VIJAY KUMAR
v.
STATE OF U.P. AND ORS.
(Criminal Appeal No. 1345 of 2011)

AUGUST 03, 2011

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

Code of Criminal Procedure, 1973 – s.311 – Summoning of witness in a bribe case – 'R', the daughter of appellant, owned a piece of agricultural land – To avoid encroachment on the land, 'R' started constructing boundary wall thereon – However, the construction was objected to, by the Nagar Palika whereafter 'R' filed suit to restrain the Nagar Palika and its servants, agents, etc. from putting up any obstruction in construction of the wall – After filing of the suit, 'R' went to U.S.A and the case instituted by her was supervised and looked after by the appellant – Prosecution case that in order to settle the matter, respondent No.2 and 'S', the Chairman and Executive Officer respectively of the Nagar Palika demanded bribe from appellant whereupon appellant filed complaint pursuant to which a trap was laid and the said two accused were arrested while receiving part payment of the bribe amount – Trial against the two accused u/s.7 and s.13(2) r/w s.13(1)(d) of Prevention of Corruption Act – Respondent no.2 filed application u/s.311 CrPC requesting the Court to summon 'R' as a court witness – Application dismissed by trial court – Order set aside by High Court – On appeal, held: Power u/s.311 CrPC should be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously – As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case – In the instant case, 'R' had nothing to do with the bribe case either as a complainant or as a witness to the

trap arranged by the police – 'R' was also not present at the time when the bribe was allegedly demanded – Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the trial court – To prove the bribe case it was not necessary for the court to examine 'R' as a court witness – Neither respondent No.2 in his application nor the High court in the impugned judgment specified the reason as to why and how examination of 'R' as a court witness was necessary – Power u/s.311 CrPC was exercised by the High Court arbitrarily and, therefore, the order rendered by it directing the trial court to examine 'R' as a court witness set aside – Prevention of Corruption Act, 1988 – s.7 and s.13(2) r/w s.13(1)(d).

Code of Criminal Procedure, 1973 – s.311 – Discretionary power under – Scope and ambit of – Held: Though s.311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice – Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law – The discretionary power conferred u/s.311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.

'R', the daughter of appellant, owned a piece of agricultural land. To avoid encroachment on the land, 'R' started constructing boundary wall thereon. However, the construction was objected to, by the *Nagar Palika* whereafter 'R' filed suit praying for permanent prohibitory injunction to restrain the *Nagar Palika* and its servants, agents, etc. from putting up any obstruction in construction of the wall. During pendency of the suit, respondent No.2, became Chairman of *Nagar Palika*. After filing of the suit, 'R' went to U.S.A and the case instituted by her was supervised and looked after by the appellant.

The prosecution case is that in order to settle the matter relating to construction of wall on the property, which was being supervised by the appellant, the respondent No. 2 and 'S', the Executive Officer of the *Nagar Palika* demanded a sum of Rs.2 lacs as bribe amount from the appellant as a result of which the appellant had filed complaint pursuant to which a trap was laid and the said two accused were arrested while receiving an amount of Rs.50,000/- as part payment of the bribe amount of Rs.2 lacs. After success of the trap, further investigation was carried out and charge-sheet was submitted against the two accused persons, for alleged commission of offences punishable under Section 7 and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988. The trial of the case was conducted before the Special Judge. Subsequently, respondent no.2 filed application under section 311 of CrPC requesting the Court to summon 'R' as a court witness. The Special Judge dismissed the application. Aggrieved, respondent No.2 filed revision petition before the High Court challenging the order by which his request to summon and examine 'R' as a court witness was rejected. The High Court allowed the revision petition. Hence the present appeal.

Allowing the appeal, the Court

HELD:1.1. Section 311 of CrPC consists of two parts, viz., (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compells a court to examine a witness if his evidence appears to be essential to the just decision of the case. The Section enables and in certain circumstances, imposes on the Court the duty of summoning witnesses who would have been otherwise brought before the Court. This Section confers a wide discretion on the Court to act as the exigencies of justice

require. The power of the Court under Section 165 of the Evidence Act is complementary to its power under this Section. These two sections between them confer jurisdiction on the Court to act in aid of justice. There is no manner of doubt that the power under Section 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. Power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case. [Para 13] [903-A-F]

1.2. In the instant case, the record nowhere shows that any complaint was filed by 'R' against any of the accused making grievance that they had demanded any bribe amount from her. After framing of charge and commencement of trial, several witnesses were examined by the prosecution, who had been cross-examined by the accused. 'R' had nothing to do with the bribe case either as a complainant or as a witness to the trap arranged by the police. Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the court of Special Judge. The High Court without specifying as to how 'R' is a material witness or how her evidence is essential for just decision of the case, directed the Special Judge to

summon 'R' as a court witness under Section 311 of the Code of Criminal Procedure and to examine her. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the Special Judge to examine 'R' as a court witness, the High Court did not examine the reasons assigned by the Special Judge as to why it was not necessary to examine her as a court witness and gave the impugned direction without assigning any reason. The High Court failed to consider the case of the prosecution that the application was submitted by the respondent No. 2 only to delay the trial and no case was made out by the respondent No. 2 as to why direction should be given to examine 'R' as a court witness. In a bribe case what is required to be proved by the prosecution is that there was a demand of bribe by the accused from the complainant and that pursuant to the said demand, bribe amount was accepted by the accused. To prove this case it was not necessary for the court to examine 'R' as a court witness. Neither the respondent No. 2 in his application nor the court in the impugned judgment specified the reason as to why and how examination of 'R' as a court witness is necessary. [Paras 14, 15] [903-G-H; 904-A-B]

1.3. This Court fails to understand as to how the evidence of 'R' was relevant in the instant case and why direction should be given to examine her as a court witness, as she was neither present at the time when the bribe was demanded or even at the time when the trap

was arranged and laid. Without examining the relevance of evidence, which may be tendered by 'R' or the necessity of examining her as a court witness or examining the question of prejudice if at all which is likely to be caused to the defence, if she is not examined, the High Court directed the Special Judge to examine 'R' as a court witness. There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure, 1973 was exercised arbitrarily and, therefore, the impugned order rendered by the Single Judge of the High Court in Criminal Revision directing the Special Judge to examine 'R' as a court witness is hereby set aside. [Paras 16, 17] [905-C-H; 906-A-D]

Sawal Das vs. State of Bihar **AIR 1974 SC 778: 1974 (3) SCR 74 – relied on.**

Case Law Reference:

1974 (3) SCR 74	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1345 of 2011.

From the Judgment & Order dated 10.5.2010 of the High Court of Judicature at Allahabad in Criminal Reivision No. 1895 of 2010.

Jitendra Mohan Sharma for the Appellant.

Ratnakar Dash, Alka Sinha, Anuvrat Sharma, Sukhendu Pal, Jetendra Singh, S.K. Sabharwal for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal, by grant of special leave, is directed against judgment dated May 10, 2010, rendered by learned

Single Judge of High Court of Judicature at Allahabad in Criminal Revision No. 1895 of 2010, by which the order dated April 23, 2010, passed by learned Special Judge, Bareilly below Application No. 103 Kha in Special Case No. 2 of 2003 refusing to summon Smt. Ruchi Saxena, staying in U.S.A., as a court witness, is set aside and the learned Special Judge, Bareilly is directed to summon and examine Smt. Ruchi Saxena as court witness under Section 311 of the Code of Criminal Procedure, 1973.

3. From the record of the case it is evident that Smt. Ruchi Saxena, resident of village Aonla, District Bareilly, U.P., is owner of an agricultural piece of land. She is settled in U.S.A. Her property is being looked after by the appellant Mr. Vijay Kumar, who is her father. To avoid encroachment on the land Smt. Ruchi Saxena started constructing boundary wall on the agricultural land belonging to her. However, construction of wall was objected to, by the Nagar Palika, Aonla on the ground that Nagar Palika is the owner of the said land. Therefore, Smt. Ruchi Saxena filed a suit No. 443 of 1999 in the Court of learned Civil Judge praying for permanent prohibitory injunction to restrain the Nagar Palika, Aonla and its servants, agents, etc. from putting up any obstruction in construction of wall to be carried out on the property in question. The learned Civil Judge, before whom the suit was pending, by order dated September 24, 1999, granted an interim order directing the Nagar Palika not to interfere with the possession of Smt. Ruchi Saxena of her agricultural land and not to obstruct construction of boundary wall. It may be stated that the Nagar Palika had filed an application on September 23, 1999 under Order VII Rule 11, Civil Procedure Code, to reject the plaint, as according to it, the plaint was not disclosing any cause of action. However, the said application was rejected by the learned Judge on September 23, 1999.

4. Feeling aggrieved by the order of injunction, Nagar Palika filed miscellaneous appeal under Order 43 Rule 1 CPC

as well as a civil revision application under Section 115 of the Civil Procedure Code against order rejecting application filed under Order VII Rule 11 of the Civil Procedure Code before the High Court. During the pendency of the appeal and the revision, the respondent No. 2, i.e. Tajammul Hussain became Chairman of Nagar Palika in the year 2001. At that time, one Mr. Shamim Ahmad was Executive Officer of the Nagar Palika. After filing of suit Smt. Ruchi Saxena has gone to U.S.A. and presently she is residing there. However, the case instituted by her is being supervised and looked after by the appellant Mr. Vijay Kumar, who is her father.

