implemented in the same manner and spirit in which it was issued.

24. In the light of the foregoing discussion, we are of the considered opinion that the impugned orders passed by the

learned Judges of the Division Benches cannot be sustained in law. Hence, the same are hereby set aside and quashed. However, looking into the controversies which have been there in the State of Rajasthan since 1992, we deem it fit and proper to pass the following orders:

(i) The Appellant-State would not be entitled to recover financial benefits already extended to the employees, pursuant to the first office order issued by Appellant on 25.01.1992.

(ii) The Appellant would not also be entitled to recover any amount which might have been paid to the employees even after issuance of the second clarificatory office Order/ letter dated 24.07.1995 as according to us, recovery of such amount would cause great hardships to the employees.

(iii) The employees who have earned censure in the past years for their service record will not be entitled to be granted 'Selection Grade' alongwith those who have a clean and unblemished record. They would be granted 'Selection Grade' only one year thereafter.

(iv) Any employee who has been promoted before the said period would not be entitled for the grant of 'Selection Grade'.

25. With the aforesaid direction, this and the connected appeals are allowed. Impugned orders as mentioned hereinabove are set aside. Parties to bear their respective costs.

R.P. Appeals allowed.

UNION OF INDIA

v.

HASSAN ALI KHAN AND ANR.

(Criminal Appeal No. 1883 of 2011)

SEPTEMBER 30, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

BAIL: *Allegations against respondent no.1 that he had huge amount of unaccounted money, that documents recovered from his premises contained instructions issued by him for transfer of various amounts to different persons from the bank accounts held by him outside India and the said monies were the proceeds of crime and by depositing the same in his bank accounts, respondent no.1 had attempted to project the same as untainted money – Further allegation that the said amount ran into billions of dollars; that respondent no.1 had obtained at least three passports in his name by submitting false documents, making false statements and by suppressing the fact that he already had a passport; that Income Tax Department had for the Assessment Years 2001-02 to 2007-08 assessed his total income as Rs.110,412,68,85303/- – Investigations also revealed that he sold a diamond from the collection of Nizam of Hyderabad and routed the proceeds through his account in Bank in Switzerland to a Bank in United Kingdom – High Court allowed bail application of respondent no.1 – On appeal, held: There was no attempt on part of respondent no.1 to disclose the source of the large sums of money handled by him – The allegations may not ultimately be established, but the burden of proof that the said monies were not the proceeds of crime and were not tainted shifted to respondent no.1 u/s.24 of PML Act – The amount lying in the Swiss bank was not explained by respondent no.1 – He was also not able to*

establish that the sum of Rs.110,412,68,85303/- were neither proceeds of crime nor tainted property – Manner in which he procured three different passports in his name after his original passport was directed to be deposited in court also lend support to apprehension that if released on bail, he may abscond – Bail granted to Respondent no.1 cancelled – Prevention of Money Laundering Act, 2002 – s.4 – FEMA – Code of Criminal Procedure, 1973 – s.439.

Bail – Application for cancellation of bail, and appeal against order granting bail – Distinction between.

State of U.P. v. Amarmani Tripathi **(2005) 8 SCC 21: 2005 (3) Suppl. SCR 454 – relied on.**

Sanjay Dutt v. State through CBI, Bombay (II) **(1994) 5 SCC 410: 1994 (3) Suppl. SCR 263;** *Uday Mohanlal Acharya v. State of Maharashtra* **(2001) 5 SCC 453: 2001 (2) SCR 878 – referred to.**

Case Law Reference:

1994 (3) Suppl. SCR 263	**referred to**	**Para 17**
2001 (2) SCR 878	**referred to**	**Para 17**
2005 (3) Suppl. SCR 454	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1883 of 2011.

From the Judgment & Order dated 12.8.2011 of the High Court of Bombay i Criminal Bail Appliction No. 994 of 2011.

A. Mariarputham, Rajiv Nanda, Revati Mohite, T.A. Khan, Anirudh Sharma, Anando Mukherjee, Harsh Parekh and B. Krishna Prasad for the Appellant.

Ishwari Prasad A. Bagaria, Vijay Bhaskar Reddy, Santosh Paul, Uma Ishwari Bagaria, Arti Singh, Arvind Gupta, Mohita Bagati, Kamal Nijhawan and Asha Gopalan Nair for the Respondents.

The Order of the Court was delivered by

O R D E R

ALTAMAS KABIR, J. 1. Leave granted.

2. The Special Leave Petition out of which this Appeal arises has been filed against the judgment and final order dated 12th August, 2011, passed by the Bombay High Court in Crl. Bail Application No.994 of 2011, whereby the High Court granted bail to the Respondent No.1, Hassan Ali Khan, in connection with Special Case No.1 of 2011, wherein the Respondent No.1 is the Accused No.1.

3. The allegation against the Respondent No.1 and the other accused is that they have committed an offence punishable under Section 4 of the Prevention of Money Laundering Act, 2002, hereinafter referred to as 'the PML Act'. The said case has been registered on the basis of a complaint filed by the Deputy Director, Directorate of Enforcement, Ministry of Finance, Department of Revenue, Government of India, on 8th January, 2007, on the basis of Enforcement Case Information Report No.02/MZO/07 based on certain information and documents received from the Income Tax Department. On the said date, the Income Tax Department carried out a search in the premises owned and/or possessed by the Respondent No.1 and a sum of Rs.88,05,000/- in cash was found in his residence at Peddar Road, Mumbai, and was seized. A number of imported watches and some jewellery were also found and seized during the search.

4. The search also revealed that the Respondent No.1 had purchased an expensive car, worth about Rs.60 lakhs, from one Anil Shankar of Bangalore through one Sheshadari and that he had paid till then a sum of Rs.46 lakhs towards purchase

of the said car. It also appears that the documents which were recovered by the Income Tax Department contained several transfer instructions said to have been issued by the Respondent No.1 for transfer of various amounts to different persons from the bank accounts held by him outside India. The said amounts forming the subject matter of the instructions issued by the Respondent No.1 ran into billions of dollars. The Income Tax Department assessed the total income of the Respondent No.1 for the Assessment Years 2001-02, 2006-07 and 2007-08 as Rs.110,412,68,85,303/-. Furthermore, during the investigation, the Directorate of Enforcement also obtained a document said to have been signed by the Respondent No.1 on 29th June, 2003, which was notarized by one Mr. Nicolas Ronald Rathbone Smith, Notary Public of London, on 30th June, 2003.

5. Further, an investigation was conducted under the Foreign Exchange Management Act, 1999, hereafter referred to as 'FEMA'. Show-cause notices were issued to the Respondent No.1 for alleged violation of Sections 3A and 4 of FEMA for dealing in and acquiring and holding foreign exchange to the extent of US$ 80,004,53,000, equivalent to Rs.36,000 crores approximately in Indian currency, in his account with the Union Bank of Switzerland, AG, Zurich, Switzerland.

6. Inquiries also revealed that Shri Hassan Ali Khan had obtained at least three Passports in his name by submitting false documents, making false statements and by suppressing the fact that he already had a Passport. In addition to the above, it was also indicated that investigations had revealed that he had sold a diamond from the collection of the Nizam of Hyderabad and had routed the sale proceeds through his account in Sarasin Bank in Basel, Switzerland, to the Barclays Bank in the United Kingdom.

7. Based on the aforesaid material, the Directorate of Enforcement, Mumbai Zonal Office, arrested the Respondent

No.1 on 7th March, 2011, and, thereafter, he was produced before the Special Judge, PMLA, Mumbai, on 8th March, 2011, and was remanded in custody. Subsequently, by an order dated 11th March, 2011, the Special Judge, PMLA, rejected the prayer made on behalf of the Directorate of Enforcement for remand of the Respondent No.1 to its custody and released him on bail. However, since a Public Interest Litigation was pending in this Court in which the Directorate of Enforcement was required to file a status report in respect of the investigations carried out in connection with the case, the fact that the Respondent No.1 had been released on bail was brought to the notice of this Court and this Court stayed the operation of the bail order and authorized the detention of the Respondent No.1 in custody, initially for a period of four days. The Union of India thereupon filed Special Leave Petition (Crl.) No.2455 of 2011 and upon observing that the material made available on record prima facie discloses the commission of an offence by the Respondent No.1 punishable under the provisions of the PML Act, this Court vide order dated 29th March, 2011, disposed of the appeal as well as the Special Leave Petition and set aside the order dated 11th March, 2011, of the Special Judge, PMLA, Mumbai, and directed that the Respondent No.1 be taken into custody. Thereafter, the Respondent No.1 was remanded into custody from time to time and the complaint came to be filed on 6th May, 2011. A further prayer for bail was thereafter made on behalf of the Respondent No.1 on 1st July, 2011, but the same was dismissed by the Special Judge, PMLA, Mumbai, on the same day.

8. The said order of the Special Judge, PMLA, Mumbai, rejecting the Respondent No.1's prayer for bail was challenged before the Bombay High Court in Bail Application No.994 dated 2nd July, 2011. After a contested hearing, the Bombay High Court by its order dated 12th August, 2011, granted bail to the Respondent No.1 and the said order is the subject matter of the present proceedings before this Court.

9. Learned Additional Solicitor General, Mr. Haren P. Raval, appearing for the Union of India, submitted that the High Court failed to appreciate the astronomical amounts of foreign exchange dealt with by the Respondent No.1, for which there was no accounting and in respect whereof the Income Tax Department had for the Assessment years 2001-02 to 2007-08 assessed the total income as Rs.110,412,68,85,303/-. The learned ASG also submitted that transfer of the huge sums from one bank to another was one of the methods adopted by persons involved in money-laundering to cover the trail of the monies which were the proceeds of crime. The learned ASG contended that the large sums of unaccounted money, with which the Respondent No.1 had been dealing, attracted the attention of the Revenue Department and on investigation conducted under the Foreign Exchange Management Act, 1959, (FEMA), show cause notices were issued to the Respondent No.1 for alleged violation of Sections 3A and 4 thereof for acquiring and holding foreign exchange and dealing with the same to the extent of US$ 80,004,53,000, equivalent to Rs.36,000/- crores, approximately, in Indian currency, in his account with the Union Bank of Switzerland, AG, Zurich, Switzerland.

10. Mr. Raval submitted that the Respondent No.1, Shri Hassan Ali Khan, used the different passports which he had acquired by submitting false documents, to open bank accounts in foreign countries to engage in the laundering of tainted money which brought such transactions squarely within the scope and ambit of Section 3 of the PML Act, 2002. Mr. Raval submitted that Section 3 of the aforesaid Act by itself was an offence since it provides that any person directly or indirectly attempting to indulge in or knowingly assisting or knowingly being a party or actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property, would be guilty of the offence of money-laundering. The learned ASG submitted that the key expressions used in Section 3 are "proceeds of crime" and "projecting it as an untainted property".

In other words, in order to prove an offence of money-laundering, it has to be established that the monies involved are the proceeds of crime and having full knowledge of the same, the person concerned projects it as untainted property. The process undertaken in doing so, amounts to be offence of money-laundering.

11. In this connection, the learned ASG referred to Section 2(u) of the PML Act, which describes "proceeds of crime" to mean any property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. He, thereafter, referred to the definition of "scheduled offence" in Section 2(y) of the above Act to mean (i) the offences specified under Part A of the Schedule; or (ii) the offences specified under Part B of the Schedule if the total value involved in such offences amounted to Rs.30 lakhs or more.

12. The learned ASG submitted that the enormous sums of money held by Shri Hassan Ali Khan in foreign accounts in Switzerland, United Kingdom and Indonesia and the transactions in respect thereof, prima facie indicated the involvement of the Respondent No.1 in dealing with proceeds of crime and projecting the same as untainted property, which was sufficient to attract the provisions of Section 3 of the PML Act, 2002. The learned ASG submitted that under Section 24 of the aforesaid Act, when a person is accused of having committed an offence under Section 3, the burden of proving that the monies involved were neither proceeds of crime nor untainted property, is on the accused. It was urged that once a definite allegation had been made against Shri Hassan Ali Khan on the basis of documents seized, that the monies in his various accounts were the proceeds of crime, the burden of proving that the money involved was neither the proceeds of crime nor untainted, shifted to him and it was upto him to prove the contrary. The learned ASG submitted that Shri Hassan Ali Khan had failed to discharge the said burden and hence the

large sums of money in the several accounts of the Respondent No.1 would have to be treated as tainted property, until proved otherwise. The learned ASG submitted that the Respondent No.1 had himself made certain statements which were recorded under Section 50 of the PML Act, parts whereof were not hit by the provisions of Section 27 of the Indian Evidence Act.

13. The learned ASG also referred to the provisions of Section 45 of the aforesaid Act which make offences under the said Act cognizable and non-bailable and also provides that notwithstanding the provisions of the Code of Criminal Procedure, no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule to the Act, is to be released on bail or on his own bond, unless the Public Prosecutor has been given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The learned ASG submitted that an exception had been made for persons under the age of 16 years or a woman or a person who is sick or infirm.

14. Referring to Part A of the Schedule to the PML Act, the learned ASG submitted that the same had been divided into paragraphs 1 and 2. While paragraph 1 deals with offences under the Indian Penal Code under Sections 121 and 121-A thereof, paragraph 2 deals with offences under the Narcotic Drugs & Psychotropic Substances Act, 1985. The learned ASG submitted that, on the other hand, Para B is divided into five paragraphs. Paragraph 1 deals with offences under the Indian Penal Code, while paragraph 2 deals with offences under the Arms Act, 1959. Paragraph 3 deals with offences under the Wild Life (Protection) Act, 1972, paragraph 4 deals with offences under the Immoral Traffic (Prevention) Act, 1956, and paragraph 5 deals with offences under the Prevention of

Corruption Act, 1988. The learned ASG submitted that the facts of the case attracted the provisions of paragraph 1 of Part A of the Schedule, since the money acquired by Shri Hassan Ali Khan, besides being the proceeds of crime, is also connected with transactions involving the international arms dealer, Adnan Khashoggi. The learned ASG submitted that the same became evident from the notarized document which had been obtained by the Directorate of Enforcement during the course of investigation which had been signed by the Respondent No.1 on 29th June, 2003, at London and notarized by Mr. Nicolas Ronald Rathbone Smith, Notary Public of London, England, on 30th June, 2003. It was also submitted that the said document certified the genuineness of the signature of the Respondent No.1 and also mentioned his Indian Passport No. Z-1069986. The learned ASG further contended that the said notarized document also referred to Dr. Peter Wielly, who was a link between Mr. Adnan Khashoggi, and one Mr. Retro Hartmann on whose introduction the Respondent No.1 opened an account at UBS, Singapore, and was also linked with Mr. Kashinath Tapuriah. The learned ASG submitted that there were other materials to show the involvement of Dr. Wielly in the various transactions of the Respondent No.1, Hassan Ali Khan.

15. Further submissions on behalf of the Appellant were advanced by Mr. A. Mariarputham, learned Senior Advocate, who referred to the purported theft of the jewellery of the Nizam of Hyderabad and the sale of the same by the Respondent No.1, on account whereof US$ 700,000 had been deposited by the Respondent No.1 in the Barclays Bank in London.

16. Mr. Mariarpurtham then submitted that although the High Court had relied on the provisions of Section 167(2) Cr.P.C. in granting bail to the Respondent No.1, the said provisions were not attracted to the facts of this case since charge sheet had already been filed within the statutory period and the High Court could not, therefore, have granted statutory bail to the Respondent No.1 on the ground that it had been

submitted on behalf of the Appellant that it would still take some time for the Appellant to commence the trial. Mr. Mariarputham submitted that while the Respondent No.1 had been arrested on 7th March, 2011 and had been produced before the Special Judge and remanded to custody on 8th March, 2011, the charge sheet had been filed on 6th May, 2011 within the prescribed period of 60 days. It was submitted that the High Court had wrongly interpreted the provisions of Section 167(2) Cr.P.C. in granting bail to the Respondent No.1.

17. In support of his submissions, the learned counsel referred to the Constitution Bench decision of this Court in *Sanjay Dutt Vs. State through CBI, Bombay (II)* [(1994) 5 SCC 410], wherein it was held that the indefeasible right of an accused to be released on bail by virtue of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, was enforceable only prior to the filing of the challan and it did not survive or remain enforceable on the challan being filed, if not already availed of. Their Lordships held further that if the right to grant of statutory bail had not been enforced till the filing of the challan, then there was no question of its enforcement thereafter, since it stood extinguished the moment the challan was filed because Section 167(2) Cr.P.C. ceased to have any application. Reference was also made to the decision of a Three Judge Bench of this Court in *Uday Mohanlal Acharya Vs. State of Maharashtra* [(2001) 5 SCC 453], wherein the scope of Section 167(2) Cr.P.C. and the proviso thereto fell for consideration and it was the majority view that an accused had an indefeasible right to be released on bail when investigation is not completed within the specified period and that for availing of such right the accused was only required to file an application before the Magistrate seeking release on bail alleging that no challan had been filed within the period prescribed and if he was prepared to offer bail on being directed by the Magistrate, the Magistrate was under an obligation to dispose of the said application and even if in the meantime a charge-sheet had been filed, the right to statutory bail would not be affected. It

was, however, clarified that if despite the direction to furnish bail, the accused failed to do so, his right to be released on bail would stand extinguished.

18. It was, therefore, submitted that the Bombay High Court had granted bail to the Respondent No.1 on an incorrect interpretation of the law and the said order granting bail was, therefore, liable to be set aside.

19. Appearing for the Respondent No.1, Hassan Ali Khan, learned counsel, Shri Ishwari Prasad A. Bagaria, firstly contended that an offence which did not form part of the scheduled offences referred to in Section 45 of the PML Act would not attract the provisions of Section 3 of the said Act. It was submitted that whatever be the amounts involved and even if the same had been unlawfully procured, the same might attract the provisions of the Income Tax Act or FEMA, but that would not satisfy the two ingredients of Section 3 which entails that not only should the money in question be the proceeds of crime, but the same had also to be projected as untainted property. Mr. Bagaria submitted that in the instant case all that has been disclosed against the Respondent No.1 is that he dealt with large sums of money, even in foreign exchange and operated bank accounts from different countries, which in itself would not indicate that the monies in question were the proceeds of crime. Mr. Bagaria also submitted that at no stage has it been shown that the said amounts lying in the accounts of the Respondent No.1 in Switzerland, the United Kingdom and Indonesia had been projected as untainted money. Furthermore, as far as the allegation regarding the theft of the Nizam's jewellery is concerned, except for mere allegations, there was no material in support of such submission in the face of the case made out by the Respondent No.1 that he had brokered the sale of some portions of the jewellery for which he had received a commission of US$30,000 which he had spent in Dubai.