5. The case of the prosecution is that the respondent No. 2 herein and the Executive Officer Mr. Shamim Ahmed demanded a sum of Rs.2 lacs as bribe from the appellant to settle the matter. Therefore, on December 5, 2001, the appellant lodged a complaint before S.P. (Vigilance), Bareilly in respect of the same, pursuant to which a trap was arranged. On December 7, 2001 the respondent No. 2 and Shamim Ahmed were arrested while receiving an amount of Rs.50,000/- as part payment of total bribe amount of Rs.2 lacs. On April 24, 2002, the miscellaneous appeal, filed by the Nagar Palika against the order granting interim injunction, was dismissed by the appellate court, and thereafter, the appellant has constructed boundary wall over the property in question.

6. After success of the trap, further investigation was carried out and on January 4, 2003 charge-sheet was submitted against the two accused persons, namely, the respondent No. 2 and Shamim Ahmed, who was then Executive Officer of the Nagar Palika, for alleged commission of offences punishable under Sections 7, 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The prosecution also submitted a list of witnesses. The list did not indicate the name of Smt. Ruchi Saxena as one of the witnesses to be examined in the case because she was neither examined during the investigation of the complaint lodged by the appellant nor has any concern with the criminal case.

7. On December 16, 2006 an application dated February 26, 2004 was moved on behalf of Smt. Ruchi Saxena in the suit filed by her before the trial court seeking permission to withdraw the suit with liberty to file fresh suit in case there was fresh cause of action. The said application was allowed and the record shows that the learned counsel for Nagar Palika was also present at the time when the said order was passed.

8. After framing of necessary charges against the two accused the trial of the case was conducted before the learned Special Judge, Bareilly in Special Case No. 2 of 2003. During the trial the prosecution examined witnesses. They were cross-examined on behalf of the accused. On March 18, 2010 the prosecution submitted certified copies of the orders passed by the competent court and the High Court in respect of civil litigation. The learned Special Judge, by an order dated March 22, 2010, allowed the papers to be admitted in evidence, by awarding cost of Rs.500/- to each of the accused and closed the evidence on behalf of the prosecution. Thereafter, the case was fixed for April 2, 2010 for statements of the accused to be recorded under Section 313 of the Code of Criminal Procedure and for defence evidence, if any.

9. On April 2, 2010, three separate applications were filed by the accused. One application No. 103 Kha was filed by accused Tajammul Hussain requesting the court to summon Smt. Ruchi Saxena as a court witness. Second application being No. 104 Kha was filed to recall the present appellant Vijay Kumar, PW-8 Anoop Kumar, PW-10 Lekh Pal Lala Ram and PW-11 Investigating Officer. Third application being No. 105 Kha was moved by the accused Shamim Ahmed to recall the appellant. On April 15, 2010, objections were filed on behalf of the prosecution to the three applications submitted by the accused. So far as application praying to summon Smt. Ruchi Saxena and examine her as a court witness was concerned, it was stated on behalf of the prosecution that the application was filed to delay the trial because the accused were fully aware of the fact that Smt. Ruchi Saxena was residing in America as a

citizen of USA and it was difficult for her to appear as a witness. It was also pointed out by the prosecution that Smt. Ruchi Saxena had nothing to do with this case and neither she was examined under Section 161 of the Code of Criminal Procedure nor her name had been listed as one of the prosecution witnesses. What was maintained by the prosecution was that the application was filed with mala fide intention and accused had failed to indicate in the application as to what was the intention of their questioning Smt. Ruchi Saxena especially when no questions and/or suggestions were put to any of the witnesses examined by the prosecution with reference to her.

10. The learned Special Judge, by order dated April 23, 2010, dismissed all the three applications. Therefore, feeling aggrieved, the respondent No. 2 filed a revision petition being Criminal Revision No. 1895 of 2010 before the High Court challenging the order by which his request to summon and examine Smt. Ruchi Saxena as a court witness was rejected.

11. The High Court has allowed the revision petition by judgment dated May 10, 2010 giving rise to the instant appeal.

12. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal.

13. Section 311 of the Code of Criminal Procedure reads as under: -

> *"311. Power to summon material witness, or examine person present.* – Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

This Section consists of two parts, viz., (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compells a court to examine a witness if his evidence appears to be essential to the just decision of the case. The Section enables and in certain circumstances, imposes on the Court the duty of summoning witnesses who would have been otherwise brought before the Court. This Section confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court under Section 165 of the Evidence Act is complementary to its power under this Section. These two sections between them confer jurisdiction on the Court to act in aid of justice. There is no manner of doubt that the power under Section 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case.

14. The record nowhere shows that any complaint was filed by Smt. Ruchi Saxena against any of the accused making grievance that they had demanded any bribe amount from her. The case of the prosecution is simple that in order to settle the matter relating to construction of boundaries on the disputed property, which is being supervised by the appellant who is father of Smt. Ruchi Saxena, the respondent No. 2 and another accused had demanded a sum of Rs.2 lacs as bribe amount

from the appellant as a result of which the appellant had filed complaint pursuant to which a trap was laid and accused were arrested while receiving an amount of Rs.50,000/- as part payment of the bribe amount of Rs.2 lacs. As is evident from the facts of the case after success of the trap, FIR in the case was lodged by Mr. V.K. Bhardwaj, Inspector U.P. Vigilance Establishment. After framing of charge and commencement of trial several witnesses were examined by the prosecution, who had been cross-examined by the accused. Smt. Ruchi Saxena had nothing to do with the bribe case either as a complainant or as a witness to the trap arranged by the police. Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the court of learned Special Judge. The High Court without specifying as to how Smt. Ruchi Saxena is a material witness or how her evidence is essential for just decision of the case, has directed the learned Special Judge to summon Smt. Ruchi Saxena as a court witness under Section 311 of the Code of Criminal Procedure and to examine her. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason. The High Court failed to consider the case of the prosecution that the application was submitted by the respondent No. 2 only to delay the trial and no case was made out by the respondent No. 2 as to why direction should be given to examine Smt. Ruchi Saxena as a court witness. In a bribe case what is required to be proved by the prosecution is that

there was a demand of bribe by the accused from the complainant and that pursuant to the said demand, bribe amount was accepted by the accused. To prove this case it was not necessary for the court to examine Smt. Ruchi Saxena as a court witness.

15. Neither the respondent No. 2 in his application nor the court in the impugned judgment has specified the reason as to why and how examination of Smt. Ruchi Saxena as a court witness is necessary.

16. At this stage, it would be advantageous to refer to decision of this Court in *Sawal Das vs. State of Bihar* AIR 1974 SC 778. In the said case the appellant, his father and his mother were charged for murder of appellant's wife. Immediately after the wife was pushed inside the room and her cries of "Bachao Bachao" came from inside the room, her children were heard crying and uttering words that their mother was either being killed or had been killed. But the children were not produced as witnesses in the trial court. There was some evidence in the case that the appellant's children had refrained from revealing any facts against the appellant or his father or his step-mother when they were questioned by the relations or by the police. The argument before this Court was that they should have been summoned as court witnesses for examination under Section 540 of the Code of Criminal Procedure, 1898, which is in pari materia with same as Section 311 of Code of Criminal Procedure, 1973. This Court has held that the court could have rightly decided in such circumstances not to examine the children under Section 540 of the Code of Criminal Procedure. If this is the approach to be made while deciding application under Section 311 of the Code of Criminal Procedure, this Court fails to understand as to how the evidence of Smt. Ruchi Saxena was relevant in the instant case and why direction should be given to examine her as a court witness, as she was neither present at the time when the bribe was demanded or even at the time when the trap was arranged and laid. Without

examining the relevance of evidence, which may be tendered by Smt. Ruchi Saxena or the necessity of examining her as a court witness or examining the question of prejudice if at all which is likely to be caused to the defence, if she is not examined, the High Court has directed the learned Special Judge to examine Smt. Ruchi Saxena as a court witness. There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure, 1973 is exercised arbitrarily and, therefore, the impugned judgment is liable to be set aside.

17. For the foregoing reasons the appeal succeeds. The impugned order dated May 10, 2010, rendered by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Revision No. 1895 of 2010 directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness is hereby set aside.

18. The appeal accordingly stands disposed of.

B.B.B. Appeal disposed of.

RAFIQ AHMED @ RAFI
v.
STATE OF U.P.
(Criminal Appeal No. 656 of 2005)

AUGUST 04, 2011

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

Penal Code, 1860:

ss.302, 396 – Allegation of dacoity and murder – Charge sheet filed u/ss.396, 201 – Conviction u/ss.302 and 201 – Plea of appellant that he was charged for offence u/s.396 but without reformulation/alteration of the charge, he was convicted for offence u/s.302 and this deprived him of a fair opportunity of defence and caused him serious prejudice; that s.302 is a graver offence than an offence punishable u/s.396 and as such the entire trial and conviction of the appellant was vitiated in law; that there were serious contradictions between the statements of the witnesses and the courts below failed to appreciate the evidence in its correct perspective and this being a case of circumstantial evidence, prosecution failed to prove chain of events pointing towards the guilt of the accused – On appeal, held: PW2 and PW4 were the witnesses who had last seen the deceased with the appellant – The statements of the Investigating Officer and the witnesses including PW3, in whose presence the dead body was recovered at the behest of the appellant, by means of recovery memo were the other material pieces of evidence which completed the chain of events and pointed undoubtedly towards the guilt of the accused – Prosecution was able to establish its case beyond reasonable doubt on the basis of the circumstantial evidence – There was no significant link which was missing in the case put forward by the prosecution – No prejudice was caused to the appellant by his conviction u/s.302 though he was initially charged u/s.396 r/w s.201 –

Further, the nature of injuries namely three incised wounds, three abrasions and severing of the trachea, caused by a sharp-edged weapon indicated that the accused knew that the injury inflicted would be sufficient in the ordinary course of nature to cause death – The incriminating evidence were clearly put to the accused in his statement u/s.313 Cr.P.C. – The circumstances which constitute an offence u/s.302 were literally put to him, as s.302 itself is an integral part of an offence punishable under s.396 – The appellant was not able to demonstrate any prejudice which the appellant suffered in his right to defence, fair trial and in relation to the case of the prosecution – Since the appellant did not suffer any prejudice, much less a serious prejudice, his conviction u/s.302 cannot be set aside merely for want of framing of a specific/alternate charge for offence punishable u/s.302 – More so because the dimensions and facets of an offence u/s.302 are incorporated by specific language and are inbuilt in the offence punishable u/s.396 – Thus, on the application of principle of 'cognate offences', there was no prejudice caused to the rights of the appellant – Conviction upheld.

ss.392, 396 – Essential ingredients – Held: To constitute an offence of 'dacoity', robbery essentially should be committed by five or more persons – To constitute an offence of 'dacoity with murder' if any one of the five or more persons commit a murder while committing the dacoity, then every one of such persons so committing, attempting to commit or aiding, by fiction of law, would be deemed to have committed the offence of murder and be liable for punishment depending upon the facts and circumstances of the case.

ss.302, 396 – Distinction between – Discussed.

ss.302, 396 – Sentencing for the offence under – Jurisdiction of court – Held: Under s.396, wide discretion is vested in the courts in awarding punishment – The court, in exercise of its jurisdiction can award sentence of ten years with fine or even award sentence of life imprisonment or sentence

of death, as the case may be while u/s.302, the court cannot, in its discretion, award sentence lesser than life imprisonment.

ss.302, 396 – Essential ingredients – Held: The ingredients of both these offences, to some extent, are different inasmuch as to complete an offence of 'dacoity' u/s.396, five or more persons must conjointly commit the robbery while u/s.302 even one person by himself can commit the offence of murder – But, to attract the provisions of s.396, the offence of 'dacoity' must be coupled with murder – The ingredients of s.302 become an integral part of the offences punishable u/s.396 – Resultantly, the distinction with regard to the number of persons involved in the commission of the crime loses its significance as it is possible that the offence of 'dacoity' may not be proved but still the offence of murder could be established – A conjoint reading of ss.396 and 302 shows that the offence of murder has been lifted and incorporated in the provisions of s.396 – The offence of murder punishable u/s.302 and as defined u/s.300 will have to be read into the provisions of offences stated u/s.396 – The expression 'murder' appearing in s.396 would have to take necessarily in its ambit and scope the ingredients of s.300 – There is no scope for any ambiguity – The provisions are clear and admit no scope for application of any other principle of interpretation except the 'golden rule of construction', i.e., to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition – These provisions read collectively put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences u/s.396 – It will have the same connotation, meaning and ingredients as are contemplated under the provisions of s.302 – Interpretation of statutes.

Criminal jurisprudence:

Offences of grave nature vis-à-vis offence of lesser grave nature – Held: Usually an offence of grave nature includes

in itself the essentials of a lesser but cognate offence – Wherever an accused is charged with a grave offence, he can be punished for a less grave offence finally, if the grave offence is not proved – But even in those cases, the Court has to be cautious while examining whether the ingredients of the offences are independently satisfied – If the ingredients even of a lesser offence are not satisfied then it may be difficult in a given case for the court to convict the person for an offence of a less grave nature – There can be cases where it may not be possible at all to punish a person of a less grave offence if its ingredients are completely different and distinct from the grave offence – Thus, the accused has to be charged with a grave offence which would take within its ambit and scope, the ingredients of a less grave offence.

Prejudice – Held: To show prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence – Courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage – Administration of Criminal Justice.

Code of criminal Procedure, 1973:

Object of the Code – Held: To further the ends of justice and not to frustrate them by the introduction of endless technicalities – The object is to ensure that an accused person gets a full and fair trial along with certain well-established and well-understood canons of law that accord with the notions of natural justice.

ss.211 to 215 – Framing of charge – Purpose of – Discussed.

ss.211 to 215 – Protections to and rights of the accused during investigation and trial – Held: The accused has the freedom to maintain silence during investigation as well as

before the Court – He may choose to maintain silence or make complete denial even when his statement u/s.313, Cr.P.C. is being recorded – The accused has right to fair trial – There is presumption of innocence (not guilty) and the prosecution has to prove its case beyond reasonable doubt – In case of allegation of prejudice by the accused, the Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused – It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case – Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication – Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to these rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law.

Non-framing of charge or some defect in drafting of the charge – Held: Per se would not vitiate the trial itself – It will have to be examined in the facts and circumstances of a given case – Of course, the court has to keep in mind that the accused 'must be' and not merely 'may be' guilty of an offence – A person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record – Where the offences are cognate offences with commonality in their feature, duly supported by evidence on record, the Courts can always exercise its power to punish the accused for one or the other provided the accused does not suffer any prejudice as indicated.

***INTERPRETATION OF STATUTES**: Where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to 'legislation by incorporation' which normally is applied between an*

existing statute and a newly enacted law – Penal Code, 1860 – ss.396.

***WORDS AND PHRASES**: Word 'prejudice', cognate', 'cognate offence – Meaning of.*

The prosecution case was that five accused including appellant committed dacoity in a car belonging to the appellant and also murdered the victim-deceased. The uncle of the deceased was a merchant. The deceased used to realize money from the market on behalf of his uncle's firm. On the fateful day, the deceased had gone to collect money but he did not return home at night. A case was registered under Section 364, IPC. After investigation, the appellant was arrested. He made a confessional statement that the dead body of the deceased was lying in sugarcane fields. The body was recovered and identified. The other accused were also arrested. The appellant was charged under Sections 396 and 201, IPC. The trial court convicted the appellant under Sections 302 and 201 IPC. The accused 'A' was convicted under Section 411, IPC but the trial court acquitted him and three other accused for the offence under Section 396 IPC by giving them benefit of doubt. On appeals, the High Court allowed the appeal of 'A' and acquitted him even of the charge under Section 411, IPC. However, the conviction of the appellant was upheld. The instant appeal was filed challenging the order of the High Court.

It was contended for the appellant that he was charged for an offence under Section 396 IPC but without reformulation/alteration of the charge, he was convicted for an offence under Section 302 IPC and this deprived him of a fair opportunity of defence and has caused him serious prejudice; that Section 302, IPC is a graver offence than an offence punishable under Section 396, IPC and as such the entire trial and conviction of the appellant was vitiated in law; that there were serious

contradictions between the statements of the witnesses and the courts below erred in fact and in law, failed to appreciate the evidence in its correct perspective and this being a case of circumstantial evidence, the prosecution has failed to prove the chain of events pointing towards the guilt of the accused.

Dismissing the appeal, the Court

HELD: 1.1. The appellant was charged with an offence under Sections 396 and 201, IPC. Section 391, IPC explains the offence of 'dacoity'. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission and attempt amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'. Under Section 392 IPC, the offence of 'robbery' simplicitor is punishable with rigorous imprisonment which may extend to ten years or 14 years depending upon the facts of a given case. Section 396 IPC brings within its ambit a murder committed along with 'dacoity'. In terms of this provision, if any one of the five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. On a plain reading of these provisions, it is clear that to constitute an offence of 'dacoity', robbery essentially should be committed by five or more persons. Similarly, to constitute an offence of 'dacoity with murder' any one of the five or more persons should commit a murder while committing the dacoity, then every one of such persons so committing, attempting to commit or aiding, by fiction of law, would be deemed to have committed the offence of murder and be liable for punishment provided under

these provisions depending upon the facts and circumstances of the case. [Paras 6-8] [932-F-H; 933-A-E]