20. Mr. Bagaria submitted that in the complaint, reference

had been made in paragraph 13 thereof to "scheduled offences" which have been set out in sub-paragraphs 13.1 to 13.5. Mr. Bagaria pointed out that the offences indicated related to alleged offences under the provisions of the Indian Penal Code, the Passport Act, 1967 and the Antiquities and Art Treasures Act, 1972, which do not come either under Part A or Part B of the Schedule to the PML Act, 2002, except for the offences under the Indian Penal Code, the sections whereof, which have been included in paragraph 1 of Part B, are not attracted to the facts of this case. Mr. Bagaria submitted that as a result, none of the offences mentioned as scheduled offences in the charge-sheet were covered by the Schedule to the PML Act, 2002, and could at best be treated as offences under the Indian Penal Code, the Passport Act and the Antiquities and Art Treasures Act, 1972. On the question of the alleged absconsion of the Respondent No.1, Mr. Bagaria submitted that the said Respondent had not gone to Singapore on his own volition, but had there been taken by one Amalendu Kumar Pandey and Shri Tapuriah. Shri Pandey was subsequently made a witness and Shri Tapuriah was made a co-accused with the Respondent No.1.

21. Mr. Bagaria also contended that once bail had been granted, even if the special leave petition is maintainable, the power to cancel grant of such bail lies with the High Court or the Court of Sessions under Section 439(2) Cr.P.C. and, consequently, all the principles laid down by this Court relating to cancellation of bail, would have to be considered before the order granting bail could be cancelled. Mr. Bagaria submitted that even though the offences were alleged to have been committed by the Respondent No.1 as far back as in the year 2007, till he was arrested on 7th May, 2011, there had been no allegation that he had in any manner interfered with the investigation or tampered with any of the witnesses. Mr. Bagaria submitted that even the apprehension expressed on behalf of the appellant that there was a possibility of the Respondent No.1 absconding to a foreign country on being

released on bail, was without any basis, since such attempts, if at all made, could be secured by taking recourse to various measures. Mr. Bagaria submitted that such a submission could not be the reason for cancelling the bail which had already been granted to the Respondent No.1.

22. Mr. Bagaria submitted that in the absence of any provisions in the PML Act that the provision thereof would have retrospective effect, the provisions of the PML Act could not also be made applicable to the Respondent No.1. Mr. Bagaria submitted that once it is accepted that the PML Act, 2002, would not apply to the Respondent No.1, the provisions of Section 45 thereof would also not apply to the Respondent's case and his further detention would be unlawful. Mr. Bagaria concluded on the note that, in any event, the PML Act had been introduced in the Lok Sabha on 4th August, 1998, and all the offences alleged to have been committed by the Respondent No.1, were long prior to the said date.

23. Having carefully considered the submissions made on behalf of the respective parties and the enormous amounts of money which the Respondent No.1 had been handling through his various bank accounts and the contents of the note signed by the Respondent No.1 and notarized in London, this case has to be treated a little differently from other cases of similar nature. It is true that at present there is only a nebulous link between the huge sums of money handled by the Respondent No.1 and any arms deal or intended arms deals, there is no attempt on the part of the Respondent No.1 to disclose the source of the large sums of money handled by him. There is no denying the fact that allegations have been made that the said monies were the proceeds of crime and by depositing the same in his bank accounts, the Respondent No.1 had attempted to project the same as untainted money. The said allegations may not ultimately be established, but having been made, the burden of proof that the said monies were not the proceeds of crime and were not, therefore, tainted shifted to

the Respondent No.1 under Section 24 of the PML Act, 2002. For the sake of reference, Section 24 is extracted hereinbelow :-

> *"24. Burden of proof.* – When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are in tainted property shall be on the accused."

24. The High Court having proceeded on the basis that the attempt made by the prosecution to link up the acquisition by the Respondent No.1 of different Passports with the operation of the foreign bank accounts by the said Respondent, was not believable, failed to focus on the other parts of the prosecution case. It is true that having a foreign bank account and also having sizeable amounts of money deposited therein does not *ipso facto* indicate the commission of an offence under the PML Act, 2002. However, when there are other surrounding circumstances which reveal that there were doubts about the origin of the accounts and the monies deposited therein, the same principles would not apply. The deposit of US$ 700,000 in the Barclays Bank account of the Respondent No.1 has not been denied. On the other hand, the allegation is that the said amount was the proceeds of the sale of diamond jewellery which is alleged to have been stolen from the collection of the Nizam of Hyderabad. In fact, on behalf of the Respondent No.1 it has been submitted that in respect of the said deal, the Respondent No.1 had received by way of commission a sum of US$ 30,000 which he had spent in Dubai.

25. Although, at this stage, we are also not prepared to accept the convoluted link attempted to be established by the learned ASG with the opening and operation of the bank accounts of the Respondent No.1 in the Union Bank of Switzerland, AG, Zurich, Switzerland, the amounts in the said bank account have not been sought to be explained by the Respondent No.1. We cannot also ignore the fact that the total income of the Respondent No.1 for the assessment years 2001-

02 to 2007-08 has been assessed at Rs.110,412,68,85,303/- by the Income Tax Department and in terms of Section 24 of the PML Act, the Respondent No.1 had not been able to establish that the same were neither the proceeds of crime nor untainted property. In addition to the above is the other factor involving the notarized document in which the name of Adnan Khashoggi figures.

26. Lastly, the manner in which the Respondent No.1 had procured three different passports in his name, after his original passport was directed to be deposited, lends support to the apprehension that, if released on bail, the Respondent No.1 may abscond.

27. As far as Mr. Bagaria's submissions regarding Section 439(2) Cr.P.C. are concerned, we cannot ignore the distinction between an application for cancellation of bail and an appeal preferred against an order granting bail. The two stand on different footings. While the ground for cancellation of bail would relate to post-bail incidents, indicating misuse of the said privilege, an appeal against an order granting bail would question the very legality of the order passed. This difference was explained by this Court in *State of U.P. Vs. Amarmani Tripathi* [(2005) 8 SCC 21].

28. Taking a different view of the circumstances which are peculiar to this case and in the light of what has been indicated hereinabove, we are of the view that the order of the High Court needs to be interfered with. We, accordingly, allow the appeal and set aside the judgment and order of the High Court impugned in this appeal and cancel the bail granted to the Respondent No.1.

D.G. Appeal allowed.

THE STATE OF WEST BENGAL & ORS.

v.

MANI BHUSHAN KUMAR

(Civil Appeal No. 8528 of 2011)

OCTOBER 11, 2011

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

Motor Vehicles Act, 1988*: ss.66, 88(1), (7) – Seizure of vehicle for want of valid permit – Temporary permit issued to the respondent by State Transport Authority, Bihar to ply stage carriage vehicle for route Motihari in Bihar to Siliguri in West Bengal – Temporary permit not counter signed by the State Transport Authority, West Bengal – Seizure of vehicle by Motor Vehicle Department at Siliguri – Challenged – Held: The State of West Bengal and the State of Bihar had entered into a reciprocal agreement in 1988 for issue of a certain number of permits, however, the State Transport Authority, Bihar had exceeded the quota of permits for the inter-state route and there was no concurrence in general or for a particular occasion for issue of the temporary permit in favour of the respondent for the inter-state route – In the absence of counter-signature of the State Transport Authority, West Bengal, on the temporary permit issued by the State Transport Authority (Bihar), the respondent had no valid permit for the part of the route inside the State of West Bengal – The plying of the vehicle of the respondent in the Siliguri region within the State of West Bengal was thus in contravention of s.66(1) of the Act which provided that no owner of a vehicle shall use or permit use of the vehicle as a transport vehicle save in accordance with the conditions of a permit granted or counter-signed by the Regional or State Transport Authority – The authorities, therefore, were well within their powers to detain and seize the vehicle of the respondent u/s.207 of the Act for contravention of s. 66 of the said Act.*

West Bengal Motor Vehicles Tax Act, 1970*: s.16(4) – Tax and additional tax – Held: Under sub-sections (3) and (4) of s.16 of the Act, power is vested in the Taxing Officer to decide whether tax in respect of the vehicle has been paid and if the same has not been paid, to recover the same from sale of the vehicle, if necessary – On a writ petition by respondent, the High Court held that the tax in respect of the vehicle has been paid – High Court erred in holding so – The impugned order of the High Court is set aside and the authorities are directed to continue with the proceedings against the respondent in accordance with s.16 and other provisions of the Motor Vehicles Tax Act for determining and recovering the tax amount after giving all due opportunity to the respondent – In case the concerned authority holds that the respondent is liable for any amount of tax, the appellant would be entitled to encash the Bank Guarantee furnished by him and recover the tax amount – However, in the facts of the case, no penalty would be recovered from the respondent because the State Transport Authority, Bihar had granted the temporary permit for the route upto Siliguri in West Bengal, in excess of the quota fixed between the two States and the respondent had in fact applied to the State Transport Authority, West Bengal for counter-signature on the temporary permit – Motor Vehicles Act, 1988.*

On 2.9.2009, the State Transport Authority, Bihar issued a temporary permit in favour of the respondent for plying a Stage Carriage Vehicle for the route Motihari in Bihar to Siliguri in West Bengal for the period of four months with effect from 1.9.2009. On 7.9.2009, the respondent submitted an application to the Secretary, State Transport Authority, West Bengal for counter signature on the temporary permit. On 8.9.2009, the respondent also deposited a sum of Rs.9180 towards tax and additional tax in respect of his vehicles for plying within the State of West Bengal.

On 8.10.2009, the vehicle of the respondent was intercepted and seized on the ground that the permit produced by the driver of the vehicle was not counter signed by the State Transport Authority, West Bengal. A notice was issued to the respondent under Section 16(4)(a) and (b) of the West Bengal Motor Vehicles Tax Act, 1970 to produce the documents showing payment of tax and additional tax due for the vehicle and other necessary documents relating to the vehicle.

The respondent filed a writ petition challenging the seizure of his vehicle and praying for release of the vehicle alongwith the seized documents. The High Court allowed the writ petition. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1.1. The last limb of sub-section (1) of Section 88 of the Motor Vehicles Act states that a permit granted in any one State shall not be valid in any other State unless counter-signed by the State Transport Authority of that other State or by the Regional Transport Authority concerned. Sub-section (7) of Section 88 of the Act, however, states that notwithstanding anything contained in sub-section (1), a Regional Transport Authority of one region may issue a temporary permit under section 87 to be valid in another region or State with the concurrence, given generally or for the particular occasion, of the Regional Transport Authority of that other region or of the State Transport Authority of that other State, as the case may be. Hence, unless there is concurrence, given generally or for the particular occasion, of the Regional Transport Authority of the other region or of the State Transport Authority of the other State no valid temporary permit can be issued for the other region or the other State. [Para 9] [803-G-H; 804-A-C]

1.2. In the facts of the instant case, although the State of West Bengal and the State of Bihar had entered into a reciprocal agreement in 1988 for issue of a certain number of permits, the State Transport Authority, Bihar exceeded the quota of permits for the inter-state route and there was no concurrence in general or for a particular occasion for issue of the temporary permit in favour of the respondent for the route from Motihari in Bihar to Siliguri in West Bengal. Therefore, the High Court was not right in relying on the provisions of sub-section (7) of Section 88 of the Motor Vehicles Act in coming to the conclusion that no counter signature of the State Transport Authority, West Bengal, was necessary for the temporary permit of the respondent for plying his vehicle in the State of West Bengal. As admittedly, there was no counter-signature of the State Transport Authority, West Bengal, on the temporary permit issued by the State Transport Authority (Bihar), the respondent did not have a valid permit for the part of the route inside the State of West Bengal. The plying of the vehicle of the respondent in the Siliguri region within the State of West Bengal was thus in contravention of Section 66(1) of the Motor Vehicles Act which provided that no owner of a vehicle shall use or permit use of the vehicle as a transport vehicle save in accordance with the conditions of a permit granted or counter-signed by the Regional or State Transport Authority. The appellants, therefore, were well within their powers to detain and seize the vehicle of the respondent under Section 207 of the Motor Vehicles Act for contravention of Section 66 of the said Act. [Paras 10, 11] [804-D-H; 805-A-B]

2. Regarding the tax payable by the respondent for the vehicle plying within the State of West Bengal, it appears that on 08.10.2009 the appellants had seized and detained the vehicle of the respondent under sub-section

(3) of Section 16 of the Motor Vehicles Tax Act and issued a notice under sub-section (4) of Section 16 of the Motor Vehicles Tax Act and it is at this stage that the respondent filed the writ petition before the High Court for release of the seized vehicle and the High Court had held that respondent has paid all the taxes in respect of the vehicle.It will be clear from the provisions of sub-sections (3) and (4) of Section 16 of the Motor Vehicles Tax Act that power is vested in the Taxing Officer to decide whether tax in respect of the vehicle has been paid and if the same has not been paid, to recover the same from sale of the vehicle, if necessary. Thus, the High Court should not have straight away come to the conclusion in the writ petition that the tax in respect of the vehicle has been paid. The impugned order of the High Court is set aside and the appellants are directed to continue with the proceedings against the respondent in accordance with Section 16 and other provisions of the Motor Vehicles Tax Act for determining and recovering the tax amount after giving all due opportunity to the respondent. The Bank Guarantee for Rs.1,00,000/- furnished by the respondent shall remain in force for six months and in case the concerned authority holds that the respondent is liable for any amount of tax, the appellant would be entitled to encash the Bank Guarantee for Rs.1,00,000/- furnished by the respondent and recover the tax amount within a period of six months from today. However, in the facts of the case no penalty will be recovered from the respondent because the State Transport Authority, Bihar had granted the temporary permit for the route upto Siliguri in West Bengal, in excess of the quota fixed between the two States and the respondent had in fact applied to the State Transport Authority, West Bengal for counter-signature on the temporary permit. [Paras 12-14] [805-B-H; 806-A-H; 807-A-B]

Ashwani Kumar and Another v. Regional Transport Authority, Bikaner and Another **(1999) 8 SCC 364: 1999 (3) Suppl. SCR 211;** *A. Venkatkrishnan v. State Transport Authority, Kerala* **(2004) 11 SCC 207;** *Kusheshwar Prasad Singh v. State of Bihar and Others* **(2007) 11 SCC 447: 2007 (4) SCR 95 – cited.**

Case Law Reference:

1999 (3) Suppl. SCR 211	**cited**	**Para 6**
(2004) 11 SCC 207	**cited**	**Para 6**
2007 (4) SCR 95	**cited**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8528 of 2011.

From the Judgment & Order dated 23.3.2010 of the High Court of Calcutta in AST No. 83 of 2010.

WITH

Civil Appeal No. 8529 of 2011.

Atalf Ahmed, Avijit Bhattacherjee, Sarbani Kar, Debjani Das Purkayastha and Bidyabrata Acharya for the Appellants.

Nagendra Rai, Shantanu Sagar, Smarhar Singh and T. Mahipal for the Appellant.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.

Civil Appeal arising out of SLP (C) NO. 11653 OF 2010:

1. Leave granted.

2. This is an appeal by special leave against the order dated 23.03.2010 of the Division Bench of the Calcutta High Court in A.S.T. No. 83 of 2010 (for short 'the impugned order).

3. The facts very briefly are that on 02.09.2009 the State Transport Authority, Bihar, issued a temporary permit in favour of the respondent for plying a Stage Carriage Vehicle for the

route Motihari in Bihar to Siliguri in West Bengal, for a period of four months with effect from 01.09.2009. On 07.09.2009, the respondent submitted an application to the Secretary, State Transport Authority, West Bengal, for counter-signature on the temporary permit. On 08.09.2009, the respondent also deposited a sum of Rs. 9,180/- towards tax and additional tax in respect of his vehicles for plying within the State of West Bengal. On 08.10.2009 vehicle no. BR-31P 5105 of the respondent was intercepted by the Enforcement Branch of the Motor Vehicle Department at Siliguri and the driver of the vehicle was asked to produce the papers including permit and proof of payment of tax relating to the vehicle. Since the permit produced by the driver of the vehicle was not counter-signed by the State Transport Authority, West Bengal, the vehicle was seized by the officials of the Motor Vehicle Department and a notice was issued to the respondent under Section 16(4)(a) & (b) of the West Bengal Motor Vehicles Tax Act, 1970 (for short 'the Motor Vehicles Tax Act') to produce the papers and documents showing payment of tax and additional tax due for the vehicle and other necessary documents relating to the vehicle failing which the vehicle will be sold.

4. Aggrieved, the respondent filed Writ Petition No. 17755 (W) of 2009 before the Calcutta High Court challenging the seizure of his vehicle and praying for release of the vehicle alongwith the seized documents. The appellants herein filed a reply in the said Writ Petition contending *inter alia* that the temporary Stage Carriage permit granted by the State Transport Authority, Bihar, in favour of the respondent for the route Motihari in Bihar to Siliguri in West Bengal had not been counter-signed by the State Transport Authority, West Bengal, as provided in Section 88 of the Motor Vehicles Act, 1988 (for short 'the Motor Vehicles Act') and hence the vehicle of the respondent was plying without a valid permit and had to be seized under Section 207 of the said Act. In the reply, the appellants also contended that in the facts of the case the duration of plying has to be reckoned as 17 weeks retrospective

from the date of interception of the vehicle and the respondent is liable to pay a tax at the rate applicable for a period of 17 weeks together with a fine of equal amount and therefore the total of tax and penalty payable by the respondent works out to Rs.1,13,460/- as per the assessment memo dated 15.10.2009 of the Taxing Officer, Siliguri.

5. The learned Single Judge, who heard the Writ Petition, held in his order dated 04.03.2010 that while sub-section (1) of Section 88 of the Motor Vehicles Act provides that counter-signature is absolutely necessary for a permanent permit, it will be clear from sub-section (7) of Section 88 of the Motor Vehicles Act that for a temporary permit no such counter-signature is necessary. The learned Single Judge also held that the entire tax had been paid by the respondent relying on a notification dated 13.04.2007 of the State Government. Accordingly, the learned Single Judge allowed the Writ Petition and directed the appellants to forthwith release the vehicle of the respondent and awarded a cost of Rs.10,000/- in favour of the respondent against the appellants. Aggrieved by the order of the learned Single Judge, the appellants filed an appeal before the Division Bench of the Calcutta High Court and by the impugned order, the Division Bench of the High Court sustained the findings of the learned Single Judge that a temporary permit issued under Section 87 of the Motor Vehicle Act to be valid in the State of West Bengal need not be counter-signed and that the respondent has paid the tax and additional tax to the State Transport Authorities in respect of the vehicle. The Division Bench, however, reduced the cost awarded by the learned Single Judge from Rs.10,000/- to Rs.5,000/- provided the vehicle of the respondent is released by 26.09.2010. On 26.04.2010, this Court directed that pending consideration of the Special Leave Petitions, the vehicle shall be released subject to the respondent furnishing a Bank Guarantee for Rs.1,00,000/- for the vehicle.

6. Mr. Altaf Ahmed, Learned Senior Counsel appearing

for the appellants, submitted that in the Reciprocal Agreement entered into by and between the State of West Bengal and State of Bihar, there was no provision for grant of temporary permit in respect of a Stage Carriage Vehicle, except for the interregnum between the draft and final publication of the Reciprocal Agreement. He submitted that in the absence of any such Reciprocal Agreement for grant of temporary permit in respect of a Stage Carriage Vehicle, no temporary permit could be granted from Motihari in Bihar to Siliguri in West Bengal. In support of this submission, he cited the decisions in *Ashwani Kumar and Another v. Regional Transport Authority, Bikaner and Another* [(1999) 8 SCC 364] and *A. Venkatkrishnan v. State Transport Authority, Kerala* [(2004) 11 SCC 207] in which this Court has held that in the absence of reciprocal agreement between two States, grant of permit for an inter-state route is illegal and beyond the jurisdiction of the State Transport Authority. He submitted that sub-section (1) of Section 88 clearly states that a permit granted in any one State shall not be valid in any other State unless counter-signed by the State Transport Authority of that other State or by the Regional Transport Authority concerned. He vehemently argued that in the absence of any counter-signature by the State Transport Authority of West Bengal, the permit issued in favour of the respondent was not a valid permit in the State of West Bengal. He submitted that since the vehicle was plying without a valid permit, the authorities of the Motor Vehicle Department had detained and seized the vehicle in accordance with the provisions of Section 207 of the Motor Vehicles Act. Regarding the tax, he relied on the provisions of sub-sections (3) and (4) of Section 16 of the Motor Vehicles Tax Act and submitted that the tax and penalty amounting to Rs.1,13,460/- as assessment in the assessment memo dated 15.10.2009 of the Taxing Officer, Siliguri had not been paid by the respondent.

7. Mr. Nagendra Rai, Learned Senior Counsel for the respondent, on the other hand, submitted that admittedly the respondent had filed an application for counter-signature on the

permit before the Secretary, State Transport Authority, West Bengal, but the counter-signature was not put on the permit by the State Transport Authority and as a result the vehicle of the appellant was seized and detained. He cited the decision of this Court in *Kusheshwar Prasad Singh v. State of Bihar and Others* [(2007) 11 SCC 447] for the proposition that a wrong-doer ought not to be permitted to make a profit out of his own wrong. He argued that since the State Transport Authority, West Bengal has not counter-signed the permit of the appellants, the appellants cannot take advantage of this wrong-doing and recover exorbitant amount of tax and penalty from the respondent.

8. Sub-section (1) & (7) of Section 88 of the Motor Vehicles Act are quoted hereinbelow:

> *"88. Validation of permits for use outside region in which granted.* -(1) Except as may be otherwise prescribed, a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region, and *a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State* or by the Regional Transport Authority concerned:
>
> Provided that a goods carriage permit, granted by the Regional Transport Authority of any one region, for any area in any other region or regions within the same State, shall be valid in that area without the countersignature of the Regional Transport Authority of the other region or of each of the other regions concerned:
>
> Provided further that where both the starting point and the terminal point of a route are situate within the same State, but part of such route lies in any other State and the length of such part does not exceed sixteen kilometres, the

permit shall be valid in the other State in respect of that part of the route which is in that other State notwithstanding that such permit has not been countersigned by the State Transport Authority or the Regional Transport Authority of that other State:

Provided also that –

(a) where a motor vehicle covered by a permit granted in one State is to be used for the purposes of defence in any other State, such vehicle shall display a certificate, in such form, and issued by such Authority, as the Central Government may, by notification in the Official Gazette, specify, to the effect that the vehicle shall be used for the period specified therein exclusively for the purposes of defence; and

(b) any such permit shall be valid in that other State notwithstanding that such permit has not been countersigned by the State Transport Authority or the Regional Transport Authority of that other State.

(7) Notwithstanding anything contained in sub-section (1), *a Regional Transport Authority of one region may issue a temporary permit under section 87 to be valid in another region or State with the concurrence, given generally or for the particular occasion, of the Regional Transport Authority of that other region or of the State Transport Authority of that other State,* as the case may be."

(emphasis supplied)

9. The last limb of sub-section (1) of Section 88 of the Motor Vehicles Act states that a permit granted in any one State shall not be valid in any other State unless counter-signed by the State Transport Authority of that other State or by the Regional Transport Authority concerned. Sub-section (7) of

Section 88 of the Motor Vehicles Act, however, states that notwithstanding anything contained in sub-section (1), a Regional Transport Authority of one region may issue a temporary permit under section 87 to be valid in another region or State with the concurrence, given generally or for the particular occasion, of the Regional Transport Authority of that other region or of the State Transport Authority of that other State, as the case may be. Hence, unless there is concurrence, given generally or for the particular occasion, of the Regional Transport Authority of the other region or of the State Transport Authority of the other State no valid temporary permit can be issued for the other region or the other State.

10. In the facts of this case, we find that although the State of West Bengal and the State of Bihar had entered into a reciprocal agreement in 1988 for issue of a certain number of permits, the State Transport Authority, Bihar exceeded the quota of permits for the inter-state route and there was no concurrence in general or for a particular occasion for issue of the temporary permit in favour of the respondent for the route from Motihari in Bihar to Siliguri in West Bengal. Hence, the High Court is not right in relying on the provisions of sub-section (7) of Section 88 of the Motor Vehicles Act in coming to the conclusion that no counter signature of the State Transport Authority, West Bengal, was necessary for the temporary permit of the respondent for plying his vehicle in the State of West Bengal.

11. As admittedly, there was no counter-signature of the State Transport Authority, West Bengal, on the temporary permit issued by the State Transport Authority (Bihar), the respondent did not have a valid permit for the part of the route inside the State of West Bengal. The plying of the vehicle of the respondent in the Siliguri region within the State of West Bengal was thus in contravention of Section 66(1) of the Motor Vehicles Act which provides that no owner of a vehicle shall use or permit use of the vehicle as a transport vehicle save in accordance with the conditions of a permit granted or counter-

signed by the Regional or State Transport Authority. The appellants, therefore, were well within their powers to detain and seize the vehicle of the respondent under Section 207 of the Motor Vehicles Act for contravention of Section 66 of the said Act.

12. Regarding the tax payable by the respondent for the vehicle plying within the State of West Bengal, it appears that on 08.10.2009 the appellants had seized and detained the vehicle of the respondent under sub-section (3) of Section 16 of the Motor Vehicles Tax Act and issued a notice under sub-section (4) of Section 16 of the Motor Vehicles Tax Act and it is at this stage that the petitioner filed the writ petition before the Calcutta High Court for release of the seized vehicle and the High Court has held that respondent has paid all the taxes in respect of the vehicle.

13. Sub-sections (3) and (4) of Section 16 of the Motor Vehicles Tax Act are extracted hereinbelow:

> "(3) Notwithstanding anything contained elsewhere in this Act, any officer referred to in sub-section (1) [may seize and detain] any motor vehicle in respect of which tax is due until the person liable to pay the tax,—
>
> (a) has satisfied the Taxing Officer having jurisdiction within thirty days of the detention that the tax has actually been paid,
>
> (b) has within thirty days of such detention paid to the Taxing Officer having jurisdiction the tax due together with the penalty to be paid for non-payment of tax within the prescribed time.
>
> (4) (a) On the expiry of the period of thirty days the vehicle seized and detained may, subject to the provisions of this Act, be sold in auction unless the person liable to pay tax has, within a further period of fifteen days, paid to the Taxing Officer having jurisdiction double the amount of the total tax due, including the penalty under section 11, in respect of such vehicle (hereinafter referred to as the aggregate amount).]
>
> Provided that the terms and conditions in respect of auction of a motor vehicle under this sub-section shall be specified by order, made in this behalf, by the State Government.
>
> (b) The sale of the vehicle seized and detained [may be effected by the Taxing Officer] within whose jurisdiction the vehicle has been seized and detained under this section, and the proceeds of sale shall be disposed of in the same manner as an arrear of land revenue."

It will be clear from the provisions of sub-sections (3) and (4) of Section 16 of the Motor Vehicles Tax Act that power is vested in the Taxing Officer to decide whether tax in respect of the vehicle has been paid and if the same has not been paid, to recover the same from sale of the vehicle, if necessary. Thus, the High Court should not have straight away come to the conclusion in the writ petition that the tax in respect of the vehicle has been paid.

14. We, therefore, set aside the impugned order of the Division Bench of the Calcutta High Court as well as the order of the learned Single Judge and direct that the appellants will continue with the proceedings against the respondent in accordance with Section 16 and other provisions of the Motor Vehicles Tax Act for determining and recovering the tax amount after giving all due opportunity to the respondent. We direct that the Bank Guarantee for Rs.1,00,000/- furnished by the respondent shall remain in force for six months and in case the concerned authority holds that the respondent is liable for any amount of tax, the appellant would be entitled to encash the Bank Guarantee for Rs.1,00,000/- furnished by the respondent and recover the tax amount within a period of six months from

today. We, however, direct that in the facts of the case no penalty will be recovered from the respondent because the State Transport Authority, Bihar had granted the temporary permit for the route upto Siliguri in West Bengal, in excess of the quota fixed between the two States and the respondent had in fact applied to the State Transport Authority, West Bengal for counter-signature on the temporary permit.

15. The appeal is allowed to the extent indicated above. There shall be no order as to costs.

Civil Appeal arising out of SLP (C) NO. 11876 OF 2010:

Leave granted.

2. This is an appeal by special leave against the order dated 23.03.2010 of the Division Bench of the Calcutta High Court in A.S.T. No. 84 of 2010 and this appeal was heard alongwith Civil Appeal arising out of SLP (C) NO. 11653 OF 2010.

3. We have delivered a judgment today setting aside the impugned order of the Division Bench of the Calcutta High Court as well as the order of the learned Single Judge against which the appeal has been filed before the Division Bench of the High Court and directed that the Bank Guarantee for Rs.1,00,000/- furnished by the respondent shall remain in force for a period of six months from today, during which the appellants will complete the proceeding for determination of tax in accordance with Section 16 of the Motor Vehicles Tax Act after giving all due opportunity to the respondent and recover the tax amount from the Bank Guarantee within six months, but will not recover any penalty from the respondent. This appeal is also disposed of in terms of the said order passed in Civil Appeal arising out of SLP (C) NO. 11653 OF 2010.

D.G. Appeals disposed of.

THE STATE OF RAJASTHAN & ORS.

v.

THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JODHPUR THROUGH ITS REGISTRAR GENERAL

(Civil Appeal Nos.8523-24 of 2011)

OCTOBER 11, 2011

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

Prevention of Food Adulteration Act, 1954 – s. 9 – Appointment of food inspectors – Power of – Held: Section 9 vests power in the State Government to appoint such persons as it thinks fit, having the prescribed qualifications to be Food Inspectors for the local areas assigned to them, as prescribed u/r. 8 of the Rules – On facts with regard to manufacture and sale of synthetic milk, the Chief Medical Officer initiated action of taking samples of the products and sending it for testing – Thereafter, in a writ petition, the High Court issued a mandamus compelling the State Government to replace the Medical Officers by Sanitary Inspectors or other regular recruits as Food Inspector which was not correct – State Government could appoint a medical officer in-charge of health administration of a local area as a Food Inspector – If the High Court found that the medical officers were not trained in food inspection and sampling work, it could also direct that the medical officers be given the required training to function as Food Inspector – Thus, the direction by the High Court with regard to appointment of Food Inspectors against 34 posts which were lying vacant and appointment of Sanitary Inspectors as Food Inspectors in the meanwhile is set aside – Prevention of Food Adulteration Rules, 1955 – r. 8.

In a suo motu writ petition entertained by the High Court with regard to manufacturing and sale of synthetic milk in certain Districts of the State, the Collectors of the District appeared on direction by the High Court. They

filed their reply that the Chief Medical Health Officer initiated action as regards taking samples of the product and sending it for testing. The High Court found that the Chief Medical Health Officers and Deputy Chief Medical Health Officers had been vested with the powers of Food Inspector, though they did not have the requisite training to function as Food Inspectors; and that 34 posts of Food Inspectors were lying vacant. The High Court directed appointment of Food Inspectors against 34 posts and till regular appointment is made, Sanitary Inspectors and others who possess the requisite qualifications may be given appointment to the post of Food Inspector. Therefore, the appellant-State filed the instant appeals.

Allowing the appeals, the Court

HELD: Sub-section (1) of Section 9 of the Prevention of Food Adulteration Act, 1954 states that the Central Government or the State Government may, by notification in the official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications to be Food Inspectors for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be. Rule 8 of the Prevention of Food Adulteration Rules, 1955 prescribes the qualifications of Food Inspectors and it states in clause (a) that a medical officer in-charge of health administration of local area is qualified for appointment as Food Inspector. In clauses (b) & (c) a graduate in medicine who has received at least one months' training in food inspection and sampling work and a graduate in Science with Chemistry as one of the subjects or a graduate in Agriculture or Public Health or Pharmacy of in Veterinary Science or a graduate in Food Technology or Dairy Technology or a Diploma Holder in Food Technology or Dairy Technology from a University or Institution

established in India by law or having equivalent qualification and has received three months satisfactory training in food inspection and sampling work is also qualified to be a Food Inspector. The State Government could therefore appoint a medical officer in-charge of health administration of a local area as a Food Inspector. If the High Court found that the medical officers were not trained in food inspection and sampling work, it could also direct that the medical officers are given the required training to function as Food Inspector, but the High Court could not have issued a mandamus compelling the State Government to replace the Medical Officers by Sanitary Inspectors or other regular recruits as Food Inspectors. The direction in the impugned order directing appointment of Food Inspectors against 34 posts and directing appointment of Sanitary Inspectors as Food Inspectors in the meanwhile, is set aside. [Paras 7 and 8] [815-C-H; 816-A-D]

Divisional Manager, Aravali Golf Club and Another vs. Chander Hass and Anr. **(2008) 1 SCC 683: 2007 (12) SCR 1084 – referred to.**

Case Law Reference:

2007 (12) SCR 1084 Referred to. Para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8523-8524 of 2011.

From the Judgment & Order dated 2.3.2007 of the High Court of Rajasthan at Jaipur in DB Civil Writ Petition No. 2677of 2005.

Dr. Manish Singhvi, AAG and R. Gopalakrishna for the Appellants.

B.D. Sharma for the Respondent.

The Judgment of the Court was delivered by

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

2. These are the appeals against the orders dated 02.03.2007 and 19.03.2007 of the Division Bench of the Rajasthan High Court, Jaipur, in D.B. Civil Writ Petition No. 2677 of 2005.

3. The facts briefly are that on the basis of a news published in the Rajasthan Patrika on 04.04.2005 regarding the manufacture and sale of synthetic milk in the districts of Alwar and Bharatpur in the State of Rajasthan, the High Court *suo motu* entertained the D.B. Civil Writ Petition No. 2677 of 2005 on 06.04.2005 and directed the Collectors of Alwar and Bharatpur Districts to appear in person before the Court. The Collector, Alwar, filed his reply before the High Court stating *inter alia* that the very next day after the news item was published, the Chief Medical Health Officer, Alwar, had initiated action and an inspection team had taken samples of the product and the samples were sent for testing in the laboratory. On 02.03.2007, the High Court found that Chief Medical Health Officers and Deputy Chief Medical Health Officers had been vested with the powers of the Food Inspector, though they did not have the requisite training to function as Food Inspectors. The High Court also observed in the order dated 02.03.2007 that the Chief Medical Health Officer/ Deputy Chief Medical Health Officer has to discharge duties of his post and has to remain at the Head Quarters and he may not effectively perform the duties of the post of Food Inspector. The High Court was of the view that the State Government should appoint sufficient number of Food Inspectors without which the menace of food adulteration could not be checked. The High Court posted the matter to 19.03.2007 and directed that the Principal Secretary, Medical and Health Department should be personally present on that day.

4. On 19.03.2007, the High Court found that there were 34

posts of Food Inspectors and all of them were lying vacant and that a requisition had already been sent to the Rajasthan Public Service Commission to fill up the posts, but the Finance Department had not sanctioned the posts on the ground that these were non-plan posts. The High Court in the impugned order dated 19.03.2007 directed the Medical Health Department of the Government of Rajasthan to initiate the process of regular appointment against the 34 posts of the Food Inspectors and also directed the Finance Department not to stall the process of appointment on technical grounds. The High Court further directed in the order dated 19.03.2007 that till regular appointment is made, Sanitary Inspectors and others who possess the requisite qualifications may be given appointment to the posts of Food Inspector so that the provisions of the Prevention of Food Adulteration Act and the Rules are properly implemented.

5. Dr. Manish Singhvi, learned Additional Advocate General appearing for the State of Rajasthan, submitted that Section 9 of the Prevention of Food Adulteration Act, 1954, vests power in the State Government to appoint such persons as it thinks fit, having prescribed qualifications to be Food Inspectors, and it is within the prerogative of the Government to determine the number of Food Inspectors required to be appointed and therefore the High Court could not have issued a *mandamus* to the State Government to make appointment of as many as 34 Food Inspectors. He further submitted that Rule 8 of the Prevention of Food Adulteration Rules, 1955, prescribes the qualifications for the purpose of appointment of Food Inspectors under Section 9 of the Act and it provides that the Medical Officer in-charge of health administration of a local area could be appointed as Food Inspector. He submitted that the High Court, therefore, could not have held that the Medical Officers cannot be continued as Food Inspectors.

6. Section 9 of the Prevention of Food Adulteration Act, 1954 (for short 'the Act') and Rule 8 of the Prevention of Food

Adulteration Rules, 1955 (for short 'the Rules') are extracted hereinbelow:

"Section 9 of The Prevention of Food Adulteration Act, 1954:

9. Food Inspectors :- (1) The Central Government or the State Government may, by notification in the official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications to be food inspectors for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be :

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be appointed to be a food inspector under this section.

(2) Every food inspector shall be deemed to be a public-servant within the meaning of section 21 of the Indian Penal Code (45 of 1860) and shall be officially subordinate to such authority as the Government appointing him, may specify in this hehalf.