1.2. Section 299 defines 'culpable homicide'. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Except the exceptions provided under Section 300 IPC, culpable homicide is murder if the act by which death is caused is done with the intention of causing death. The intention to cause death is the primary distinguishing feature between these two offences. It is a fine but clear line of distinction. In terms of Section 300 IPC, except in the cases stated in that provision, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or in terms of any of the circumstances stated secondly, thirdly and fourthly respectively. The law clearly marks a distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder. Another distinction between Sections 302 and 396 is that under the latter, wide discretion is vested in the courts in awarding punishment. The court, in exercise of its jurisdiction and judicial discretion in consonance with the established principles of law can award sentence of ten years with fine or even award sentence of life imprisonment or sentence of death, as the case may be while under Section 302, the court cannot, in its discretion, award sentence lesser than life imprisonment.The ingredients of both these offences, to some extent, are also different inasmuch as to complete an offence of 'dacoity' under Section 396 IPC, five or more persons must conjointly commit the robbery while under Section 302 of the IPC even one person by himself can commit the offence of

murder. But, to attract the provisions of Section 396, the offence of 'dacoity' must be coupled with murder. In other words, the ingredients of Section 302 become an integral part of the offences punishable under Section 396 of the IPC. Resultantly, the distinction with regard to the number of persons involved in the commission of the crime loses its significance as it is possible that the offence of 'dacoity' may not be proved but still the offence of murder could be established, like in the instant case. Upon reasonable analysis of the language of these provisions, it is clear that the Court has to keep in mind the ingredients which shall constitute a criminal offence within the meaning of the penal section. This is not only essential in the case of the offence charged with but even where there is comparative study of different penal provisions as the accused may have committed more than one offence or even offences of a graver nature. He may finally be punished for a lesser offence or vice versa, if the law so permits and the requisite ingredients are satisfied. [Paras 9-11] [933-F-H; 934-A-H]

1.3. The judicial pronouncements show a consistent trend that wherever an accused is charged with a grave offence, he can be punished for a less grave offence finally, if the grave offence is not proved. But even in those cases, the Court has to be cautious while examining whether the ingredients of the offences are independently satisfied. If the ingredients even of a lesser offence are not satisfied then it may be difficult in a given case for the court to convict the person for an offence of a less grave nature. There can be cases where it may not be possible at all to punish a person of a less grave offence if its ingredients are completely different and distinct from the grave offence. In other words, the accused has to be charged with a grave offence which would take within its ambit and scope the ingredients of a less grave offence. The evidence led by the prosecution

for a grave offence, thus, would cover an offence of a less grave nature. But it is essential that the offence for which the Court proposes to punish the accused, is established beyond reasonable doubt by the prosecution. [Para 12] [935-A-F]

1.4. The Code of Criminal Procedure like all procedural laws is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along with certain well-established and well-understood canons of law that accord with the notions of natural justice. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences against property and offences relating to cheating, misappropriation, forgery etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be *inter se* the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content. [Paras 14, 17] [939-B-C; 942-B-E]

Willie (William) Slaney v. State of Madhya Pradesh **AIR 1956 SC 116: 1955 SCR 1140 – followed.**

Iman Ali & Anr. v. State of Assam **AIR 1968 SC 1464: 1968 SCR 610 – relied on.**

2.1. To show prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted certain protections to and rights of the accused during investigation and trial which are: The accused has the freedom to maintain silence during investigation as well as before the Court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the Court would be entitled to draw inference, including adverse inference, as may be permissible to it in accordance with law. The accused has right to fair trial; There is presumption of innocence (not guilty) and the prosecution must prove its case beyond reasonable doubt. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court. [Paras 20-21] [945-B-H; 946-A-B]

Anil @ Raju Namdev Patil vs. Administration of Daman & Diu and Anr. **2006 Suppl. (9) SCR 466;** *K. Prema S. Rao and Anr. v. Yadla Srinivasa Rao and Ors.* **(2003) 1 SCC 217: 2002 (3) Suppl. SCR 339;** *Kammari Brahmaiah and Ors. v. Public Prosecutor, High Court of A.P.* **(1999) 2 SCC 522: 1999 (1) SCR 361;** *Dalbir Singh v. State of U.P.* **(2004) 5 SCC 334;** *Kamalanantha and Ors. v. State of T.N.* **(2005) 5 SCC 194: 2005 (3) SCR 182;** *Harjit Singh v. State of Punjab* **(2006) 1 SCC 463: 2005 (5) Suppl. SCR 629 – relied on.**

Black's Law Dictionary, **Eighth Edition – referred to.**

2.2. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of Indian criminal jurisprudence. The Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication. Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to these rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law. [Para 22] [946-C-E]

Shamnsaheb M. Multtani v. *State of Karnataka* **(2001) 2 SCC 577: 2001 (1) SCR 514;** *Dinesh Seth* v. *State of NCT of Delhi* **(2008) 14 SCC 94: 2008 (12) SCR 113;** *Shivaji Sahebrao Bobade & Anr.* v. *State of Maharashtra* **AIR 1973 SC 2622: 1974 (1) SCR 489 – relied on.**

2.3. During conduct of trial, framing of a charge is an

important function of the court. Sections 211 to 224 of Chapter XVII of the Code of Criminal Procedure, 1973 have been devoted by the Legislature to the various facets of framing of charge and other related matters thereto. Under Section 211, the charge should state the offence with which the accused is charged and should contain the other particulars specified in that section. In terms of Section 214, in every charge, words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable. Another significant provision is Section 215 which states that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Further, the court has been vested with the power to alter the charge. There could be trial of more than one offence together and there could even be joint trial of the accused. The purpose of framing of a charge is to put the accused at notice regarding the offence for which he is being tried before the court of competent jurisdiction. For want of requisite information of offence and details thereof, the accused should not suffer prejudice or there should not be failure of justice. The requirements of putting the accused at notice and there being a charge containing the requisite particulars, as contemplated under Section 211, has to be read with reference to Section 215 of the Code. [Para 22] [946-F-H; 947-A-D]

3.1. Non-framing of charge or some defect in drafting of the charge *per se* would not vitiate the trial itself. It will have to be examined in the facts and circumstances of a given case. Of course, the court has to keep in mind that the accused 'must be' and not merely 'may be' guilty of

an offence. The mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. A person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record. Alike or similar offences can be termed as 'cognate offences'. The word 'cognate' is a term primarily used in civil jurisprudence particularly with reference to the provisions of the Hindu Succession Act, 1956 where Section 3(c) has used this expression in relation to the descendants of a class of heirs and normally the term is used with reference to blood relations. The expression 'cognate' has also been recognized and applied to the criminal jurisprudence as well not only in the Indian system but even in other parts of the world. Such offences indicate the similarity, common essential features between the offences and they primarily being based on differences of degree have been understood to be 'cognate offences'. Therefore, where the offences are cognate offences with commonality in their feature, duly supported by evidence on record, the Courts can always exercise its power to punish the accused for one or the other provided the accused does not suffer any prejudice as indicated. [Paras 22, 23, 25, 26] [948-C-G; 949-A-B-G-H; 950-C]

Dalbir Singh v. State of U.P. **(2004) 5 SCC 334 – Followed.**

Lakhjit Singh v. State of Punjab **1994 Suppl. (1) SCC (Crl.) 173;** *Sanagaraboina Sreenu v. State of A.P.* **(1997) 5 SCC 348: 1997 (3) SCR 957 – relied on.**

3.2. The concept of punishing the accused for a less grave offence than the one for which he was charged is not unique to the Indian Judicial System. It has its relevancy even under the English jurisprudence under the concept of alternative verdicts. There is no absolute

bar or impediment, in law, in punishing a person for an offence less grave than the offences for which the accused was charged during the course of the trial provided the essential ingredients for adopting such a course are satisfied. [Paras 29, 31] [956-H; 957-A-B; 958-E-F]

R v. Coutts (Appellant) **2006 UKHL 39 – referred to.**

3.3. The instant case related with an offence punishable under Section 396 IPC and in alternative with an offence under Section 302 of the IPC. The offence under Section 396 consists of two parts: firstly, dacoity by five or more persons, and secondly, committing of a murder in addition to the offence of dacoity. If the accused have committed both these offences, they are liable to be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and be liable to pay fine as well. Under Section 302 IPC, whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to pay fine. A conjoint reading of Sections 396 and 302 IPC shows that the offence of murder has been lifted and incorporated in the provisions of Section 396 IPC. In other words, the offence of murder punishable under Section 302 and as defined under Section 300 will have to be read into the provisions of offences stated under Section 396 IPC. In other words, where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to 'legislation by incorporation' which normally is applied between an existing statute and a newly enacted law. The expression 'murder' appearing in Section 396 would have to take necessarily in its ambit and scope the ingredients of Section 300 of the IPC. There is no scope for any ambiguity. The provisions are clear and admit no scope for application of any other principle of

interpretation except the 'golden rule of construction', i.e., to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition. These provisions read collectively put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences under Section 396. It will have the same connotation, meaning and ingredients as are contemplated under the provisions of Section 302 IPC. [Paras 32-33] [958-G-H; 959-A-F]

3.4. This is admittedly a case of circumstantial evidence and, thus, the evidence has to be examined in that context. There is no dispute to the fact that the charge under Sections 396 and 201 IPC were framed against the accused. The trial court had acquitted the four accused but convicted the appellant for an offence under Sections 302 and 201, IPC. [para 34] [959-G-H; 960-A-B]

3.5. PW2 and PW4 were the witnesses who had last seen the deceased with the appellant. The statements of the Investigating Officer (PW11) and the witnesses including PW3, in whose presence the dead body was recovered at the behest of the appellant, by means of recovery memo are the other material pieces of evidence which would complete the chain of events and point undoubtedly towards the guilt of the accused. The accused, for the reasons best known to him, had taken up a stand of complete denial in his statement recorded under Section 313 Cr.P.C. and opted not to explain his whereabouts at the relevant time. Furthermore, he was a regular taxi driver. It is true that the statement under Section 313 Cr.P.C. cannot be the sole basis for conviction of the accused but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been

able to establish the chain of events. It was clearly established from the evidence on record that the deceased was a regular trader and used to come to Nehtaur from where he was picked up by the appellant on the fateful day. These were certain definite circumstances clearly indicating towards the involvement of the appellant in the commission of the crime. The prosecution was able to establish its case beyond reasonable doubt on the basis of the circumstantial evidence. There was no significant link which was missing in the case put forward by the prosecution. [para 35] [961-D-H; 962-A]