Rule 8 of The Prevention of Food Adulteration Rules, 1955:

8. Qualification of food inspector :- A person shall not be qualified for appointment as food inspector unless he:-

(a) is a medical officer in-charge of health administration of local area ; or

(b) is a graduate in medicine and has received at least one month's training in food inspection and sampling work approved for the purpose by the Central Government or a State Government; or

(c) is a graduate in Science with Chemistry as one of the

subjects or is a graduate in Agriculture or Public Health or Pharmacy or in Veterinary Science or a graduate in Food Technology or Dairy Technology or is a diploma holder in Food Technology or Dairy Technology from a University or Institution established in India by law or has equivalent qualifications recognised and notified by the Central Government for the purpose and has received three months' satisfactory training in food inspection and sampling work under a Food (Health) Authority or in an institution approved for the purpose by the Central Government:

Provided that the training in food inspection and sampling work obtained prior to the commencement of 1[Rule 3 of the

Prevention of Food Adulteration (Fourth Amendment) Rules, 1976], in any of the laboratories under the control of :-

(i) a public analyst appointed under the Act, or

(ii) a fellow of the Royal Institute of Chemistry of Great Britain (Branch E); or

(iii) any Director, Central Food Laboratory ; or

the training obtained under a Food (Health) Authority, prior to the commencement of the Prevention of Food Adulteration (Amendment) Rules 1980, shall be considered to be equivalent for the purpose of the requisite training under these rules :

Provided further that a person who is a qualified Sanitary Inspector having experience as such for a minimum period of one year and has received at least three months training in whole or in parts in food inspection and sampling work, may be eligible for appointment as food inspector, upto the period ending on the 31st March, 1985 and may

continue as such if so appointed even though he does not fulfill the qualifications laid down in clauses (a) to (c)].

Provided also that nothing in this rule shall be construed to disqualify any person who is a food inspector on the commencement of the Prevention of the Food Adulteration (Amendment) Rules 1980 from continuing as such after such commencement."

7. Sub-section (1) of Section 9 of the Act states that the Central Government or the State Government may, by notification in the official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications to be Food Inspectors for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be. Rule 8 of the Rules prescribes the qualifications of Food Inspectors and it states in clause (a) that a medical officer in-charge of health administration of local area is qualified for appointment as Food Inspector. In clauses (b) & (c) a graduate in medicine who has received at least one months' training in food inspection and sampling work and a graduate in Science with Chemistry as one of the subjects or a graduate in Agriculture or Public Health or Pharmacy of in Veterinary Science or a graduate in Food Technology or Dairy Technology or a Diploma Holder in Food Technology or Dairy Technology from a University or Institution established in India by law or having equivalent qualification and has received three months satisfactory training in food inspection and sampling work is also qualified to be a Food Inspector. The State Government could therefore appoint a medical officer in-charge of health administration of a local area as a Food Inspector. If the High Court found that the medical officers were not trained in food inspection and sampling work, it could also direct that the medical officers are given the required training to function as Food Inspector, but the High Court could not have issued a *mandamus* compelling the State Government to replace the Medical Officers by Sanitary Inspectors or other regular recruits

as Food Inspectors. This Court has held in *Divisional Manager, Aravali Golf Club and Another* vs. *Chander Hass and Another* [(2008) 1 SCC 683] at page 688 in para 15:

> "The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post."

8. We therefore set aside the direction in the impugned order directing appointment of Food Inspectors against 34 posts and directing appointment of Sanitary Inspectors as Food Inspectors in the meanwhile and allow the appeals. There shall be no order as to costs.

N.J. Appeals allowed.

RAJENDRA VASSUDEV DESHPRABHU (DEAD) THROUGH LRS. & ORS.
v.
DEPUTY COLLECTOR (RETD.) & LAND ACQUISITION OFFICER, PANAJI
(Civil Appeal No. 8539 of 2011)

OCTOBER 11, 2011

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

Goa, Daman and Diu Agricultural Tenancy Act, 1964 – ss. 18A, 18K and 3 – Enhancement of compensation for the acquired land – Land subjected to tenancy – Land Acquisition Officer apportioned compensation at the rate of 50 % for landlord and 50 % for tenant – Award passed by Land Acquisition Officer at the rate of Rs. 17 per sq. m. enhanced to Rs. 175 per sq. m. by the Reference Court – High Court restored the award of Rs. 17/- per sq.m. – On appeal held: When the Notification was issued for land acquisition, the Land Use Act whereby land vest in tenant could be valued only as an agricultural land, was not in force – Thus, market value of the land could be determined with reference to the development potential for non-agricultural purposes – Mere fact of obtaining of sanction from Mamlatdar for sale of such land would not depress the price of the land nor affect its potential for being developed as residential or industrial use – Inspite of s. 3 which prohibits conversion of agricultural land for non-agricultural use in public interest, compensation was determined as Rs. 78 per sq. m. for neighboring agricultural land acquired under the same Notification which has attained finality and there is no reason why the said rate should not apply to the instant case – Order of High Court holding that compensation for the land should be less than compensation for the land which is not subjected to tenancy, is not correct – Thus, order of High Court is modified by increasing the

compensation for the acquired land from Rs. 17 per sq. m. to Rs. 78 per sq. m. – Goa Land Use (Regulations) Act, 1991 – s. 2.

Appellants are the legal heirs of the co-owners of land. Notification was issued for acquisition of certain land including the land of the co-owners. The said land was tenanted and is in occupation of tenants and vested in them on the Tiller's Day in terms of Section 18A of the Goa, Daman and Diu Agricultural Tenancy Act, 1964. The Land Acquisition Officer awarded compensation for the acquired land at the rate of Rs. 17 per sq. m. As the co-owners admitted their tenancy rights, the Land Acquisition Officer directed that the compensation to be divided between the owners and the tenants at the rate of 50% each. The Reference Court increased the compensation from Rs. 17 per sq. m. to Rs. 75 per sq. m. The High Court set aside the judgment and award of the Reference Court and restored the award of Rs. 17/- per sq. m. by the Land Acquisition officer.

Appellants contended before this Court that in regard to the remaining extent of land acquired under the same Notification, the High Court by judgment dated 14.11.2008 in FA No. 123/2003 (*The Deputy Collector (Dev.) & LAO, Panaji vs. Smt. Sita Devi*) **determined the compensation as Rs.78 per sq.m. and therefore, the compensation should have been the same in regard to the land of the appellants also.**

Allowing the appeal, the Court

HELD: 1.1. Section 2 of the Goa Land Use (Regulations) Act, 1991 provides that no land which is vested in a tenant under the provisions of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 shall be used or allowed to be used for any purpose other than agriculture. If the Land Use Act was applicable to the land

at the time of acquisition, then the land could be used only as agricultural land and could be valued only as an agricultural land. But the Land Use Act, came into force with effect from 2.11.1990. The relevant date for the purpose of determination of compensation is the date of publication of preliminary notification under Section 4(1) of the Land Acquisition Act, 1894 which is 1.2.1990. On that day the Land Use Act was not in force and consequently there was no restriction that the use land vested in the tenant should be used only for agricultural purposes. Therefore, the market value of the land could be determined with reference to the development potential for non-agricultural purposes. [Para 7] [825-E-H]

1.2. Under Section 18K of the Tenancy Act, the mere fact that the sanction has to be obtained from Mamlatdar for sale of such land would not depress the price of the land, nor affect its potential for being developed as residential or industrial use. [Para 8] [826-A-B]

1.3. Section 3 of the Tenancy Act provides that if any owner of agricultural land applies for conversion thereof for non-agricultural use, the Government may, instead of granting conversion, prohibit such conversion in public interest. The risk not being permitted to convert the land should also be taken note of while assessing the market value with reference to development potential of the land. Such a contingency exists in regard to all agricultural lands and is not specific to the appellants. Inspite of Section 3 of Tenancy Act, compensation has been determined as Rs.78/- per sq.m. for neighbouring agricultural lands and there is no reason why the said rate should not apply to the land in question also. [Para 9] [826-C-E]

1.4. The High Court committed an error in holding that the compensation for the land in question should be

lesser than the compensation for a land which is not subject to tenancy. It relied upon the principle that a free hold land normally commands higher compensation while the land burdened with encumbrances secures lesser price and the fact of a tenant in occupation would be an encumbrance and no willing purchaser would willingly offer the same price as would be offered for a freehold land. The said principle would apply only where a property subject to encumbrances is to be sold to a private purchaser or is acquired subject to the tenancy. In the instant case, the landlords were awarded only 50% of the compensation amount and remaining 50% was awarded to the tenants. The High Court mixed up a sale subject to encumbrances with an acquisition free from encumbrances under the Land Acquisition Act, 1894. The two are conceptually different. If a property subject to a lease and in the possession of a lessee is offered for sale by the owner to a prospective private purchaser, the purchaser being aware that on purchase he would get only title, but not possession and that the sale in his favour would be subject to an encumbrance, namely the lease, would offer a price taking note of the encumbrances. Naturally such a price would be less than the price of a property without any encumbrances. But when a land is acquired free from encumbrances, what is acquired is not only the landlord's right, but also the lessee's rights. In such a case compensation awarded is for the property free from encumbrances, which includes the lessee's rights also. [Para 10] [826-F-H; 827-A-E]

1.6. As the High Court has already determined Rs.78 per sq.m. as the compensation in regard to the adjoining lands acquired under the same notification vide its judgment dated 14.10.2008 *(Dy.Collector (Development) and Land Acquisition Officer, Panaji v. Smt. Sitadevi & Ors.* ***in FA No.123/2003*****) and the said judgment has attained finality, there is no reason why the same compensation**

should not be awarded for the land in the instant case also. Thus, the order of the High Court is modified by increasing the compensation for the acquired land from Rs.17 per sq.m. to Rs.78 per sq.m. [Paras 11 and 12] [828-D-G]

M.B. Gopala Krishna and Ors. v. Special Deputy Collector, LandAcquisition **(1996) 3 SCC 594: 1996 (2) SCR 248;** *Dy.Collector(Development) and Land Acquisition Officer, Panaji v. Smt. Sitadeviand Ors*. **in FA No.123/2003 – referred to.**

Case Law Reference:

1996 (2) SCR 248 Referred to. Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8539 of 2011.

From the Judgment & Order dated 14.10.2008 of the High Court of Bombay at Goa in First Appeal No. 138 of 2003.

L. Nageswara Rao, A. Raghunath for the Appellants.

Siddharth Bhatnagar, Pawan Kumar Bansal, T. Mahipal for the Respondents.

The Judgment of the Court was delivered by

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

2. An extent of 1,06,864 sq.m. of land including 5070 sq.m. of land in Survey No. 284 (Part) in Pernem village of which the appellants are co-owners was acquired in pursuance of preliminary notification dated 12.1.1990 (Gazetted on 1.2.1990). By award dated 27.3.1991, the Land Acquisition Officer awarded compensation for the acquired land at the rate of Rs.17 per sq.m. As there were three tenants, namely, Krishna Arjun Kauthankar, Keshav Bhikaji Kauthankar and Harischandra Bhikaji Kauthankar and as the co-owners had admitted their tenancy rights, the Land Acquisition Officer

directed that the compensation to be divided between the owners and the tenants at the rate of 50% each. The reference court, by judgment daed 22.11.2002, increased the compensation from Rs.17 per sq.m. to Rs.175 per sq.m. The appeal by the State was allowed by a division bench of the Bombay High Court, by the impugned judgment dated 14.11.2008. The High Court set aside the judgment and award of the reference court, thereby restoring the award of Rs.17/- per sq.m. by the Land Acquisition Officer, on the following reasoning:

> "….. the Applicants' acquired portion was garden land but tenanted and the tenants had become deemed purchasers of the same and the only interest which the applicants had in the said land was to receive the purchase price, and in such a case no willing purchaser would have ventured to purchase such a land for building purposes or for that matter for any other purpose from the applicants. The said Krishna Arjun Kauthankar and others were in possession of the land and had become deemed owners of the same. The learned reference court was not right in assessing the value of the acquired land as having building potential based on several awards/sale instances which were of land dissimilar to the acquired land."

3. The said judgment is challenged in this appeal by special leave. At the outset the appellants submitted that Late Rajinder Vasdev Deshprabhu (of whom appellants are the LRs.) and his brother late Raghuraj Vasdev Deshprabhu were the co-owners of the property, and on their death their respective legal heirs have become the owners thereof; that the land was tenanted and is in occupation of Krishan Arjun Kauthankar and two others and vested in the tenants on the Tiller's day in terms of section 18A of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 ('Tenancy Act' for short). They submitted that they do not dispute the award of the Land Acquisition Officer apportioning 50% of the compensation to the landlords and

50% to the tenants; and that out of 50% payable to landlords, the appellants are entitled to one half as the LRs. of Rajendra V.Deshprabhu and the remaining half is payable to the legal heirs of Raghuraj V.Deshprabhu. In other words the appellants restrict their claim to 25% of the award amount and submitted that even in regard to any increase in compensation, they are entitled to only 25%.

4. The appellants contend that in regard to the remaining extent of land acquired under the same notification, the High Court by judgment dated 14.11.2008 in FA No. 123/2003 (*The Deputy Collector (Dev.) & LAO, Panaji vs. Smt. Sita Devi*) had determined the compensation as Rs.78 per sq.m. and therefore the compensation should have been the same in regard to their land also. Therefore question for consideration is whether the compensation for the acquired land should be increased to Rs.78/- per sq.m.

5. Respondents do not dispute that in regard to the adjoining lands compensation has been determined by the High Court at Rs. 78/- per sq.m. in *Deputy Collector vs. Sita Devi* (FA No.123/2003 decided on 14.11.2008) and that order not having been challenged, has attained finality. They also do not dispute the position that if the acquired land had not been subject to any tenancy right, the land owners would have been entitled to compensation at the said rate of Rs.78 per sq.m. They however contend that the land in question was different from the other acquired lands for which Rs.78/- per sq.m. has been awarded as compensation. They supported the judgment of the High Court on the following grounds:

(i) As the land was in the occupation of tenants, the appellants as owners would not have been able to sell the said land to any willing purchaser and obtain the market value. Even the tenants had obtained a purchase certificate under section 18H, they could not have sold the property, as there was a restriction on transfer of the land purchased by the tenant in section 18K of the Tenancy Act which required previous sanction of the Mamlatdar for sale.

(ii) Section 3 of the Tenancy Act provided that when a request is made by the owner of an agricultural land to convert it to non agricultural purpose, the authority concerned can grant conversion, or in public interest prohibit the conversion. There was thus no absolute right to get the land converted to non agricultural use and develop it for other non-agricultural purposes.

(iii) Section 2 of the Goa Land Use (Regulations) Act, 1991 ('Land Use Act' for short) provides that no land which vested in the tenant under the provisions of the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. As the land in question had vested in the tenants on the Tiller's Day (8.10.1976), the land had to be used only for agricultural purposes. The land therefore did not have the potential for development for any non-agricultural purpose and therefore will have to be valued only as an agricultural land. Even as agricultural land, the market value will not be the normal market value as it was tenanted.

6. We are not required to decide in this appeal, either the entitlement of the landlords/owners for compensation or the extent of share in the compensation. It is an admitted position that the land is tenanted and vested in the tenants under section 18A of the Tenancy Act on the Tiller's Day (that is, 8.10.1976) and the tenants are deemed to have purchased the land. The purchase price under section 18D of the Tenancy Act was not however paid to the landlords and no purchase certificate had been issued to the tenants under section 18H of the Tenancy Act. According to the appellants, where land is acquired under the Land Acquisition Act, 1894, before payment of the purchase

price to the landlords under section 18D of Tenancy Act and before the issue of purchase certificate to the tenants under section 18H of the Tenancy Act, inspite of the vesting under section 18A of the Tenancy Act, the compensation will be divided equally between the landlord and tenant as per standing instructions of the government. The appellants contend that the said procedure had been followed by the Land Acquisition Officer in making the award by holding that 50% of the compensation was payable to the landlords and 50% of compensation was payable to the tenants. The appellants submitted that neither the landlords, nor the tenants, have disputed the said apportionment and therefore this appeal does not involve any issue relating to entitlement to compensation or apportionment thereof. It was further submitted that the only issue in this appeal relates to the quantum of compensation. In view of the said submission, we have only considered the question of quantum in this appeal, and have not examined the rights of the landlord vis-à-vis the tenants.

7. We may first deal with the contention of the respondents with reference to the regulation of land use under the Land Use Act. Section 2 of the said Act provides that no land which is vested in a tenant under the provisions of the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. If the Land Use Act was applicable to the land at the time of acquisition, then the land could be used only as agricultural land and could be valued only as an agricultural land. But the Land Use Act, came into force with effect from 2.11.1990. The relevant date for the purpose of determination of compensation is the date of publication of preliminary notification under section 4(1) of the Land Acquisition Act, 1894 which is 1.2.1990. On that day the Land Use Act was not in force and consequently there was no restriction that the use land vested in the tenant should be used only for agricultural purposes. Therefore the market value of the land could be determined with reference to the development potential for non agricultural purposes.

8. The next contention of the respondents is that a land purchased by a tenant under Chapter IIA of the Tenancy Act, could not be sold without the previous sanction of Mamlatdar, under section 18K of the Tenancy Act. The mere fact that the sanction has to be obtained from Mamlatdar for sale of such land would not depress the price of the land, nor affect its potential for being developed as residential or industrial use.

9. The next contention of the respondents was based on Section 3 of the Tenancy Act. Section 3 provides that if any owner of agricultural land applies for conversion thereof for non-agricultural use, the Government may, instead of granting conversion, prohibit such conversion in public interest. The risk not being permitted to convert the land should also be taken note of while assessing the market value with reference to development potential of the land. Such a contingency exists in regard to all agricultural lands and is not specific to the appellants. Inspite of section 3 of Tenancy Act, compensation has been determined as Rs.78/- per sq.m. for neighbouring agricultural lands and we see no reason why the said rate should not apply to the land in question also.

10. The High Court committed an error in holding that the compensation for the land in question should be lesser than the compensation for a land which is not subject to tenancy. It relied upon the decision of this Court in *M.B. Gopala Krishna & Ors. v. Special Deputy Collector, Land Acquisition* (1996) 3 SCC 594 wherein this Court observed :

> "A freehold land and one burdened with encumbrances do make a big difference in attracting willing buyers. A free hold land normally commands higher compensation while the land burdened with encumbrances secures lesser price. The fact of a tenant in occupation would be an encumbrance and no willing purchaser would willingly offer the same price as would be offered for a freehold land."

The said principle will apply only where a property subject

to encumbrances is to be sold to a private purchaser or is acquired subject to the tenancy. The decision of this Court made those observations when upholding the compensation that was payable to the landlord, without reference to the tenant's rights, where the tenant did not claim any compensation. But in this case, the landlords have been awarded only 50% of the compensation amount and remaining 50% has been awarded to the tenants. The High Court has mixed up a sale subject to encumbrances with an acquisition free from encumbrances under the Land Acquisition Act, 1894. The two are conceptually different. If a property subject to a lease and in the possession of a lessee is offered for sale by the owner to a prospective private purchaser, the purchaser being aware that on purchase he will get only title, but not possession and that the sale in his favour will be subject to an encumbrance, namely the lease, will offer a price taking note of the encumbrances. Naturally such a price would be less than the price of a property without any encumbrances. But when a land is acquired free from encumbrances, what is acquired is not only the landlord's right, but also the lessee's rights. In such a case compensation awarded is for the property free from encumbrances, which includes the lessee's rights also. We may illustrate by the following example:

> Let us assume the value of a property which is not subject to any lease is Rs.Ten lakhs. If that property was subject to a lease and if the possession was with the lessee, a purchaser will offer only Rs.Five lakhs as he will be purchasing a property with an encumbrance and will not be getting physical possession. But when the property subject to a lease is acquired, under the Land Acquisition Act, 1894, what is acquired is not only the landlord's right, title and interest, but also the lessee's right and interest. In other words the property with all rights, free from encumbrances is acquired and the compensation is determined and paid for the property as one free from encumbrances. The rights of lessor as well as lessee are extinguished. Therefore compensation payable will be the entire market value that is Rs.Ten lakhs which may be shared by the lessors and lessee at the rate of Rs.Five lakhs each or such other ratio as may be determined with reference to the extent of their respective rights. The Land Acquisition Officer issue notice to all persons interested and hears them before making the apportionment of the compensation among the persons interested. The 'market value' of the property free from encumbrances acquired by the State will not therefore be the same as the price a purchaser may pay to buy the property subject to a lease (encumbrances).

11. As the High Court has already determined Rs.78 per sq.m. as the compensation in regard to the adjoining lands acquired under the same notification vide its judgment dated 14.10.2008 (*Dy.Collector (Development) and Land Acquisition Officer, Panaji v. Smt. Sitadevi & Ors. in FA No.123/2003*) and the said judgment has attained finality, there is no reason why the same compensation should not be awarded for this land also. The appellants have no grievance in regard to the apportionment made by the Land Acquisition Officer at the rate of 50% for the landlords and 50% for the tenants. The tenants apparently have not raised any dispute in regard to the apportionment. It is made clear that if any dispute regarding apportionment is pending, this decision shall not be construed as determining the percentage of entitlement of appellants or other co-owners (not before us) or the tenants (not before us).

12. In view of the above, this appeal is allowed and the order of the High Court is modified by increasing the compensation for the acquired land from Rs.17 per sq.m. to Rs.78 per sq.m. All statutory benefits are also granted.

N.J. Appeal allowed.

FEE REGULATORY COMMITTEE
v.
KALOL INSTITUTE OF MANAGEMENT, ETC.
(Civil Appeal No. 8543 of 2011)

OCTOBER 11, 2011.

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

GUJARAT PROFESSIONAL TECHNICAL EDUCATIONAL COLLEGES OR INSTITUTIONS (REGULATION OF ADMISSION AND FIXATION OF FEES) ACT, 2007:

s. 10(3) – Fee structure – Revision of – Claim by private unaided educational institutions for revision of fee of their students on account of higher emoluments payable to teaching and non-teaching staff on the basis of the recommendations of the Sixth Pay Commission – Held: The institutions are entitled to collect the extra cost on account of payment of revised pay and allowances to the teaching and non-teaching staff through the fees collected from the students and this aspect will be taken into consideration by the Fee Regulatory Committee while determining the fees for the academic years 2011-2012, 2012-2013 and 2013-2014 and subsequent period of three years in accordance with the provisions of the Act and the observations made in the judgment – The fee structure determined by the Fee Regulatory Committee for the years 2008-2009, 2009-2010 and 2010-2011 shall be binding on the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion of his professional course in that college or institution – Education/Educational Institutions.

The respondents-unaided private professional and educational colleges and institutions in the State of Gujarat, sought revision of the fee determined by the Fee Regulatory Committee in the State of Gujarat for the three academic years 2008-2009, 2009-2010 and 2010-2011 for students admitted in their colleges and institutions, on the ground that they were required to pay higher emoluments to their teaching and non-teaching staff w.e.f. 1.1.2006 on the basis of the recommendations of the Sixth Pay Commission, but the Fee Regulatory Committee declined to revise the fees. The respondents-colleges/institutions filed writ petitions before the High Court, which held that the respondents-institutions were liable to pay salary and allowances to their teaching and non-teaching staff on the basis of the recommendations made by the Sixth Pay Commission and this would be one of the criteria to be taken into consideration for determination of fee by the Fee Regulatory Committee. The High Court set aside the orders of the Fee Regulatory Committee and remitted the matters to it for consideration and decision afresh in accordance with the observations made in the orders of the High Court. Aggrieved, the Fee Regulatory Committee has filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The Fee Regulatory Committee cannot overlook the statutory provisions in s. 10(3) of the Gujarat Professional Technical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Act, 2007 that the fee structure so determined by the Fee Regulatory Committee shall be binding on the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion

of his professional course in that college or institution. The High Court, therefore, could not have directed revision of the fees already fixed by the Fee Regulatory Committee for the academic years 2008-2009, 2009-2010 and 2010-2011 contrary to the said statutory provisions. [Para 8] [836-D-G]

1.2. Nonetheless, the unaided private professional and technical colleges or institutions were entitled to recover the extra cost on account of payment of revised pay and allowances to the teaching and non-teaching staff through the fees collected from the students and this could be done only by enhancing the fees from the students for the academic years 2011-2012, 2012-2013 and 2013-2014 and for period of three years thereafter. Exactly how much of this cost would be recovered through the fees collected from the students during the first period of the three years and how much of this cost would be recovered through fees collected from the students during the second period of three years can only be appropriately worked out by the Fee Regulatory Committee keeping in mind the interests of both the colleges/institutions and the students. [para 8] [836-F-H; 837-A-B]

1.3. The impugned orders of the High Court are set aside and it is directed that the increase in cost suffered by the respondents-colleges/institutions on account of the higher pay and allowances payable to the teaching and non-teaching staff on the basis of the recommendations of the Sixth Pay Commission will be taken into consideration by the Fee Regulatory Committee while determining the fees for the academic years 2011-2012, 2012-2013 and 2013-2014 and subsequent period of three years in accordance with the provisions of the Act and the observations made in the judgment. [para 9] [837-B-D]

Islamic Academy of Education and Another v. *State of Karnataka and Others* **2003 (2) Suppl. SCR 474=(2003) 6 SCC 697;** *T.M.A. Pai Foundation and Others v. State of Karnataka and Others* **2002 (3) Suppl. SCR 587 = (2002) 8 SCC 481; and** *P.A. Inamdar and Others v. State of Maharashtra and Others* **2005 (2) Suppl. SCR 603 = (2005) 6 SCC 537 – cited.**

Case Law Reference:

2003 (2) Suppl. SCR 474	**cited**	**para 5**
2002 (3) Suppl. SCR 587	**cited**	**para 6**
2005 (2) Suppl. SCR 603	**cited**	**para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8543 of 2011.

From the Judgment & Order dated 1.10.2010 of the High Court of Gujarat at Ahmedabad in SCA No. 9242 of 2010.

WITH

8544, 8545, 8546, 8547, 8548, 8549, 8550, 8551, 8552, 8553, 8554, 8555, 8556, 8557, 8558, 8559, 8560, 8561, 8562, 8563, 8564, 8565 and 8566 of 2011.

Dr. Rajeev Dhawan, D.N. Ray, Manisha Lav Kumar, Lokesh K. Choudhary and Sumita Ray for the Appellant.

Dushyant A. Dave, K.V. Vishwanathan, Dhaval C. Dave, A. Venayagam Balan, Nikhil Goel for the Respondents.

The Judgment of the Court was delivered by

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

2. These are appeals by special leave against the impugned orders of the Division Bench of the Gujarat High Court.

3. The facts very briefly are that the respondents are different unaided private professional and educational colleges and institutions in the State of Gujarat. The fees for admission to the private unaided professional and educational colleges and institutions in the State of Gujarat are regulated by the Gujarat Professional Technical Educational Colleges or Institutions (Regulation of Admission Fixation of Fees) Act, 2007 (for short 'the Act'), which came into effect on 30.04.2008. Section 9 of the Act provides that the State Government shall, for the purpose of determining the fees for admission of students in the professional educational colleges or institutions, constitute a Fee Regulatory Committee with a retired judge of the High Court nominated by the State Government as its Chairperson. Section 10(1) of the Act provides that the Fee Regulatory Committee shall determine the fee structure for admission of students in the professional course and different fee structure may be determined for admission of students in different professional courses and in different professional educational colleges or institutions. Section 10(3) of the Act states that the fee structure so determined by the Fee Regulatory Committee shall be binding on the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion of his professional course in that college or institution. Section 11(1) of the Act provides that the Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an unaided professional education college or institution taking into consideration the factors mentioned therein and one of the factors mentioned therein is the expenditure on administration and maintenance. In accordance with these provisions of the Act, the Fee Regulatory Committee determined the fees for the students of the unaided professional educational colleges and institutions in the State of Gujarat for the three academic years 2008-2009, 2009-2010 and 2010-2011 by different orders for different colleges and institutions

passed in the years 2009 and 2010. When the State Government accepted the recommendations of the Sixth Pay Commission for revision of the pay and allowances of the employees with effect from 01.01.2006, different private engineering and technical colleges and institutions sought revision of the fees for students admitted in their colleges and institutions before the Fee Regulatory Committee on the ground that they have to pay their teaching and non-teaching staff the revised pay and allowances as per the recommendations of the Sixth Pay Commission, but the Fee Regulatory Committee declined to revise the fees.

4. The respondents-colleges/institutions then moved the High Court in different writ petitions under Article 226 of the Constitution and by the impugned orders, the High Court held that the Self-Finance Institutions, like the institutions of the respondents, are liable to pay salary and allowances to its teaching and non-teaching staff on the basis of the recommendations made by the Sixth Pay Commission and the revision of pay of Teachers in accordance with the recommendations of the Sixth Pay Commission is one of the criteria to be taken into consideration for determination of fee by the Fee Regulatory Committee. The High Court, relying on its orders passed in similar cases, set aside the orders of the Fee Regulatory Committee and remitted the matters to the Fee Regulatory Committee for fresh consideration and decision in accordance with the observations made in the impugned orders. The High Court also held that if the respondents file undertaking that they will actually implement the recommendations made by the Sixth Pay Commission for their teaching and non-teaching staff, such additional burden on account of implementation of the recommendations of the Sixth Pay Commission shall also be taken into consideration while deciding the fee structure afresh by the Fee Regulatory Committee. The High Court observed that till such orders are passed by the Fee Regulatory Committee, the respondents shall continue to collect the same fees from the students as are

collected presently under the orders of the Fee Regulatory Committee. Aggrieved by the impugned orders of the High Court, the Fee Regulatory Committee has filed these appeals.

5. The only contention raised before us by Dr. Rajiv Dhavan, learned counsel appearing for the appellants, is that the direction of this Court in *Islamic Academy of Education and Another* v. *State of Karnataka and Others* [(2003) 6 SCC 697] is that the fee fixed by the Committee shall be binding for a period of three years and at the end of the period of three years, the institution would be at liberty to apply for revision and accordingly it has been provided in Section 10(3) of the Act that the fee structure determined by the Fee Regulatory Committee shall be binding on the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion of his professional course in that college or institution. He submitted that despite this statutory provision in Section 10(3) of the Act, the High Court has directed to revise the fees for the academic years 2008-2009, 2009-2010 and 2010-2011, which had already been determined by the Fee Regulatory Committee and which could not be revised for a period of three years.

6. Mr. Dushyant A. Dave, learned counsel appearing for the respondents, on the other hand, submitted that unaided private engineering and professional colleges have to pay the revised pay and allowances as per the recommendations of the Sixth Pay Commission and, therefore, they are entitled to recover the additional cost on account of payment of revised pay and allowances from the students by enhancing fees in accordance with the judgments of this Court in *T.M.A. Pai Foundation and Others v. State of Karnataka and Others* [(2002) 8 SCC 481], *Islamic Academy of Education and Another* v. *State of Karnataka and Others* (supra) and *P.A.*

Inamdar and Others v. State of Maharashtra and Others [(2005) 6 SCC 537].

7. We have considered the submissions of the learned counsel for the parties and we find that Section 10(3) of the Act reads as follows:

> "10(3). The fee structure so determined by the Fee Regulatory Committee shall be binding to the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion of his professional course in that college or institution."

8. Obviously, the Fee Regulatory Committee cannot overlook the aforesaid statutory provisions in Section 10(3) of the Act that the fee structure so determined by the Fee Regulatory Committee shall be binding on the unaided professional educational colleges or institutions for a period of three years and the fee so determined shall be applicable to a student who is admitted to a professional educational college or institution in that academic year and shall not be revised till the completion of his professional course in that college or institution. The High Court, therefore, could not have directed revision of the fees already fixed by the Fee Regulatory Committee for the academic years 2008-2009, 2009-2010 and 2010-2011 contrary to the aforesaid statutory provisions. Nonetheless, the unaided private professional and technical colleges or institutions were entitled to recover the extra cost on account of payment of revised pay and allowances to the teaching and non-teaching staff through the fees collected from the students and this could be done only by enhancing the fees from the students for the academic years 2011-2012, 2012-2013 and 2013-2014 and for period of three years thereafter. Exactly how much of this cost would be recovered through the fees collected from the students during the first period of the

three years and how much of this cost would be recovered through fees collected from the students during the second period of three years can only be appropriately worked out by the Fee Regulatory Committee keeping in mind both the interest of the colleges/institutions and the students.

9. We accordingly set aside the impugned orders of the High Court and direct that the increase in cost suffered by the respondents-colleges/institutions on account of the higher pay and allowances payable to the teaching and non-teaching staff on the basis of the recommendations of the Sixth Pay Commission will be taken into consideration by the Fee Regulatory Committee while determining the fees for the academic years 2011-2012, 2012-2013 and 2013-2014 and subsequent period of three years in accordance with the provisions of the Act and the observations made herein. These appeals are allowed. There shall be no order as to costs.

R.P. Appeals allowed.

DELHI ADMINISTRATION THROUGH ITS SECRETARY
v.
UMRAO SINGH
(Civil Appeal No. 8526 of 2011)

OCTOBER 11, 2011

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

Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 – rr.4, 6 – Government of India considered the recommendations of the Committee set up to study the measures for controlling land values and stabilizing land prices in the urban areas of Delhi and framed 1961 scheme for acquisition, development and disposal of land – By office order dated 3.4.1986 issued by Delhi Administration, 1961 Scheme was amended – Whether 1961 scheme could have been amended by administrative order dated 3.4.1986 – Held: Sub-rule (1) of r.4 of Rules stated that the Authority may, in conformity with the plans, and subject to the other provisions of the rules, allot Nazul land to individuals and other categories of persons – Sub-rule (2) of r.4 further provided that the Authority shall in conformity with plans and subject to the Rules dispose the Nazul Land by auction to the categories of institutions named in clauses (a) to (g) in sub-rule 2 of r.4 – There is nothing in r.4 to indicate that the 1961 Scheme has been incorporated in r.4 – r.6(1) of the Rules only provided that if the Authority decides to allot Nazul land to the individuals eligible under the 1961 Scheme, then Nazul land shall be allotted at pre-determined rates and not at the rates determined in a public auction – High Court took an erroneous view in the impugned order that r. 6 of the Rules, which was a statutory rule, laid down conditions for allotment of land under the 1961 Scheme and the conditions for allotment of land under the 1961 Scheme could therefore be amended by only statutory rules u/s.56 read with s.22 of

the Act – r.6 of the Rules did not stipulate the conditions for allotment under the 1961 Scheme and the 1961 Scheme being an administrative scheme could be amended without a statutory rule – Delhi Development Act, 1957 – ss.22, 56.

Ramanand v. Union of India and Ors. **AIR (1994) Delhi 29 – *approved.***

Case Law Reference:

AIR (1994) Delhi 29 approved Para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8526 of 2011.

From the Judgment & Order dated 15.12.2008 of the High Court of Delhi at New Delhi in Civil WP No. 2147 of 1992.

WITH

Civil Appeal No. 8527 of 2011.

Parag P. Tripathi, ASG, Rachana Srivastava for the Appellant.

Bharat Jain, N.S. Vashisht and Irshad Ahmad for the Respondent.

The order of the Court was delivered by

O R D E R

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

2. These are appeals against the common judgment and order dated 15.12.2008 of the Division Bench of the High Court of Delhi in Civil Writ Petition Nos.2147 of 1992 and 2148 of 1992 (for short the 'impugned order').

3. The facts very briefly are that in the year 1959, the Government of India, Ministry of Home Affairs, set up a

Committee to study the problems of introducing measures of control on land values and stabilizing land prices in the urban areas of Delhi and this Committee submitted its report recommending some measures. The Government of India considered the recommendations and conveyed its decision to the Chief Commissioner, Delhi, by its letter dated 02.05.1961 regarding acquisition, development and disposal of land (hereinafter called 'the 1961 Scheme').The 1961 Scheme *inter alia* contemplated that land may be allotted at pre-determined rates, namely, at the cost of acquisition and development plus the additional charges mentioned in the Scheme, to individuals whose land has been acquired as a result of the Chief Commissioner's notifications dated 17.07.1959, 03.09.1957, 13.11.1959 and 10.11.1960 or other such notifications with a view to rehabilitate such individuals. Pursuant to the 1961 Scheme, land-owners, whose land was acquired, applied for allotment of alternative plots pursuant to advertisements inviting applications and after the necessary requirements as stipulated in the 1961 Scheme were complied with, plots were allotted to the persons who were the recorded owners prior to the issue of notification under Section 4 of the Land Acquisition Act.

4. By an Officer Order dated 03.04.1986 issued by the Delhi Administration, Delhi, Land and Building Department, the 1961 Scheme was amended. The Office Order dated 03.04.1986 is extracted hereinbelow:-

"DELHI ADMINISTATION, DELHI
LAND AND BUILDING DEPARTMENT
VIKAS MINAR, NEW DELHI.

37(32)/1/12 Dated: 3rd April' 86

Office Order

In supersession of and previous order issued on the subject, the Administrator Delhi is pleased to order that following norms should be followed in respect of allotment

of alternative plots in lieu of the land acquired for Planned Development of Delhi under the scope of large scale Acquisition, Development and Disposal of land in Delhi of the Government of India contained in their letter dated 2.5.1961.