Shyam Behari v. State of Uttar Pradesh **AIR 1957 S.C. 320 – Followed.**

4. No prejudice was caused to the appellant by his conviction for an offence under Section 302 IPC though he was initially charged with an offence punishable under Section 396 IPC read with Section 201 IPC. Further, the nature of injuries namely three incised wounds, three abrasions and severing of the trachea, caused by a sharp-edged weapon as noticed by the High Court indicated that the accused knew that the injury inflicted would be sufficient in the ordinary course of nature to cause death. The 'prejudice' has to be examined with reference to the rights and/or protections available to the accused. The incriminating evidence was clearly put to the accused in his statement under Section 313 Cr.P.C. The circumstances which constitute an offence under Section 302 were literally put to him, as Section 302 IPC itself is an integral part of an offence punishable under Section 396 IPC. The appellant was not able to demonstrate any prejudice which the appellant has suffered in his right to defence, fair trial and in relation to the case of the prosecution. Once the appellant has not suffered any prejudice, much less a serious prejudice,

then the conviction of the appellant under Section 302 IPC cannot be set aside merely for want of framing of a specific/alternate charge for an offence punishable under Section 302 IPC. It is more so because the dimensions and facets of an offence under Section 302 are incorporated by specific language and are inbuilt in the offence punishable under Section 396 IPC. Thus, on the application of principle of 'cognate offences', there was no prejudice caused to the rights of the appellant. [para 38] [963-E-H; 964-A-C]

Case Law Reference:

1968 SCR 610	relied on	Para 15
2006 Suppl. (9) SCR 466	relied on	Para 18
2002 (3) Suppl. SCR 339	relied on	Para 18
1999 (1) SCR 361	relied on	Para 18
2005 (3) SCR 182	relied on	Para 18
2005 (5) Suppl. SCR 629	relied on	Para 18
2001 (1) SCR 514	relied on.	Para 22
1955 SCR 1140	Followed	Paras 13, 22
2008 (12) SCR 113	relied on	Para 22
1974 (1) SCR 489	relied on	Para 22
1994 Suppl. (1) SCC (Crl.) 173	relied on	Para 27
1997 (3) SCR 957	relied on	Para 27
(2004) 5 SCC 334	Followed	Para 27
2001 (1) SCR 514	relied on	Para 28
2006 UKHL 39	referred to	Para 29
AIR 1957 SC 320	Followed	Paras 36, 37

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 656 of 2005.

From the Judgment & Order dated 29.9.2004 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1887 of 1981.

R. Anand Padmanabhan, Prithvi Raj B.N., G. Ramakrishna Prasad for the Appellant.

T.N. Singh, Rajeev Dubey, Kamlendra Mishra, Jatinder Kumar Bhatia for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Fine distinctions of law, if discerning, should normally be recognized and permitted to operate in their respective fields. With the development of criminal jurisprudence, the law has recognized the concept of cognate charges besides alternative charges. The differentiation between the offences from the same family in contradistinction to the offences falling in different categories have persuaded the courts to apply the principle of 'cognate offences' and punish the offender of a less grave offence because the offence of greater gravity has not been proved beyond reasonable doubt. This principle is to be applied keeping in view the facts and circumstances of a given case and notwithstanding the fact that no charge for such less grave offence had been framed against the offender. In the case in hand, we are concerned with a similar question which arises from the following facts:

All the five accused, namely, Rafiq Ahmad, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh, according to the prosecution, in the intervening night of 30th September, 1977 and 1st October, 1977 committed dacoity in Ambassador Car No.UPS 7293 belonging to Rafiq Ahmad. While the car was going on the pucca road from Nehtaur to Dhampur within the

jurisdiction of thana Nehtaur, the accused had committed the murder of Jagdish Prasad @ Jagdish Chandra @ Jagdish Babu and thereafter thrown his body in a sugarcane field of one Ikrar Ahmad situated in Village Kashmiri, thana Nehtaur with the intention of screening themselves from punishment for committing any offence. Shri Krishna Garg, uncle of the deceased was carrying on the wholesale business of sugar, *Khandsari*, flour, food grains etc. under the name of M/s. Badri Prasad Sunder Lal in Mohalla Bari Mandi, Dhampur (Bijnor). This firm had branches in the name of 'Garg Brothers'. The firm used to sell the above products on credit to the customers at Dhampur, Nagina, Sherkot, Sheohara, Haldaur and Nehtaur and the deceased, Jagdish Prasad, used to go to Nehtaur every Friday to realize money from them. On Friday, 30th September, 1977, also he left for Nehtaur to collect money. Ordinarily, he used to return home between 9.00 p.m. and 10.00 p.m. with collections roughly upto Rs. 10,000/-. Though, Jagdish Prasad, on that day also had collected more than Rs. 8,000/- from the customers, but he did not return home that night. The next morning, Shri Krishna Garg sent his Munim, Ramesh Chandra to Nehtaur to enquire about Jagdish Prasad. The Munim returned and disclosed to Shri Krishna Garg the above facts. After arrival of the Munim, Shri Krishna Garg left Dhampur for Nehtaur along with Pyare Lal, Surendra Kumar, Har Kishan and Kamlesh to enquire about Jagdish Prasad. From the enquiries, it came to light that at about 8.00 p.m., the deceased Jagdish Prasad had occupied a taxi, in which some persons were already sitting, at the Agency Chauraha, Nehtaur. The matter was reported and after making an entry in the GD on 1st October, 1977 at 2.30 p.m., SI K.L. Verma started investigation and interrogated a number of persons including Shri Krishna Garg and Pyare Lal. Thereafter, a case was registered under Section 364 of the Indian Penal Code (IPC). On 2.10.1977, the investigation was taken up by Station Officer (S.O.) Raj Pal Yadav and both Mr. Verma and Mr. Yadav left the police station together for investigation and reached P.S. Dhampur. At about 9.00 pm, accused Rafiq Ahmad was

arrested by the police along with his taxi No.UPS 7293. His arrest led to recovery of the taxi which was made in presence of Pyare Lal and Surendra Kumar. During the course of the investigation, the accused Rafiq Ahmad also made a confessional statement before the investigating officer in presence of Surendra Kumar and Pyare Lal that the dead body of the deceased was lying in the sugarcane fields near village Kashmiri. The body of the deceased was, thus, recovered and identified by Pyare Lal. SI K.L Verma (PW9) prepared the inquest report and the body was subjected to post mortem by Dr. R.B. Saxena (PW8), the Medical Officer.

On 3rd October, 1977, the accused Ahsan and his brother Imamuddin were arrested with the help of Zamal Ahmad @ Khan Zamaloo and Sattar. A gold ring was recovered from the possession of Ahsan. These arrests were effected at about 9.00 pm. Similarly, the accused Yashwant Singh was arrested by the police from the railway platform at 1.00 am on 2nd October, 1977.

We may refer to the post-mortem report and the ante-mortem injuries found by Dr. Saxena (PW8) on the body of the deceased which are as follows :

"1. Incised wound with chopping of left ear vertically oblique with ½ part of ear missing.

2. Incised wound oblique from above down wards below left side angle of jaw to upper neck 1/1/4"X¾"X¼".

3. Incised wound 6"X1"X bone deep at front of neck just above Adam's cartilage.

4. Abrasion ¼" X ¼" on back of both shoulders.

5. Abrasion 1/8" X ¼" on back of right elbow joint.

6. Abrasion ¼" X ¼" on outer side and back of left elbow.

In the opinion of Dr. Saxena, death was caused on account of respiratory failure and hemorrhage resulting from severing of trachea."

The investigation was completed and the charge-sheet in accordance with the provisions of Section 173 of the Criminal Procedure Code (for short 'Cr.P.C.') was filed before the court of competent jurisdiction. The accused were committed to the Court of Sessions and tried in accordance with law.

The learned Trial Court having considered the material and the report submitted to it in terms of Section 173 of the Cr.P.C. and vide order dated 11th September, 1979 framed the following charge against all the accused, including the present appellant, Rafiq Ahmad:

"S.T. No.3/78
State VS. Rafiq Etc.
Charge

I Jawant singh III additionaL Sessions Judge, Bijnour hereby charge you Rafiq, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh accused as follows: -

That you in the night of 30-9-77 committed dacoity in Taxi No. UPS 7273 while it was running on Nehtaur to Dhampur road and that in the commission of said dacoity murder was committed by you of one jagdish prashad and that you thereby committed an offence punishable u/s 396 IPC and within my cognizance And I hereby direct that you be tried by me on the said charge.

Dt.11-9-79 Sd/- Judge

Charge read over and explained in Hindi to the accused who pleaded not guilty.