1. In order to make applicant eligible for all allotment of alternative plot, the minimum land acquired for Planned Development of Delhi will be one bigha instead of 150 sq. yds. which was being followed earlier.

2. In case the applicant has purchased the requisite land of 1 bigha he should have purchased the same 5 years earlier than the date of notification under Section 4 of the Delhi Land Acquisition Act in order to make him eligible for allotment of alternative plot.

3. Condition No. 2 will, however, not be applicable in respect of ancestral cases.

4. Minimum size of the plot will be restricted to 250 sq. yards where land acquired is more than 10 bighas. Cases where land acquired is more than 5 bighas but upto 10 bighas plot size of 150 sq. yds. will be recommended and in respect of the cases where the land acquired ranges between 1 bigha to 5 bighas, the size of the plot will be restricted to 80 sq. yrds.

5. The plot will be allotted by DDA on pre-determined rates fixed by the Competent Authority from time to time.

It is also clarified that these orders shall also apply to all pending applications.

(P.S. Bhatnagar)
SECRETARY
(LAND AND BUILDING)"

It was, thus, stipulated in the amended Scheme that in case the applicant has purchased the requisite land of one bigha, he should have purchased the same five years earlier than the date of notification under Section 4 of the Land Acquisition Act in order to make him eligible for allotment of alternative plot.

5. On 27.01.1984, a notification was issued under Section 4 of the Land Acquisition Act for acquisition of 3787 bighas and 12 biswas of land situated in Village Andheria for the public purpose of Planned Development of Delhi, which included the lands of the respondents, and the respondents were paid compensation in accordance with the Awards. The Government thereafter invited applications for allotment of alternative plots under the 1961 Scheme and the respondents applied for allotment of alternative plots in their applications dated 07.11.1986. As the applications submitted by the respondents lacked material particulars and were not accompanied with the relevant documents, the respondents were intimated to furnish material particulars and the relevant documents including the sale deeds by which they had purchased the land. The respondents furnished the particulars and documents and on scrutiny, it was found that the respondents had purchased the land in the years 1982 and 1983. The applications of the respondents were rejected by communications dated 30.09.1991 as they had purchased the lands within five years of the date of the notification under Section 4 of the Land Acquisition Act, i.e. 22.01.1984.

6. Aggrieved, the respondents filed Civil Writ Petition Nos.2147 of 1992 and 2148 of 1992 in the High Court and contended that the 1961 Scheme had been incorporated in the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (for short 'the Nazul Land Rules'), which are statutory in character and these rules could not be amended by an administrative order dated 03.04.1986. The High Court accepted the contention of the petitioner and held in the impugned order that Nazul Land Rules had been made by the Central Government under clause (j) of sub-section (2) of

Section 56 read with sub-section (3) of Section 22 of the Delhi Development Act, 1957 (for short 'the Act') and could be amended only in the manner prescribed under Section 56 read with Section 22 of the Act and by an administrative order a further condition could not be stipulated under Rule 6 of the Nazul Land Rules. The High Court accordingly set aside the communications dated 30.09.1991 rejecting the applications of the respondents for alternative plots and remitted the matter to the appellants to consider the request of the respondents in the light of the provisions contained in the Nazul Land Rules and made it clear that the appellants would be permitted to take into consideration the nature of the policy as well as the condition stipulated in the 1961 Scheme as explained in the Full Bench judgment of the High Court in *Ramanand v. Union of India & Ors*. [AIR 1994 Delhi 29].

7. The only contention raised by the learned counsel for the appellant before us is that the view taken by the High Court that the 1961 Scheme could not have been amended by the administrative order dated 03.04.1986 was not correct. Learned counsel for the respondents, on the other hand, supported the impugned order of the High Court.

8. Rules 4 and 6 of the Nazul Land Rules, which are relevant for deciding the issue raised in this appeal, are extracted hereinbelow:

> *"4. Persons to whom Nazul land may be allotted.*-(1) The Authority may, in conformity with the plans, and subject to the other provisions of these rules, allot Nazul land to individuals, [body of persons, firms, companies], public and private institutions, co-operative house building societies, other co-operative societies of individuals, cooperative societies of industrialists and to the departments of the Central Government, State Governments and the Union territories.
>
> (2) The Authority shall, in conformity with plans and subject to the provisions of these rules, dispose the Nazul land by

> auction to the following institutions :
>
> (a) hospitals;
>
> (b) dispensaries;
>
> (c) nursing homes;
>
> (d) higher or technical education institutions;
>
> (e) community halls;
>
> (f) clubs;
>
> (g) schools:
>
> Provided that nothing in this sub-rule shall affect the allotment of land to the Central Government, State Government, Union territory, local body, autonomous bodies or organisations owned by the Central Government."
>
> *"6. Allotment of Nazul land at pre-determined rates.*— Subject to the other provisions of these rules, the Authority shall allot Nazul land at the pre-determined rates in the following cases, namely:-
>
> (i) to individuals whose land has been acquired for planned development of Delhi after the 1st day of January,1961, and which forms part of Nazul land:
>
> Provided that if an individual is to be allotted a residential plot, the size of such plot may be determined by the Administrator after taking into consideration the area and the value of the land acquired from him and the location and the value of the plot to be allotted;
>
> (ii) to individuals in the low income group or the middle income group other than specified in clause (i) —
>
> (a) who are tenants in a building in any area in respect of which a slum clearance order is made under the Slum Areas Act;

(b) who, in any slum area or the other congested area, own any plot of land measuring less than 67 square metres or own any building in any slum area or other congested area;

(iii) to individuals, other than those specified in clauses (i) and (ii), who are in the low income group or the middle income group, by draw of lots to be conducted under the supervision of the Land Allotment Advisory Committee;

(iv) to individuals belonging to Scheduled Castes and Scheduled Tribes or who are widows of defence personnel killed in action, or ex-servicemen, physically handicapped individuals subject to the provisions of rule 13;

(v) to industrialists or owners and occupiers of warehouses who are required to shift their industries and warehouses from non-conforming areas to conforming area under the Master Plan, or whose land is acquired or is proposed to be acquired under the Act:

Provided that the size of such industrial plot shall be determined with reference to the requirement of the industry or warehouses set up or to be set up in accordance with the plants and such industrialists and owners of warehouses have the capacity to establish and run such industries or warehouses and on the condition that the land allotted at pre-determined rates shall not, in any case, exceed the size of the land which has been, if any, acquired from such industrialist or owners and occupiers of warehouses and which form part of Nazul land:

Provided further that in making such allotment, the Authority shall be advised by the Land Allotment Advisory Committee;

(vi) to co-operative group housing societies, co-operative housing societies, consumer co-operative societies and co-operative societies of industrialists on "first come first served basis."

9. It will be clear from sub-rule (1) of Rule 4 of the Nazul Land Rules that the Authority may, in conformity with the plans, and subject to the other provisions of these rules, allot Nazul land to individuals and other categories of persons. Sub-rule (2) of Rule 4 further provides that the Authority shall in conformity with plans and subject to the rules dispose the Nazul Land by auction to the categories of institutions named in clauses (a) to (g) in sub-rule 2 of Rule 4. The Full Bench of the High Court has held in the case of *Ramanand v. Union of India & Ors*. (supra) that Rule 4 requires that the allotment of land shall be made in conformity with the plans and 'plans' means the Master Plan and the Zonal Development Plan for a zone. Thus, there is nothing in Rule 4 which envisages allotment of Nazul land to different category of persons to indicate that the 1961 Scheme has been incorporated in Rule 4. The Full Bench of the High Court has also held in the aforesaid decision that the word 'may' in sub-rule (1) of Rule 4 cannot be construed as 'shall' and discretion has been vested in the Authority to allot land to the categories of persons mentioned in the sub-rule.

10. Rule 6 is titled "Allotment of Nazul land at pre-determined rates" and it provides that subject to the other provisions of the rules, the Authority shall allot Nazul land at the pre-determined rates in the cases enumerated in clauses (i) to (iv) and clause (i) of Rule 6 covers cases of individuals whose land has been acquired for planned development of Delhi after the 1st day of January, 1961 and which forms part of Nazul land. Sub-Rule (1) of Rule 6, therefore, only provides that when the Authority decides to allot land to any individual under the 1961 Scheme, it shall allot at the predetermined rates.

11. This is the view that the Full Bench of the Delhi High Court has taken in *Ramanand v. Union of India & Ors*. (supra). The relevant portion of the Full Bench judgment is quoted hereunder:

"Rule 6, in reality, controls the rates of premium chargeable

only in those cases where land is allotted to the persons mentioned therein. In other cases, the rules provide for sale of land at the market price determined by the highest bid on public auction of land."

Thus, according to the Full Bench of the High Court in *Ramanand v. Union of India & Ors*. (supra) Rule 6 controls the rates of premium chargeable only in those cases where land is allotted to the persons mentioned therein and in other cases, the rules provide for sale of land at the market price determined by the highest bid on public auction of land.

12. We are therefore of the considered opinion that Rule 6(1) of the Nazul Land Rules is not really a rule which incorporates the 1961 Scheme, but it only provides that if the Authority decides to allot Nazul land to the individuals eligible under the 1961 Scheme, then Nazul land shall be allotted at pre-determined rates and not at the rates determined in a public auction. The High Court has taken an erroneous view in the impugned order that Rule 6 of the Nazul Land Rules, which was a statutory rule, laid down conditions for allotment of land under the 1961 Scheme and the conditions for allotment of land under the 1961 Scheme could therefore be amended by only statutory rules under Section 56 read with Section 22 of the Act. In our considered opinion, Rule 6 of the Nazul Law Rules did not stipulate the conditions for allotment under the 1961 Scheme and the 1961 Scheme being an administrative scheme could be amended without a statutory rule made under Section 56 read with Section 22 of the Act.

13. In the result, the appeals are allowed and the impugned order is set aside. There shall be no order as to costs.

D.G. Appeals allowed.

SURAJ LAMP & INDUSTRIES PVT. LTD.
v.
STATE OF HARYANA & ANR.
(Special Leave Petition (C) No. 13917 of 2009)

OCTOBER 11, 2011.

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

Transfer of property:

Transactions under Sale Agreement/General Power of Attorney/ Will (SA/GPA/Will) – HELD: Immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance – Courts will not treat transactions of the nature of 'GPA sales' or 'SA/GPA/Will transfers' as completed or concluded transfers or as conveyances, since they neither convey title nor do they create any interest in an immovable property – Such transactions cannot be recognized as valid mode of transfer of immoveable property – They cannot be recognized as deeds of title, except to the limited extent of s. 53A of the TP Act nor can they be relied upon or made the basis for mutations in Municipal or revenue records – It is time that an end is put to the pernicious practice of SA/GPA/Will transactions known as GPA sales – Directions given as regards SA/GPAs/Wills entered before the date of the instant judgment – Transfer of Property Act, 1882 – ss. 5,53,53-A, 54 and 55 – Power of Attorney Act, 1882 – ss. 1-A and 2 – Succession Act, 1925 – ss. 69 and 70 – Stamp Act, 1899 – ss. 23 and 27 – Registration Act, 1908 – ss. 17 and 49.

Deeds and Documents:

Sale agreement/General Power of Attorney/Will – Scope of – Advantages of registration of documents which purport

or operate to create, declare, assign, limit or extinguish any right title or interest – Explained.

In *Suraj Lamp and Industries Pvt. Ltd.*[1], **the Supreme Court pointing out ill-effects of transfer of immovable property under Sale Agreements/General Power of Attorney/Will ('SA/GPA/ Will transfers), asked the Solicitor General to give suggestions on behalf of the Union of India. The Court also directed notice to issue to the States of Delhi, Haryana, Punjab and Uttar Pradesh to give their views on the matter. All the four States responded and confirmed that 'SA/GPA/Will transfers' were required to be discouraged as they led to loss of revenue and increase in litigation due to defective title.**

Directing the special leave petition to be listed for final disposal, the Court

HELD: 1.1. When parties resort to 'SA/GPA/Will transfers', the adverse effect is not only loss of revenue (stamp duty and registration charges) but the greater danger of generation of 'black' money. These transactions are not to be confused or equated with genuine transactions where the owner of a property grants a power of Attorney in favour of a family member or friend to manage or sell his property, as he is not able to manage the property or execute the sale, personally. These are transactions, where a purchaser pays the full price, but instead of getting a deed of conveyance gets a SA/GPA/WILL as a mode of transfer, either at the instance of the vendor or at his own instance. [paras 2 and 5] [855-F-H; 858-F-G]

1.2. A high rate of stamp duty acts as a damper for execution of deeds of conveyance for full value and encourages SA/GPA/Will transfers. Reducing the stamp

1. Suraj Lamp & Industries Pvt. Ltd.*v.* State of Haryana & Anr. 2009 (7) SCC 363.

duty on conveyance to realistic levels will encourage public to disclose the maximum sale value and have the sale deeds registered. Though the reduction of the stamp duty, may result in an immediate reduction in the revenue by way of stamp duty, in the long run it will be advantageous for two reasons: (i) parties will be encouraged to execute registered deeds of conveyance/ sale deeds without any under valuation, instead of entering into SA/GPA/WILL transactions; and (ii) more and more sale transactions will be done by way of duly registered sale deeds, disclosing the entire sale consideration thereby reducing the generation of black money to a large extent. Registration of documents also makes the process of verification and certification of title easier and simpler. Further, it reduces disputes and litigations to a large extent. [para 5 and 10] [858-F-H; 859-A-B; 864-A]

<u>Scope of Agreement of sale:</u>

2.1. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale, does not, of itself, create any interest in or charge on such property. A transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of ss. 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. [para 11-12] [864-B-C; 865-B-E]

Narandas Karsondas v. S.A. Kamtam and Anr. **1977 (2) SCR 341 = (1977) 3 SCC 247;** *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra* **2004 (3) Suppl. SCR 817 = 2004 (8) SCC 614 – relied on.**

Scope of Power of Attorney:

2.2. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. It is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (ss.1A and 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable power of attorney does not have the effect of transferring title to the grantee. An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor. [para 13] [865-F-H; 866-F]

State of Rajasthan vs. Basant Nehata **– 2005 (3) Suppl. SCR 1 =2005 (12) SCC 77 – relied on.**

Scope of Will:

2.3. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer *inter vivos*. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (ss.69 and 70 of Succession Act, 1925). Registration of a will does not make it any more effective. [para 14] [866-G-H; 867-A-B]

2.4. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in *Asha M. Jain's* ***case, while dealing with transactions by way of SA/GPA/WILL, that the "concept of power of attorney sales have been recognized as a mode of transaction" are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/Will transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law. [para 15] [867-C-E]**

Asha M. Jain v. Canara Bank* **– 94 (2001) DLT 841 – disapproved.

2.5. Immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of '*GPA sales'* or '*SA/GPA/WILL transfers'* do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances, as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of s. 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. This will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales. [para 16] [867-F-H; 868-A]

2.6. SA/GPA/WILL transactions can continue to be treated as existing agreement of sale. Parties concerned may get registered the deeds of conveyance to complete their title. The 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession u/s 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. It is made clear that if the documents relating to 'SA/GPA/WILL transactions' have been accepted and acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision. [para 18] [868-D-F]

2.7. The observations in this judgment are not intended to, in any way, affect the validity of sale agreements and powers of attorney executed in genuine transactions. In several States, the execution of development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. The observations regarding 'SA/GPA/Will transactions' are not intended to apply to such bonafide/ genuine transactions. [para 19] [868-G-H; 869-A-B]

Case Law Reference:

2009 (7) SCC 363	**relied on**	**para 1**
1977 (2) SCR 341	**relied on**	**para 11**
2004 (3) Suppl. SCR 817	**relied on**	**para 11**
2005 (3) Suppl. SCR 1	**relied on**	**para 13**
94 (2001) DLT 841	**disapproved**	**para 15**

CIVIL APPELLATE JURISDICTION : Petition for Special Leave (Civil) No. 13917 of 2009.

From the Judgment & Order dated 25.11.2008 of the High Court of Punjab and Hayana at Chandigarh in CWP No. 19864 of 2008.

Gopal Subramanium, Jayant Kumar Mehta, Sukant Vikram and Rishi Raj Saxena for the Petitioner.

Shail Kumar Dwivedi, AAG, Ajay Pal, Anil Katiyar, S.N. Pandey, Gunnam Venkateswara Rao, Ashutosh Sharma, Aviral Shukla, Abhinav Srivastava, Lakshmi Raman Singh, Kuldip Singh, Satish Hooda, Kamal Mohan Gupta and Vineet Bhagat for the Respondents.

The Judgment of the Court was delivered

R. V. RAVEENDRAN J. 1. By an earlier order dated 15.5.2009 [reported in *Suraj Lamp & Industries Pvt.Ltd. vs. State of Haryana & Anr.* - 2009 (7) SCC 363], we had referred to the ill - effects of what is known as G*eneral Power of Attorney Sales* (for short 'GPA Sales') or *Sale Agreement/General Power of Attorney/Will transfers* (for short 'SA/GPA/WILL' transfers). Both the descriptions are misnomers as there cannot be a sale by execution of a power of attorney nor can there be a transfer by execution of an agreement of sale and a power of attorney and will. As noticed in the earlier order, these kinds of transactions were evolved to avoid prohibitions/conditions regarding certain transfers, to avoid payment of stamp duty and registration charges on deeds of conveyance, to avoid payment of capital gains on transfers, to invest unaccounted money ('black money') and to avoid payment of 'unearned increases' due to Development Authorities on transfer.

2. The *modus operandi* in such SA/GPA/WILL transactions is for the vendor or person claiming to be the owner to receive the agreed consideration, deliver possession of the property to the purchaser and execute the following documents or variations thereof:

(a) An Agreement of sale by the vendor in favour of the purchaser confirming the terms of sale, delivery of possession and payment of full consideration and undertaking to execute any document as and when required in future.

Or

An agreement of sale agreeing to sell the property, with a separate affidavit confirming receipt of full price and delivery of possession and undertaking to execute sale deed whenever required.

(b) An Irrevocable General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing him to manage, deal with and dispose of the property without reference to the vendor.

Or

A General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing the attorney holder to sell or transfer the property and a Special Power of Attorney to manage the property.

(c) A will bequeathing the property to the purchaser (as a safeguard against the consequences of death of the vendor before transfer is effected).

These transactions are not to be confused or equated with genuine transactions where the owner of a property grants a power of Attorney in favour of a family member or friend to manage or sell his property, as he is not able to manage the property or execute the sale, personally. These are transactions, where a purchaser pays the full price, but instead of getting a deed of conveyance gets a SA/GPA/WILL as a mode of transfer, either at the instance of the vendor or at his own instance.

Ill-Effects of SA/GPA/WILL transactions

3. The earlier order dated 15.5.2009, noted the ill-effects of such SA/GPA/WILL transactions (that is generation of black money, growth of land mafia and criminalization of civil disputes) as under:

"Recourse to `SA/GPA/WILL' transactions is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property, by the following categories of persons:

(a) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(b) Purchasers who want to invest undisclosed wealth/ income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(c) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/registration fees so as to increase their profit margin.

Whatever be the intention, the consequences are disturbing and far reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the government and the public. Secondly, such transactions enable persons with undisclosed wealth/ income to invest their black money and also earn profit/ income, thereby encouraging circulation of black money and corruption.

> This kind of transactions has disastrous collateral effects also. For example, when the market value increases, many vendors (who effected power of attorney sales without registration) are tempted to resell the property taking advantage of the fact that there is no registered instrument or record in any public office thereby cheating the purchaser. When the purchaser under such 'power of attorney sales' comes to know about the vendors action, he invariably tries to take the help of musclemen to 'sort out' the issue and protect his rights. On the other hand, real estate mafia many a time purchase properties which are already subject to power of attorney sale and then threaten the previous 'Power of Attorney Sale' purchasers from asserting their rights. Either way, such power of attorney sales indirectly lead to growth of real estate mafia and criminalization of real estate transactions."

It also makes title verification and certification of title, which is an integral part of orderly conduct of transactions relating to immovable property, difficult, if not impossible, giving nightmares to bonafide purchasers wanting to own a property with an assurance of good and marketable title.

4. This Court had therefore requested the learned Solicitor General to give suggestions on behalf of Union of India. This Court also directed notice to States of Delhi, Haryana, Punjab, Uttar Pradesh to give their views on the matter. The four states have responded and confirmed that SA/GPA/WILL transfers required to be discouraged as they lead to loss of revenue (stamp duty) and increase in litigations due to defective title. They also referred to some measures taken in that behalf. The measures differ from State to State. In general, the measures are: (i) to amend Registration Act, 1908 by Amendment Act 48 of 2001 with effect from 24.9.2001 requiring documents containing contract to transfer for consideration (agreements of sale etc.) relating to any immoveable property for the purpose of section 53A of the Act, shall be registered; and (ii)

to amend the stamp laws subjecting agreements of sale with delivery of possession and/or irrevocable powers of attorney in favour of non-family members authorizing sale, to the same stamp duty as deed of conveyance. These measures, no doubt, to some extent plugged the loss of revenue by way of stamp duty on account of parties having recourse to SA/GPA/WILL transactions, instead of executing deeds of conveyance. But the other ill-effects continued. Further such transaction which was only prevalent in Delhi and the surrounding areas have started spreading to other States also. Those with ulterior motives either to indulge in black money transactions or land mafia continue to favour such transactions. There are also efforts to thwart the amended provisions by not referring to delivery of possession in the agreement of sale and giving a separate possession receipt or an affidavit confirming delivery of possession and thereby avoiding the registration and stamp duty. The amendments to stamp and registration laws do not address the larger issue of generation of black money and operation of land mafia. The four States and the Union of India are however unanimous that SA/GPA/WILL transactions should be curbed and expressed their willingness to take remedial steps.

5. The State of Haryana has however taken a further positive step by reducing the stamp duty on deeds of conveyance from 12.5% to 5%. A high rate of stamp duty acts as a damper for execution of deeds of conveyance for full value, and encourages SA/GPA/WILL transfers. When parties resort to SA/GPA/WILL transfers, the adverse effect is not only loss of revenue (stamp duty and registration charges) but the greater danger of generation of 'black' money. Reducing the stamp duty on conveyance to realistic levels will encourage public to disclose the maximum sale value and have the sale deeds registered. Though the reduction of the stamp duty, may result in an immediate reduction in the revenue by way of stamp duty, in the long run it will be advantageous for two reasons: (i) parties will be encouraged to execute registered

deeds of conveyance/sale deeds without any under valuation, instead of entering into SA/GPA/WILL transactions; and (ii) more and more sale transactions will be done by way of duly registered sale deeds, disclosing the entire sale consideration thereby reducing the generation of black money to a large extent. When high stamp duty is prevalent, there is a tendency to undervalue documents, even where sale deeds are executed. When properties are undervalued, a large part of the sale price changes hand by way of cash thereby generating 'black' money. Even when the state governments take action to prevent undervaluation, it only results in the recovery of deficit stamp duty and registration charges with reference to the market value, but the actual sale consideration remains unaltered. If a property worth Rs. 5 millions is sold for Rs. 2 millions, the Undervaluation Rules may enable the state government to initiate proceedings so as to ensure that the deficit stamp duty and registration charges are recovered in respect of the difference of Rs. 3 millions. But the sale price remains Rs. 2 millions and the black money of Rs. 3 millions generated by the undervalued sale transaction, remains undisturbed.

6. In this background, we will examine the validity and legality of SA/GPA/WILL transactions. We have heard learned Mr. Gopal Subramanian, Amicus Curiae and noted the views of the Government of NCT of Delhi, Government of Haryana, Government of Punjab and Government of Uttar Pradesh who have filed their submissions in the form of affidavits.

Relevant Legal Provisions

7. Section 5 of the Transfer of Property Act, 1882 ('TP Act' for short) defines 'transfer of property' as under:

> "5. Transfer of Property defined : In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself [or to himself] and one

> or more other living persons; and "to transfer property" is to perform such act." xxx xxx

Section 54 of the TP Act defines 'sales' thus:

> "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> Sale how made. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> Contract for sale.-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

Section 53A of the TP Act defines 'part performance' thus :

> *"Part Performance.* – Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract,

taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999 (Note : Stamp Laws may vary from state to state, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that instrument. Article 23 prescribes stamp duty on 'Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of Attorney authorizes the attorney to 'sell any immovable property are charged with the same duty as leviable on conveyance.

9. Section 17 of the Registration Act, 1908 which makes a deed of conveyance compulsorily registrable. We extract below the relevant portions of section 17.

"Section 17 - Documents of which registration is compulsory- (1) The following documents shall be registered, namely:—

xxxxx

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

xxxxx

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

Advantages of Registration

10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference :

"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

Section 17 of the Registration Act clearly provides that any

document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

Registration of documents makes the process of verification and certification of title easier and simpler. It reduces disputes and litigations to a large extent.

Scope of an Agreement of sale

11. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in *Narandas Karsondas v. S.A. Kamtam and Anr.* (1977) 3 SCC 247, observed:

> A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See *Rambaran Prosad v. Ram Mohit Hazra* [1967]1 SCR 293. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein."
>
> In India, the word 'transfer' is defined with reference to the word 'convey'. The word 'conveys' in section 5 of Transfer of Property Act is used in the wider sense of conveying ownership… …that only on execution of conveyance ownership passes from one party to another…."

In *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra* [2004 (8) SCC 614] this Court held:

> "Protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with

the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In *State of Rajasthan vs. Basant Nehata* – 2005 (12) SCC 77, this Court held :

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer *inter vivos*. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is

said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

Conclusion

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in *Asha M. Jain v. Canara Bank* – 94 (2001) DLT 841, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of '*GPA sales*' or '*SA/GPA/WILL transfers*' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a

registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

17. It has been submitted that making declaration that GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer is likely to create hardship to a large number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship.

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.

19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing

apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bonafide/genuine transactions.

20. We place on record our appreciation for the assistance rendered by Mr. Gopal Subramaniun, Senior Counsel, initially as Solicitor General and later as Amicus Curiae.

21. As the issue relating to validity of SA/GPA/WILL has been dealt with by this order, what remains is the consideration of the special leave petition on its merits. List the special leave petition for final disposal.

R.P. Matter pending.

MALTHESH GUDDA POOJA

v.

STATE OF KARNATAKA & ORS.

(Civil Appeal No. 8525 of 2011)

OCTOBER 11, 2011

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

Karnataka High Court Rules, 1959:

Rule 5 of Chapter 3 of High Court Rules read with O. 47, rr. 1 and 5 CPC and Notification dated 29.12.2008 issued by Karnataka High Court – Review of judgment delivered at Circuit Bench – Judges or anyone of them who delivered the original judgment not sitting at Circuit Bench – Listing of review petition as per roster of Circuit Bench – HELD: Rule 5 of Chapter 3 of High Court Rules will prevail over r.5 of O.47 CPC – There is no inconsistency between r.5 of Chapter 3 of High Court Rules and r.5 of O.47, CPC – The words 'absence or other cause for a period of six months' in Rule 5 of Order 47 CPC and the words 'by reason of death, retirement or absence' in Rule 5 of Chapter 3 of the High Court Rules, in essence refer to the same causes, due to which the review application cannot be heard by the same bench which passed the original order – Rule 5 of Chapter 3 of High Court Rules does not specify the period of 'absence' but it is clear from the context that it does not refer to casual absence – Therefore, it is appropriate to interpret the said words as 'absence for a period of six months next after the application' by taking guidance from r. 5 of O. 47 CPC – In the instant case, after filing of the review petition, for more than six months the Original Bench either did not sit or dispose of the review petition and it was possible that for six more months there was no likelihood of the Judges constituting Original Bench being together at Dharwad – Therefore, the listing of the petition before a different Bench and hearing and deciding

the same by that Bench as per Notification dated 29.12.2008, was valid as per rules – Code of Civil Procedure, 1908 – O.47, r.5 – High Court of Karnataka Notification No. HCBB.CBD.01/ 2008 dated 29.12.2008.

PRACTICE AND PROCEDURE:

Listing of writ appeal for hearing, after review petition was allowed at Dharwad Bench of Karnataka High Court – The Division Bench before which the memo for listing of writ appeal for hearing was listed, holding that the order allowing the review was a nullity as a different Bench had no jurisdiction to take up the review petition – Held: When an application memo is filed in a matter where review has been granted, the Bench dealing with such memo or application is bound to proceed on the basis of the said order granting review, in view of the principles of finality and res judicata and ought to have listed the writ appeal for hearing and could not have examined the correctness or validity of review order – Review – Res judicata – Principle of finality.

WORDS AND PHRASES:

'Absence' occurring in r.5 of Chapter 3 of Karnataka High Court Rules – Connotation of.

A petition for review of a judgment delivered by a Division Bench in a writ appeal at the Dharwad Circuit Bench of the Karnataka High Court, was placed before a different Division Bench at Dharwad Circuit Bench. Respondent no. 3 objected to the hearing of the review petition by the said Bench on the ground that the review petition should be heard and decided by the same Bench which had heard and disposed of the writ appeal. It was also contended that the Notification dated 29.12.2008 of the High Court notifying that the review petitions relating to the judgments passed by a Division Bench or a single Judge in the Circuit Bench at Dharwad would be posted

as per roster, was contrary to r.5 of the Karnataka High Court Rules, 1959. The review petition was allowed by order dated 17.12.2009. The appellant then filed a memo for listing the writ appeal for hearing. The memo came up for orders before a Division Bench at Dharwad Circuit Bench, which, by the impugned order held that the order dated 17.12.2009 allowing the review petition, was a nullity inasmuch as a different Bench had no jurisdiction to take up the review petition, grant a review and reverse the order made in the writ appeal.

In the instant appeal, the questions for consideration before the Court were: (i) "whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing on grant of application for review by a co-ordinate bench, could refuse to act upon the order of review on the ground that the said order made by a bench different from the bench which passed the original order, granting review is a nullity and that the original order stands"; (ii) "the review application having been placed before the bench holding the roster, as per the standing instructions of the Chief Justice, and the said bench having heard and granted the review application, whether another bench before which a request is made for early hearing, can say it will ignore the order granting review as it is a nullity?"

Allowing the appeal, the Court

HELD: 1.1. An application for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The rule of consistency and finality of decisions, make it necessary that subject to circumstances which may make it impossible or impractical for the original bench to hear it, the review applications should be considered by the Judge or

Judges who heard and decided the matter or if one of them is not available, at least by a bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned) the applications for review will have to be placed before some other bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and available to perform normal duties, in the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same court. The said requirement should not be routinely dispensed with. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged. [para 13-14] [888-B-C; 889-E-H; 890-A-E]

Reliance Industries Ltd. vs. Pravinbhai Jasbhai Patel & Ors. **1997 (3) Suppl. SCR 636 = 1997 (7) SCC 300 – relied on.**

Benjamin Cardozo in Nature of Judicial Process (page 12) **– referred to.**

1.2. As regards the instant case, after the Circuit Bench of the High Court of Karnataka started functioning at Dharwad and Gulberga in July 2008, the Registry faced difficulties in listing the review petitions before the Bench which had heard and disposed of the matters due to the fact that both or one of the Judges of the Bench would not be available at the Circuit Bench. Therefore, on the proposal of the Registry, the Chief Justice made an order that the review petitions may be posted as per the roster and accordingly a Notification No.HCBB.CBD.01/2008 dated 29.12.2008 was issued by the High Court in this regard. [para 9] [883-A-C; 884-A-C]

1.3. The Rules made by the High Court in exercise of power u/s 122 of the Code of Civil Procedure, 1908, cannot be inconsistent with the body of the Code (that is sections in the Code), but can be inconsistent with any of the Rules in the First Schedule to the Code. As the Rules u/s 122 can alter or add any rule in the First Schedule to the Code, the provisions of Rule 5 of Chapter 3 of the High Court Rules will prevail over Rule 5 of Order 47 of the Code. [para 8] [882-A-F]

1.4. There is no inconsistency between Rule 5 of Chapter 3 of the High Court Rules and Rule 5 of Order 47 of the Code. Rule 5 of Chapter 3 of the High Court Rules provides that every petition for review of a judgment shall be posted before the original Bench which pronounced the judgment or if the Judges who constituted such Bench are not available by reason of *death, retirement or absence,* before any other Bench in the same manner as the original Bench. The word 'absence' is not defined and the duration of absence is not indicated in the said Rule, but it is clear from the context that it does not refer to casual absence. The ordinary meaning of the word 'absence' is "the state of being away from one's usual place". Order 47 Rule 5 of the Code, provides that the review petition shall be heard only by the Judges who passed the order if the said Judges continue *attached to the Court* (at the time when the application for review is made) and are not precluded by *absence or other cause* from considering the application for a period of six months. The words "continue attached to the Court" mean available to perform normal duties and has not been transferred or away on deputation. The words 'absence or other cause for a period of six months' in Rule 5 of Order 47 of the Code and the words 'by reason of death, retirement or absence' in Rule 5 of Chapter 3 of the High Court Rules,

in essence refer to the same causes, due to which the review application cannot be heard by the same bench which passed the original order. Therefore, it is appropriate to interpret the said words as 'absence for a period of six months next after the application' by taking guidance from Rule 5 of Order 47 of the Code. [para 11] [886-A-G]

1.5. In the instant case, the Judges constituting the original bench were not sitting at Dharwad. The review petition was filed on 2.3.2009 and for more than six months, the original Bench either did not sit or dispose of the review petition, and it was possible that for six more months there was no likelihood of the Judges constituting original bench being together at Dharwad. The review petition was placed for hearing before a different bench (bench holding the roster for hearing writ appeals) as per the Notification dated 29.12.2008 issued by the High Court under the directions of the Chief Justice. Thus, on 17.12.2009, when another bench heard and decided the matter, the listing of the case before that bench and hearing by that bench was valid as per rules. The said bench considered and rejected the contention that the same bench which had passed the order should hear the review application, in view of the Notifications dated 29.12.2008 and held that the Chief Justice had the power and authority to issue the notification dated 29.12.2008. The order dated 17.12.2009 was, therefore, neither a nullity nor one lacking of inherent jurisdiction, nor obtained by fraud. Even assuming it to be erroneous, it was final as it was not challenged. [para 16] [890-H; 891-A-E]

2.1. Once the application for review was granted on 17.12.2009, the order reviewed stands recalled. Consequently, the writ appeal stood revived and restored. Therefore, when the appellant filed a memo for listing the writ appeal for hearing, he was not really

seeking a judicial order for restoration but only a direction for fixing a date for hearing the writ appeal. When an application or memo is filed in a matter where review has been granted, *the Bench dealing with such memo or application is bound to proceed on the basis of the said order granting review, in view of the principles of finality and res judicata.* The review order dated 17.12.2009 considered the statutory provisions relating to review and consciously arrived at a decision that the provisions thereof did not prevent the hearing of the application for review. It should be noted that neither party was aggrieved by it and the order dated 17.12.2009 was not under challenge. Therefore, when the memo for posting was filed by one of the parties, the court, being bound by its final decision rendered on 17.12.2009 ought to have listed the writ appeal for hearing and could not have examined the correctness or validity of review order dated 17.12.2009. [para 17] [891-F-H; 892-A-B]

2.2. The impugned order dated 23.4.2010 is set aside and Writ Appeal No.169/2007 is directed to be listed for final hearing. [para 18] [892-C-D]

Case Law Reference:

1997 (3) Suppl. SCR 636 relied on para 12

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8525 of 2011.

From the Judgment and order dated 23.4.2010 of the High Court of Karnataka at Bangalore in WA No. 169 of 2007.

Basava Prabhu Patil, D. Rajeswar Rao, Avtar Kaur Dhingra, Anjani Aiyagari for the Appellant.

Sanjay R. Hegde, Abhishek Malviya, Ramesh Kr. Mishra, S.J. Aristotle, Priya Aristotle, Prabu Ramasubramanian, V.G. Pragasam for the Respondents.

The Judgment of the Court was delivered by

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

2. By an order dated 8.11.2006, the Government of Karnataka appointed the Assistant Commissioner, Haveri District as the Administrator of the Malathesh (Sri Mylara Linga) Temple, Devara Gudda, till the formation of a Managing Committee. The appellant along with one Guddanna Gowda claiming to be Panchas (Trustees) filed Writ Petition No.16158/2006 in the High Court of Karnataka challenging the said notification dated 8.11.2006. The third respondent herein got himself impleaded in the said writ petition, as a devotee of the temple. The said writ petition was allowed in part by a learned Single Judge, by order dated 22.12.2006 and the said notification dated 8.11.2006 was quashed, reserving liberty to the State to pass appropriate orders after affording an opportunity to the writ petitioners. The writ petitioners filed an appeal (Writ Appeal No.169/2007) at the Dharwad Circuit Bench challenging that part of the order reserving liberty to respondents 1 and 2 to pass fresh orders. By judgment dated 31.1.2009, a Division Bench of the High Court (V.Gopala Gowda and L.Narayana Swamy, JJ) dismissed the writ appeal.