Sd/- Judge
Sd/- Rafiq,
Sd/- Ahsan,
Sd/- Imamuddin,
Sd/- Arun Kumar
Sd/- Yashwant Singh"

This charge came to be amended by the learned Trial Court and the amended charge read as under:

" S.T. No. 3/78
State VS. Rafiq Etc.
Amended Charge

I Jaswant singh III additional Sessions Judge, Bijnour hereby charge you Rafiq, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh accused as follows: -

Firstly that you along with one another during the night of 30-9-77 and 1-10-77 committed dacoity in Ambassador Car No. UPS 7293 belonging to rafiq accused while it was going from Nehtaur to Dhampur on the pucca road within the circle of P.S. Nahtaur District Bijnaur and that in the commission of the said dacoity, murder of jagdish prashad was committed by you and that you thereby committed an offence punishable under Section 396 IPC and within the cognizance of this court.

Secondly – that you along with one another during the night of 30-09-77 and 1-10-77 in the area of village Kashmiri P.S. Nehtaur Dist. Bijnore knowing or having reason to believe that an offence U/s 396 IPC punishable with death or imprisonment for life has been committed did cause evidence of the said offence to disappear by secreting the dead body of jagdish prashad in the sugar cane field of Ikrar Ahmad with the intention of screening yourself from legal punishment and thereby committed an offence

punishable u/s 201 IPC and with the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge

25-2-80 Sd/- Judge

Charge read over and explained in Hindi to the accused who pleaded not guilty.

Sd/- Judge

Sd/- Rafiq,
Sd/- Ahsan,
Sd/- Imamuddin,
Sd/- Arun Kumar
Sd/- Yashwant Singh"

The prosecution examined as many as 12 witnesses to prove its case. Besides the statement of these witnesses, prosecution had also placed reliance on Exhibits Ka-1 to Ka-23. Incriminating evidence against the accused which came on record during the course of the trial was put to the accused whose statement under Section 313 of the Cr.P.C. was recorded by the Court on 20th February, 1981. It may be stated here that in his statement, accused Rafiq Ahmad denied his presence at the place of occurrence and stated that the witnesses being the relatives of the deceased were deposing against the appellant. The accused had also led defence and examined two witnesses, namely, Naik Singh (DW1) and Shri J.P. Singh (DW2) and placed number of documents on record.

The Trial Court, by a detailed judgment dated 17th August, 1981, came to the conclusion that Rafiq Ahmad was guilty of charge under Sections 302 and 201 IPC under which the accused was liable for conviction and punishment. The Court further held that Ahsan was guilty of a charge under Section 411 IPC but acquitted him and the three other accused, namely, Imamuddin, Arun Kumar and Yashwant Singh under Section 396 IPC by giving them benefit of doubt. The Court awarded

rigorous imprisonment for life to Rafiq Ahmad under Section 302 IPC and seven years rigorous imprisonment under Section 201 IPC. Both the sentences were ordered to run concurrently. The Trial Court ordered the accused Ahsan to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.500/- under Section 411, IPC and in default to undergo imprisonment for further period of six months.

Accused Rafiq Ahmad, dissatisfied with the judgment of the Trial Court, preferred an appeal before the High Court. Ahsan also challenged his conviction and sentence. Both these appeals were heard and disposed of by the High Court by a common judgment. The appeal filed by Rafiq Ahmad was dismissed. His conviction and sentence was maintained while the appeal preferred by Ahsan was accepted and he was acquitted even of the charge under Section 411 IPC.

Rafiq Ahmad, in the present appeal, has impugned the judgment of the High Court.

2. The entire emphasis of the submissions made on behalf of the appellant is primarily founded on determination of a question of law, which, if answered in favour of the appellant, according to the learned counsel appearing for the appellant, would entitle the appellant to an order of acquittal. The argument is that the appellant was charged for an offence under Section 396 IPC and without reformulation/alteration of the charge, the appellant has been convicted for an offence under Section 302 IPC. This according to the learned counsel, has deprived the appellant of a fair opportunity of defence and has caused him serious prejudice. Section 302 IPC is a graver offence than an offence punishable under Section 396 of the IPC and as such the entire trial and conviction of the appellant is vitiated in law.

3. It is also contended that the learned trial court as well as the High Court have erred in fact and in law, have failed to appreciate the evidence in its correct perspective and also that there are serious contradictions between the statements of the witnesses. It is also urged that this being a case of

circumstantial evidence, the prosecution has failed to prove the chain of events, pointing towards the guilt of the accused. Therefore, the judgments of the courts below are liable to be set aside.

4. On the contra, it is contended on behalf of the State that despite the present case being a case of circumstantial evidence, the prosecution has been able to establish its case beyond any reasonable doubt. The appellant has suffered no prejudice, whatsoever, because of his conviction under Section 302 of the IPC.

5. Before we proceed to examine the merit or otherwise of the above rival contentions, it will be important for us to refer to the relevant provisions of the IPC at this stage itself. The relevant provisions read as under:-

> *"302.Punishment for murder.*-Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.
>
> *396. Dacoity with murder.*-If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

6. As is evident from the amended charge reproduced earlier, the appellant was charged with an offence under Sections 396 and 201 of the IPC. It is not necessary for us to examine the charge framed against the other co-accused as all of them have been acquitted and the judgment of acquittal has not been challenged before this Court.

7. Section 391 IPC explains the offence of 'dacoity'. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons

present and aiding such commission and attempt amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'. Under Section 392 IPC, the offence of 'robbery' simplicitor is punishable with rigorous imprisonment which may extend to ten years or 14 years depending upon the facts of a given case. Section 396 IPC brings within its ambit a murder committed along with 'dacoity'. In terms of this provision, if any one of the five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

8. On a plain reading of these provisions, it is clear that to constitute an offence of 'dacoity', robbery essentially should be committed by five or more persons. Similarly, to constitute an offence of 'dacoity with murder' any one of the five or more persons should commit a murder while committing the dacoity, then every one of such persons so committing, attempting to commit or aiding, by fiction of law, would be deemed to have committed the offence of murder and be liable for punishment provided under these provisions depending upon the facts and circumstances of the case.

9. Section 299 defines 'culpable homicide'. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Except the exceptions provided under Section 300 IPC, culpable homicide is murder if the act by which death is caused is done with the intention of causing death. The intention to cause death is the primary distinguishing feature between these two offences. It is a fine but clear line of distinction.

10. In terms of Section 300 IPC, except in the cases stated in that provision, culpable homicide is murder if the act by which

the death is caused is done with the intention of causing death or in terms of any of the circumstances stated secondly, thirdly and fourthly respectively. The law clearly marks a distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder. Another distinction between Sections 302 and 396 is that under the latter, wide discretion is vested in the courts in relation awarding of punishment. The court, in exercise of its jurisdiction and judicial discretion in consonance with the established principles of law can award sentence of ten years with fine or even award sentence of life imprisonment or sentence of death, as the case may be while under Section 302, the court cannot, in its discretion, award sentence lesser than life imprisonment.

11. The ingredients of both these offences, to some extent, are also different inasmuch as to complete an offence of 'dacoity' under Section 396 IPC, five or more persons must conjointly commit the robbery while under Section 302 of the IPC even one person by himself can commit the offence of murder. But, as already noticed, to attract the provisions of Section 396, the offence of 'dacoity' must be coupled with murder. In other words, the ingredients of Section 302 become an integral part of the offences punishable under Section 396 of the IPC. Resultantly, the distinction with regard to the number of persons involved in the commission of the crime loses its significance as it is possible that the offence of 'dacoity' may not be proved but still the offence of murder could be established, like in the present case. Upon reasonable analysis of the language of these provisions, it is clear that the Court has to keep in mind the ingredients which shall constitute a criminal offence within the meaning of the penal section. This is not only essential in the case of the offence charged with but even where there is comparative study of different penal provisions as the accused may have committed more than one offence or even offences of a graver nature. He may finally be punished for a lesser offence or vice versa, if the law so permits and the requisite ingredients are satisfied.

12. So far the judicial pronouncements show a consistent trend that wherever an accused is charged with a grave offence, he can be punished for a less grave offence finally, if the grave offence is not proved. For example, a person charged with an offence under Section 302 of the IPC may finally be convicted only for an offence under Section 304 Part II where the prescribed punishment is lesser and the consequences of conviction are less serious in comparison to a conviction under Section 302. But even in those cases, the Court has to be cautious while examining whether the ingredients of the offences are independently satisfied. If the ingredients even of a lesser offence are not satisfied then it may be difficult in a given case for the court to convict the person for an offence of a less grave nature**.** There can be cases where it may not be possible at all to punish a person of a less grave offence if its ingredients are completely different and distinct from the grave offence. To deal with this aspect illustratively, one could say that a person who is charged with an offence under Section 326 may not be liable to be convicted for an offence under Section 406 IPC because their ingredients are entirely distinct, different and have to be established by the prosecution on its own strength. In other words, the accused has to be charged with a grave offence which would take within its ambit and scope the ingredients of a less grave offence. The evidence led by the prosecution for a grave offence, thus, would cover an offence of a less grave nature. But it is essential that the offence for which the Court proposes to punish the accused, is established beyond reasonable doubt by the prosecution.