3. The appellant filed a review petition (R.P.No.1513/2009) for review of the said order, at the Dharwad Circuit Bench. The said review petition was placed before a Division Bench consisting of K.Sreedhar Rao and Ravi Malimath, JJ., at the Dharwad Circuit Bench. The third respondent objected to the hearing of the review petition by the said Bench on the ground that the writ appeal was heard and disposed of by the Division Bench consisting of V.Gopala Gowda and L.Narayana Swamy, JJ. and the review petition should therefore be heard and decided by the same Bench. He also contended that the notification dated 29.12.2008 of the High Court notifying that the review petitions relating to judgments passed by a Division Bench or Single Bench in respect of Circuit Bench, Dharwad will be posted as per the roster existing in the Circuit Bench,

Dharwad, was contrary to Rule 5 of the Karnataka High Court Rules, 1959.

4. A Division Bench consisting of K.Sreedhar Rao and Ravi Malimath, JJ. heard the said review petition and allowed it by judgment dated 17.12.2009 and directed that the appeal should be heard afresh for disposal in accordance with law. With reference to the objection of the third respondent that the learned Judges who disposed of the appeal alone should hear the review petition, it was held as follows :

> "3. Rule 5 is not a rigid mandate. The exception to the rule is provided in the rule itself. In the case of death or non-availability of the judge, the review petition is permitted to be heard by the Bench other than the one, which passed the order. The experience has shown that for correcting trivial mistakes in the judgment, the review jurisdiction is invoked by the parties. In the scheme of sitting arrangement for the Circuit Benches, it is difficult to obtain the same combination to hear the review within a reasonable time. Therefore, in order to obviate the hardship to the litigants, the above notification is issued. Even on merits when a judgment or an order is to be reviewed, the similar difficulty of non-availability of the Bench, which passed the order within a reasonable time, is very much felt.
>
> 4. The exercise of power of allotment of subjects and cases is the prerogative of the Hon'ble Chief Justice.
>
> 5. Keeping in view the practical considerations the above notification is issued. Therefore the notification cannot be termed as arbitrary and illegal."

5. The appellant thereafter filed a memo dated 25.3.2010 for listing the writ appeal (restored by order dated 17.12.2009) for fresh hearing. The said memo came up for orders before a Division Bench consisting of D.V. Shailendra Kumar and

N.Ananda, JJ., at Dharwad Circuit Bench. After hearing the parties on the said memo, the said Division Bench passed the impugned order dated 23.4.2010 holding that the judgment dated 17.12.2009 in Review Petition No.1513/2009 allowing the petition in exercise of the review jurisdiction under Order 47 Rule 1 CPC was nothing short of a nullity in the eye of law and was without jurisdiction, having regard to the fact that the Bench which rendered the judgment in writ appeal No.169/2007 (V.Gopala Gowda and Narayana Swamy, JJ) were still Judges in the High Court and were available for hearing; and that therefore a different Division Bench had no jurisdiction to take up a review petition, grant a review and reverse the order made in the writ appeal. Consequently the memo filed by the appellant for listing of restored Writ Appeal No.169/2007 for hearing was dismissed. The Division Bench relied upon the provisions of Order 47 Rules 1 and 5 of Code of Civil Procedure (for short the 'Code') and Rule 5 of the High Court of Karnataka Rules, 1959 ('High Court Rules' or 'Rules' for short) in passing the order dated 23.4.2010. It held :

(i) The Division Bench which heard the review petition had no jurisdiction to take up the review petition as the learned Judges who constituted the Bench which heard and disposed of the writ appeal on 31.1.2009 continued to be the Judges of the court.

(ii) The review proceedings are not by way of appeal and have to be strictly confined to the ambit of order 47 Rule 1 CPC.

(iii) The Division Bench which heard the review petition instead of confining itself to the ambit of Order 47 Rule 1 had dealt with the merits of the judgment dated 31.1.2009 as if it was sitting in appeal over the said judgment and allowed the review petition which was contrary to law.

The effect of the impugned order dated 23.4.2010 was to

declare that the review judgment dated 17.12.2009 was *non est* and a nullity and consequently the earlier judgment dated 31.1.2009 passed in the writ appeal continued to be in effect. The said order is challenged in this appeal by special leave.

Question for consideration

6. The question for consideration is whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate bench could refuse to act upon the order of review on the ground that the said order made by a bench different from the bench which passed the original order, granting review is a nullity and that the original order stands.

Who can hear applications for review?

7. Order 47 of the Code relates to review. The relevant portions of Rules 1(1), 4, 5, and 8 are extracted below :

"1**.** *Application for review of judgment.*—(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order

made against him, may apply for a review of judgment to the Court which passed the decree or made the order. X x x x x

4. *Application where rejected.*—(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) *Application where granted*.—Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that –

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and x x x x x

5. *Application for review in Court consisting of two or more judges.*—Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, *continues or continue attached to the Court at the time when the application for a review is presented*, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, *and no other Judge or Judges of the Court shall hear the same*. x x x x

8. *Registry of application granted, and order for re-hearing.*—When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

(emphasis supplied)

8. Section 122 of the Code relates to power of the High Courts to make rules. The said section empowers the High Court from time to time, after previous publication to make rules regulating their own procedure, and may by such rules annul, alter or add to all or any of the rules in the First Schedule to the Code. The High Court, in exercise of the powers conferred under Article 225 of the Constitution, section 122 of the Code and other relevant provisions, with the previous approval of the Government of Karnataka promulgated and issued the High Court of Karnataka Rules, 1959 in regard to the practice and procedures to be followed by the High Court. Rule 5 of chapter 3 of the said Rules provides as under :

> "5. Every petition or application for review, reconsideration or correction of a judgment, decree, order or sentence shall be posted before the original Bench which pronounced, made or passed such judgment, decree, order or sentence or *if the Judge or any of the Judges who constituted the said Bench is not available by reason of death, retirement or absence, before any other Bench constituted in the same manner as the original Bench*."
>
> (emphasis supplied)

The Rules made under Rule 122 cannot be inconsistent with the body of the Code (that is sections in the Code), but can be inconsistent with any of the Rules in the First Schedule to the Code. As the Rules under section 122 can alter or add any rule in the First Schedule to the Code, the provisions of Rule 5 of Chapter 3 of the High Court Rules will prevail over Rule 5 of Order 47 of the Code.

9. After the Circuit Bench of the High Court started functioning at Dharwad and Gulberga in July 2008, the Registry faced difficulties in listing the review petitions before the Bench which heard and disposed of the matters due to the fact that both or one of the Judges of the Bench will not be available at the Circuit Bench. Certain number of Judges from the main

Bench chosen by the Chief Justice as per a broad roster, hold sittings for 5 to 6 weeks in the circuit benches followed by other batches of Judges and many a time a Judge who had sat during a particular session of 5 to 6 weeks may not sit again in the same circuit Bench for more than six months to one year. Further in case of decisions rendered by division benches, the two learned Judges who constituted the Bench may not sit together in the circuit Bench again as they may be posted during different periods before the Circuit Bench. Therefore the Registry submitted a note dated 19.12.2008 to the learned Chief Justice seeking directions in that behalf. The relevant portions of the said note are extracted below :

> "……..in case of the Review Petitions relating to judgment, decree, order or sentence pronounced, made or passed by the Division Bench out of which one of the Hon'ble Judge is not available for the reasons stated in Rule 5, it may not be permissible to post the said Review Petition before the Division Bench assigned with the respective subjects at this Circuit Bench even if one of the Hon'ble Judge having sittings at this Circuit Bench was a member of the Division Bench original constituted. X x x x x
>
> Because, having regard to Rule 5 of the High Court of Karnataka Rules 1959, it may not be permissible to post such of the Review Petitions before other Single Bench constituted at this Circuit Bench assigned with the concerned subjects. Consequently, either such Review Petitions shall have to be kept pending at this Circuit Bench for being posted before the original Bench, which pronounced, made or passed such judgment, decree, order or sentence as and when it is constituted at this Circuit Bench or such Review Petitions may have to be transferred to the Principal Bench for being posted before the original Bench.
>
> In view of the above said Rule 5 of the Karnataka High Court Rules, 1959, kind orders are solicited as to what norms are to be followed, if a Review Petition is filed against the order of Division Bench or a Single Bench on merits before the High Court Circuit Bench, Dharwad."

On the said note, the learned Chief Justice made an order that the review petition may be posted as per the roster. In pursuance of it, the High Court issued a notification No.HCBB.CBD.01/2008 dated 29.12.2008 reading as follows :

> "It is hereby notified that the Review Petitions relating to Judgments, Decree, Order or sentence pronounced, made or passed by the Division Bench or Single Bench in respect of Circuit Bench, Dharwad, will be posted as per the roster existing in the Circuit Bench, Dharwad."

It is in view of the said notification, instead of listing the review petitions before the Judges who passed the order, the review petitions were being listed before the Bench which was currently assigned the subject roster.

10. The validity of the circular dated 29.12.2008 was considered by another Division Bench of the High Court in *Sri Balachandra Vigneshwara Dixit v. H.S. Srikanta Babu* [C.C.C. No.2020 of 2009 (Civil) decided on 26.3.2010]. The said decision held that the circular dated 29.12.2008 directing that the review petitions relating to judgments, decree and orders made by a Division Bench or a Single Bench at Circuit Bench, Dharwad be posted as per the roster existing in the Circuit Bench, Dharwad is ultra vires Rule 5 of the Karnataka High Court Rules, 1959 and quashed the said circular. In that behalf, the Division Bench observed as follows :

> "45. In this context, if a review petition is filed and the judges who passed the order are not sitting at the Circuit Benches, then it is open to the parties to file a review petition either at the Circuit Bench where the original order

was passed, or at the Principal Bench. Then it is open to the Chief Justice to constitute the bench in accordance with Rules, arrange roster and have the said review petition heard and decided either at the Circuit Bench or at the Principal Bench. The party had the opportunity of full hearing of the case. If the order is against him, without availing the remedy of appeal, if he wants to avail the remedy of review, he cannot plead that his convenience alone should be taken into consideration in arranging hearing of the review petition. If he is really aggrieved, wants review, it should not be difficult for him even to appear before the Principal Bench and argue his case for review.

46. In that view of the matter, the contention that a review petition cannot be heard by the Principal Bench at Bangalore when the original order is passed at the Circuit Benches at Dharwad/Gulbarga, is without any substance. It would be better if those review petitions are also heard at the Circuit Benches, and that is possible only when the original Bench which passed the order, is functioning in the Circuit Benches. If the original Bench is not functioning in those Circuit Benches, and if there is difficulty to constitute such Bench for the purpose of hearing the review petition, it is open to the learned Chief Justice to constitute the Bench at the Principal Bench at Bangalore, and the parties can prosecute the same at Bangalore."

The said order was challenged by the High Court in SLP [C] No.14337/2010 and this court on 13.5.2010 stayed the operation of the said order. Be that as it may. The validity of the order dated 29.12.2008 does not arise for our consideration in this case. It is relevant to note that the impugned order dated 23.4.2010 was made after the decision of the High Court in *Sri Balachandra Vigneshwara Dixit* and before the stay of that decision by this Court.

11. We may now examine the scope of Rule 5 of Chapter

3 of the High Court Rules and Rule 5 of Order 47 of the Code. At the outset it should be noticed that there is no inconsistency between the two provisions. As noticed above Rule 5 of Chapter 3 of the High Court Rules provides that every petition for review of a judgment shall be posted before the original Bench which pronounced the judgment or if the Judges who constituted the such Bench constituted are not available by reason of *death, retirement or absence* before any other Bench in the same manner as the original Bench. The word 'absence' is not defined and the duration of absence is not indicated in the said Rule. The ordinary meaning of the word 'absence' is "the state of being away from one's usual place". Order 47 Rule 5 of the Code, provides that the review petition shall be heard only by the Judges who passed the order if the said Judges continues or continue *attached to the Court* (at the time when the application for review is made) and are not precluded by *absence or other cause* from considering the application for a period of six months. The words "continue attached to the Court" mean available to perform normal duties and has not been transferred or away on deputation. The words 'absence or other cause for a period of six months' in Rule 5 of Order 47 of the Code and the words 'by reason of death, retirement or absence' in Rule 5 of Chapter 3 of the High Court Rules, in essence refer to the same causes, due to which the review application cannot be heard by the same bench which passed the original order. As Rule 5 of Chapter 3 of High Court Rules does not specify the period of 'absence' but it is clear from the context that it does not refer to casual absence. Therefore, it is appropriate to interpret the said words as 'absence for a period of six months next after the application' by taking guidance from Rule 5 of Order 47 of the Code.

12. This court in *Reliance Industries Ltd. vs. Pravinbhai Jasbhai Patel & Ors*. [1997 (7) SCC 300] explained the object and scope of review applications as under:

"It has to be kept in view, that review petitions are not by

way of appeals before the superior Court but they are by way of requests to the same Court which decided the matter, for persuading it to recall or reconsider its own decision on grounds which are legally permissible for reviewing such orders. As laid down by O. XLVII R. 5, CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their own judgment. Thus in substance a review amounts to reconsideration of its own decision by the very same Court. When the Court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own judgment of course within the limits of review powers, but still invoking for that limited purpose the very same jurisdiction which it exercised earlier. It is axiomatic that if a Division Bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised. Similarly when a decision rendered in exercise of original jurisdiction by a Bench of two learned Judges is sought to be reviewed the learned Judges exercising review jurisdiction subject to the limitations inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the Court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be some independent jurisdiction sought to be exercised by the Court dehors the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it."

13. Order 47 Rule 5 of the Code and Rule 5 of the Chapter

3 of the High Court Rules require, and in fact mandates that if the Judges who made the order in regard to which review is sought continue to be the Judges of the court, they should hear the application for review and not any other Judges unless precluded by death, retirement or absence from the Court for a period of six months from the date of the application. An application for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter would have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered. They will be able to appreciate the point in issue, when the grounds for review are raised. If the matter should go before another Bench, the Judges constituting that bench will be looking at the matter for the first time and will have to familiarize themselves about the entire case to know whether the grounds for review exist. Further when it goes before some other Bench, there is always a chance that the members of the new bench may be influenced by their own perspectives, which need not necessarily be that of the Bench which decided the case. Benjamin Cardozo's celebrated statement in the *Nature of Judicial Process* (page 12) is relevant in this context:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; ……In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eye except our own."

Necessarily therefore, when a Bench other than the Bench which rendered the judgment, is required to consider an application for review, there is every likelihood of some tendency on the part of a different bench to look at the matter slightly differently from the manner in which the authors of the judgment looked at it. Therefore the rule of consistency and finality of decisions, make it necessary that subject to circumstances which may make it impossible or impractical for the original bench to hear it, the review applications should be considered by the Judge or Judges who heard and decided the matter or if one of them is not available, at least by a bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned above) the applications for review will have to be placed before some other bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and available to perform normal duties, all efforts should be made to place it before them. The said requirement should not be routinely dispensed with.

14. When the provision for review by the same Judge/s was made, it was made on the assumption that the Judges will be available at the same place. The Rules did not contemplate the court having Benches outside the main seat or Circuit Benches and Judges moving from Bench to Bench or Judges and coming back after three months or six months. A Judge who sits and hears a matter in a Circuit Bench away from the main seat, may not be available in that particular Circuit Bench for a considerable time which may vary from three to six months or even more. Further, when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Rule 5 of Chapter 3 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue

to be attached to the Court are sitting at the Main bench, or temporarily at another bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same court. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged. With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing. Or an appropriate rule can be made, if such a rule is not already available, for consideration of the application written submissions alone. For example Order XL Rule 3 of the Supreme Court Rules provides that unless otherwise ordered by the court, an application for review shall be disposed of by circulation without any oral arguments but with written arguments. That will not in any way violate section 114 of the Code providing for review. The solution may not be to send the review petition to the place where the concerned Judges are holding their sitting in view of the fact that would involve travel, engaging of new counsel, additional cost etc. and defeat the very purpose of having circuit benches. Every effort should be made to achieve the object of review by ensuring that the matter is considered by the Judge or the Bench which rendered the judgment. Be that as it may.

Finality of decisions

15. But the crucial question is this: The review application having been placed before the bench holding the roster, as per the standing instructions of the Chief Justice, and the said bench having heard and granted the review application, whether before another bench a request is made for early hearing can say it will ignore the order granting review as it is a nullity?

16. In this case, the review petition was placed before different bench (bench holding the roster for hearing writ

appeals) as per the Notification dated 29.12.2008 issued by the High Court under the directions of the learned Chief Justice requiring the review petition to be placed before a bench assigned to hear writ appeals as per the then existing roster. As on 17.12.2009, when another bench heard and decided the matter, the listing of the case before that bench and hearing by that bench was valid as per rules. The Judges constituting the original bench were not sitting at Dharwad. The review petition was filed on 2.3.2009 and for more than six months, the original Bench either did not sit or dispose of the review petition. When the review petition was placed for hearing before the roster bench, it was possible that for six more months there was no likelihood of the Judges constituting original bench being together at Dharwad. The bench before which the review application was placed held the writ appeal roster. The said bench considered and rejected the contention that the same bench which passed the order should hear the review application, in view of the Notifications dated 29.12.2008 and that bench also held that the Chief Justice had the power and authority to issue the notification dated 29.12.2008. The order dated 17.12.2009 was therefore neither a nullity nor one lacking of inherent jurisdiction, nor obtained by fraud. Even assuming it to be erroneous, it was final as it was not challenged.

17. Once the application for review was granted on 17.12.2009, the order reviewed stands recalled. Consequently the review appeal stood revived and restored. Therefore when the appellant filed a memo for listing the writ appeal for hearing, he was not really seeking a judicial order for restoration but only a direction for fixing a date for hearing the writ appeal. When an application or memo is filed in a matter where review has been granted, the Bench dealing with such memo or application is bound to proceed on the basis of the said order granting review, in view of the principles of finality and *res judicata*. Even a wrong decision between parties which has attained finality is binding and cannot be re-agitated or re-opened at a later stage. As noticed above, the review order dated 17.12.2009

considered the statutory provisions relating to review and consciously arrived at a decision that the provisions thereof did not prevent it from hearing the application for review. It should be noted that neither party was aggrieved by it and the order dated 17.12.2009 was not under challenge. Therefore when the memo for posting was filed by one of the parties, the court, being bound by its final decision rendered on 17.12.2009 ought to have listed the writ appeal for hearing and could not have examined the correctness or validity of review order dated 17.12.2009.

18. We therefore allow this appeal, set aside the impugned order dated 23.4.2010 and direct the Writ Appeal No.169/2007 be listed for final hearing. Our observations as to who should hear review applications, will not affect the validity of orders made on review applications by roster benches as per notification dated 29.12.2008 and which have attained finality.

R.P. Appeal allowed.