13. A Constitution Bench of this Court in the case of *Willie (William) Slaney v. State of Madhya Pradesh* [AIR 1956 SC 116] dealt with a question as to whether omission to frame a charge was a curable irregularity. In that case the accused was charged for committing an offence punishable under Section 302 IPC but the Court finally convicted him of an offence punishable under Section 304, Part II. The Court, while examining if the accused had been prejudiced in his defence

and the validity of his conviction, held as under:

> "6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood line that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.
>
> 7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions. The question here is, does the Code deal with the absence of a charge and irregularities in it, and if so, into which of the two categories does it place them ? But before looking into the Code, we deem it desirable to refer to certain decisions of the Privy Council because much of the judicial thinking in this country has been moulded by their observations. In our opinion, the general effect of those decisions can be summarised as follows.

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17. It is possible (though we need not so decide in this case) that the recent amendment to section 537 in the Code of Criminal Procedure (Amendment) Act XXVI of 1955, where mis-joinder of charges has been placed in the curable category, will set at rest the controversy that has raged around the true meaning of N. A. Subramania Iyer v. King-Emperor. In any case, our opinion is that the real object of the Code is to leave these matters to the discretion and vigilance of the courts. Slightly to alter the language of the Privy Council in *Babulal Choukhani v. The King-Emperor* [1938] L.R. 65 IndAp 158, we would say -

> "It must be hoped, and indeed assumed, that magistrates and judges will exercise their jurisdiction fairly and honestly. Such is the implied condition of the exercise of judicial power. It they do not, or if they go wrong in fact or in law, the accused has prima facie a right of recourse to the superior courts by way of appeal or revision; and the cases show how vigilant and resolute the High Courts are in seeing that the accused is not prejudiced or embarrassed by unsubstantial departures from the Code and how closely and jealously the Supreme Court guards the position of the accused. These safeguards may well have appeared to the Legislature to be sufficient when they enacted the remedial provisions of the Code and have now left them substantially unaltered in the new Code recently introduced".

This, we feel, is the true intent and purpose of section 537(a) which covers every proceeding taken with jurisdiction in the general phrase "or other proceedings under this Code". It is for the Court in all these cases to determine whether there has been prejudice to the

accused; and in doing so to bear in mind that some violations are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and without anything else they must be struck down, while in other cases a close examination of all the circumstances will be called for in order to discover whether the accused has been prejudiced.

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In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage.

If it was not, and particularly where the accused is defended by 'AIR 1930 PC 57 (2) at p.58 (G)', it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that "no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused" 'AIR 1927 PC 44 at pp.46-47 & 49 (F)'.

But these are matters of fact which ill be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another,

because the facts can never be alike in any two cases however alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even judges, are sometimes prone to argue and to act if there were."

14. The Court, while laying down the above law, significantly noticed that the Code is a code of procedure and like all procedural laws is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the code is to ensure that an accused person gets a full and fair trial along with certain well-established and well-understood canons of law that accord with the notions of natural justice.

15. In the case of *Iman Ali & Anr. v. State of Assam*, [AIR 1968 SC 1464], the Court had the occasion to explain the distinction between the scope, liability and punishment for an offence under Section 396, as opposed to Section 302 IPC. The Court noticed that the offence under Section 396 was no less heinous than an offence under Section 302 though in the latter case, it was obligatory on the part of the Court to record reasons for not awarding death sentence. The Court while sustaining the enhancement of punishment from sentence of life imprisonment to sentence of death by the High Court on the ground that there was a direct evidence to show that the accused had committed the alleged murder, held as under:

"Learned counsel for the appellants, in challenging the justification for the order of enhancement of sentence by the High Court, relied on the principle laid down by this court in *Dalip Singh* v. *State of Punjab, 1954 SCR 145 at p.156 = (AIR 1953 SC 364 at pp. 367-368)* which was explained in the following words:-

"In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded

considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly be found, an appellate court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is that the discretion has been improperly exercised, as for example, where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty."

It appears to us, however, that, in the present case, this principle is of no assistance to the appellants for challenging the step taken by the High Court. This court cautioned the appellate court against interfering if the discretion of the trying Judge is exercised for reasons recorded by him and if it appears from the reasons that he had exercised a judicial mind in not awarding the sentence of death. In the present case, as mentioned by the High Court and as is apparent from the judgment of the Court of Session, the trial court awarded the sentence of imprisonment for life without giving any reasons at all for adopting that course. It is true that the appellants were not convicted in the present case for the offence of murder simpliciter under Section 302 IPC; but that, in our opinion, is immaterial. The conviction of the appellants under section 396 IPC, was not based on constructive liability as members of the gang of dacoits. There was clear finding by the court of Session which has been upheld by the High Court that each of these appellants committed a cold-

blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by them. Those persons were shot and killed even though they had not even tried to put up any resistance. The offence under Section 396 IPC, was therefore, no less heinous than an offence under Section 302 IPC. In these circumstances, when the court of Session gave no reason at all for not awarding the sentence of death and for sentencing them to imprisonment for life only, it cannot be held that the High Court was not justified in interfering with that order.

Learned counsel in this connection refereed us to a decision of a Division Bench of the Allahabad High Court in *Lal Singh v. Emperor* A.I.R. 1938 Alld. 625, where it was held :

> "We do not consider that as a general rule a sentence of death should necessarily follow a conviction under s. 396, I.P.C., and this Section differs from s. 302, I.P.C., in that respect. The rule is under s. 302, that a sentence of death should follow unless reasons are shown for giving a lesser sentence. No such rule applies to s. 396, I.P.C."

Again, we do not think that the learned Judges of the Allahabad High Court intended to lay down that, even in cases where a person is convicted for the offence under s. 396, I.P.C., and there is clear evidence that he himself had committed a cold-blooded murder in committing the dacoity, a sentence of death should not follow. Clearly, the view expressed was meant to apply to those cases where there could be no definite finding as to which person committed the murder and all the members of the gang are held constructively guilty of the offence punishable under s. 396, I.P.C. A principle enunciated for such a situation cannot be applied to a case where there is direct evidence that a particular accused committed the murder himself,

as is the finding in the present case."

17. With the passage of time more and more such cases came up for consideration of this Court as well as the High Courts. The development of law has not changed the basic principles which have been stated in the judgments afore-referred. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences against property and offences relating to cheating, misappropriation, forgery etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be *inter se* the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content.

18. In the case of *Anil @ Raju Namdev Patil vs. Administration of Daman & Diu and Anr.* [2006 Suppl. (9) SCR 466], the Court had to deal with a situation where the accused, a car driver had kidnapped a child of five years for the purpose of demanding ransom and later killed the child. The accused had been charged for an offence punishable under Sections 364, 302 and 201 IPC, but was finally convicted for an offence punishable under Section 364-A and was awarded sentence of death. This Court held that there was prejudice caused to the appellant and the sentence was modified from death to rigorous imprisonment for life with conviction under Section 364 IPC. The Court, besides recording the above findings on the merits of the case noticed the precedents in relation to non-framing of charge. The Bench referred to various judgments of

this Court in *K. Prema S. Rao and Anr. v. Yadla Srinivasa Rao and Ors.* [(2003) 1 SCC 217], *Kammari Brahmaiah and Ors. v. Public Prosecutor, High Court of A.P.* [(1999) 2 SCC 522], *Dalbir Singh v. State of U.P.* [(2004 5 SCC 334], *Kamalanantha and Ors. v. State of T.N.* [(2005 5 SCC 194], *Harjit Singh v. State of Punjab* [(2006 1 SCC 463] and recapitulated the principles of law stated in these judgments and stated the following precepts of law which would govern such cases:

"The propositions of law which can be culled out from the aforementioned judgments are:

(i) The appellant should not suffer any prejudice by reason of misjoinder of charges.

(ii) A conviction for lesser offence is permissible.

(iii) It should not result in failure of justice.

(iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges.

The ingredients for commission of offence of Section 364 and 364-A are different. Whereas the intention to kidnap in order that he may be murdered or may be so disposed of as to be put in danger as murder satisfied the requirements of Section 364 of the Indian Penal Code, for obtaining a conviction for commission of an offence under Section 364-A thereof it is necessary to prove that not only such kidnapping or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel

the government or any other person to do or abstain from doing any act or to pay a ransom.

It was, thus, obligatory on the part of the learned Sessions Judge, Daman, to frame a charge which would answer the description of the offence envisaged under Section 364-A of the Indian Penal Code. It may be true that the kidnapping was done with a view to get ransom but the same should have been put to the appellant while framing a charge. The prejudice to the appellant is apparent as the ingredients of a higher offence had not been put to him while framing any charge.

It is not a case unlike *Kammari Brahmaiah* (supra) where the offence was of a lesser gravity, as has been observed by Shah, J."

19. In light of the above principles, let us now examine the meaning of 'prejudice'. The expression has been defined in Black's Law Dictionary (Eighth Edition), as follows:

"**prejudice, 1.** Damage or detriment to one's legal rights or claims. See *dismissal with prejudice, dismissal without prejudice* under DISMISSAL.

Legal prejudice. A condition that, if shown by a party, will usu. defeat the opposing party's action: esp. a condition that, if shown by the defendant, will defeat a plaintiff's motion to dismiss a case without prejudice. The defendant may show that dismissal will deprive the defendant of a substantive property right or preclude the defendant from raising a defense that will be unavailable or endangered in a second suit.

Undue prejudice. The harm resulting from a fact-trier's being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned.

2. A preconceived judgment formed without a factual basis; a strong bias"

20. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial :

(a) The accused has the freedom to maintain silence during investigation as well as before the Court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the Court would be entitled to draw inference, including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial

(c) Presumption of innocence (not guilty)

(d) Prosecution must prove its case beyond reasonable doubt.

21. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. 'Prejudice' is incapable of being interpreted in its

generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

22. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication. Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law.

During conduct of trial, framing of a charge is an important function of the court. Sections 211 to 224 of Chapter XVII of the Code of Criminal Procedure, 1973 have been devoted by the Legislature to the various facets of framing of charge and other related matters thereto. Under Section 211, the charge should state the offence with which the accused is charged and should contain the other particulars specified in that section. In terms of Section 214, in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable. Another significant provision is Section 215 which states that no error in stating either the offence or

the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Further, the court has been vested with the power to alter the charge. There could be trial of more than one offence together and there could even be joint trial of the accused. We have referred to these provisions primarily to indicate that the purpose of framing of a charge is to put the accused at notice regarding the offence for which he is being tried before the court of competent jurisdiction. For want of requisite information of offence and details thereof, the accused should not suffer prejudice or there should not be failure of justice, as held by this Court in the case of *Shamnsaheb M. Multtani* v. *State of Karnataka* [(2001) 2 SCC 577]. The requirements of putting the accused at notice and there being a charge containing the requisite particulars, as contemplated under Section 211, has to be read with reference to Section 215 of the Code. Every omission would not vitiate the trial. This Court has settled this position in the case of *Willie (William) Slaney* v. *State of Madhya Pradesh* [AIR 1956 SC 116] wherein the Court held as under :

> "**36.** Sections 222 to 224 deal with the form of a charge and explain what a charge should contain. Section 225 deals with the effect of errors relating to a charge. Sections 233 to 240 deal with the joinder of charges. Sections 535 and 537 are in the Chapter that deals with irregularities generally and these two sections deal specifically with the charge and make it clear that an omission to frame a charge as well as irregularities, errors and omission in a charge are all irregularities that do not vitiate or invalidate a conviction unless there is prejudice.
>
> **37.** But, apart from that, if we examine the learned counsel's contention more closely, the fallacy in his argument becomes clear. Sections 237 and 238 deal with

> cases in which there is a charge to start with and then they go on to say that in certain cases the trial can proceed beyond the matter actually charged and a conviction for an offence disclosed in the evidence in that type of case will be good despite the absence of a charge in respect of it. But what are those cases? Only those in which the additional charge or charges could have been framed from the start; and that is controlled by Sections 234, 235 and 239 which set out the rules about joinder of charges and persons."

Dinesh Seth v. *State of NCT of Delhi* [(2008) 14 SCC 94] was a case where the accused was charged with an offence under Section 304B read with Section 34 IPC but was finally convicted for an offence under Section 498A. The plea of prejudice, on the ground that no specific charge under Section 498A was framed and the Court, while referring to the facts and circumstances of the case and the cross-examination of the prosecution witnesses found that it was unmistakably shown that the defence had made concerted efforts to discredit the testimony of the alleging cruelty, was rejected and the accused was punished for an offence under Section 498A. This clearly demonstrates the principle that in all cases, non-framing of charge or some defect in drafting of the charge *per se* would not vitiate the trial itself. It will have to be examined in the facts and circumstances of a given case. Of course, the court has to keep in mind that the accused 'must be' and not merely 'may be' guilty of an offence. The mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. {*Shivaji Sahebrao Bobade & Anr.* v. *State of Maharashtra* [AIR 1973 SC 2622]}.

23. Having stated the above, let us now examine what kind of offences may fall in the same category except to the extent of 'grave or less grave'. We have already noticed that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are

satisfied with the evidence on record. Examples of this kind have already been noticed by us like a charge being framed under Section 302 IPC and the accused being punished under Section 304, Part I or II, as the circumstances and facts of the case may demand. Furthermore, a person who is charged with an offence under Section 326 IPC can be finally convicted for an offence of lesser gravity under Section 325 or 323 IPC, if the facts of the case so establish. Alike or similar offences can be termed as 'cognate offences'. The word 'cognate' is a term primarily used in civil jurisprudence particularly with reference to the provisions of the Hindu Succession Act, 1956 where Section 3(c) has used this expression in relation to the descendants of a class of heirs and normally the term is used with reference to blood relations. Section 3(c) of the Hindu Succession Act defines "cognate" as follows:

> "one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males."

24. The Encyclopedia Law Lexicon, explain the word 'cognate' in relation to civil law as follows:

> "**Cognate. -** According to Hindu Law it is a class of heirs, descended or borrowed from the same earlier form.
>
> - It means blood relation including female relation.
>
> Word "cognate" literally means "akin in nature", *Ram Briksh v. State, 1978 All Cri C 253*"

25. This expression has also been recognized and applied to the criminal jurisprudence as well not only in the Indian system but even in other parts of the world. Such offences indicate the similarity, common essential features between the offences and they primarily being based on differences of degree have been understood to be 'cognate offences'. Black's Law Dictionary (Eighth Edition) defines the expression 'cognate offences' as follows:

> "***cognate offences***. A lesser offence that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category. For example, shoplifting is a cognate offence of larceny because both crimes require the element of taking property with the intent to deprive the rightful owner of that property."

26. Therefore, where the offences are cognate offences with commonality in their feature, duly supported by evidence on record, the Courts can always exercise its power to punish the accused for one or the other provided the accused does not suffer any prejudice as afore-indicated.

27. We may now refer to certain cases where this Court had the occasion to deal with such issues. Certain divergent views were also expressed in relation to conversion of an offence from a grave to a less grave offence. In the case of *Lakhjit Singh v. State of Punjab* [1994 Suppl.(1) SCC (Crl.) 173], the accused was charged with an offence under Section 302 IPC and convicted and sentenced for the said offence, both by the Trial Court as well as the High Court. In appeal, a Division Bench of this Court considered whether the offence could be converted and the appellant could be convicted for an offence under Section 306 IPC. Having regard to the evidence adduced by the prosecution and the answer of the accused to the questions put to him under Section 313 of the Cr.P.C., the Court was satisfied that the accused had fair notice of the allegations to attract an offence under Section 306 IPC and as such there was no denial of fair trial to the accused. Finally, the Court convicted him of an offence under Section 306 IPC. However, a different view was expressed in a subsequent judgment by another Division Bench of this Court in the case of *Sanagaraboina Sreenu v. State of A.P.* [(1997) 5 SCC 348 : AIR 1957 SC 623]. In that case also the Court was dealing with the situation where the accused was charged under Section 302 but had been convicted under Section 306 IPC. This Court felt

that having acquitted the accused for an offence under Section 302 which was the only charge against the accused, he could not have been convicted for an offence punishable under Section 306 IPC as both these offences were distinct and different. Resultantly, the accused was acquitted. The controversy arising from these two judgments of this Court came up for consideration before a three-Judge Bench of this court in the case of *Dalbir Singh v. State of U.P.* [(2004) 5 SCC 334], wherein the accused was charged with an offence under Sections 302, 498A and 304-B IPC, but finally was convicted under Section 302 by the Trial Court and sentenced to death. On appeal, the High Court acquitted him of the charge under Section 302 IPC opining that the evidence on record clearly established the charge under Section 306 IPC. Keeping in view the decision in the case of *Sanagaraboina Sreenu* (supra), the High Court had concluded that the accused could not be convicted under Section 306 and on this basis convicted him under Section 498A alone. The argument raised before this Court was that the basic ingredients were distinct and different. The accused was not aware of the basic ingredients, the facts sought to be established against him were not explained to him and he did not get a fair chance to defend himself. Resultantly, he ought not to have been convicted for an offence under Section 498A IPC. Rejecting all these contentions, this Court, while convicting the accused for an offence under Section 306, held that the law stated in *Sanagaraboina Sreenu* (supra) was not correct enunciation of law and held as under :

> "This question was again examined by a three Judge Bench in *Gurbachan Singh v. State of Punjab* AIR 1957 SC 623 in which it was held as under:
>
> > "[I]n judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that *Sangarabonia Sreenu* (AIR 1957 SC 623) was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.

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The next question to be seen is whether the accused was confronted with the aforesaid features of the prosecution case in his statement under Section 313 CrPC. His statement runs into six pages where every aspect of the prosecution case referred to above was put to him. He also gave a long written statement in accordance with Section 233(2) CrPC wherein he admitted that Vimla committed suicide. He also admitted that the scooter and colour TV were subsequently given to him by his in-laws but came out with a plea that he had paid money and purchased the same from his in-laws. There is no aspect of the

prosecution which may not have been put to him. We are, therefore, of the opinion that in view of the material on record, the conviction under Section 306 IPC can safely be recorded and the same would not result in failure of justice in any manner. The record shows that the accused was taken into custody on 29-3-1991 and was released from jail after the decision of the High Court on 20-3-1997 and thus he has undergone nearly six years of imprisonment. In our opinion, the period already undergone (as undertrial and after conviction) would meet the ends of justice."

28. We may also make a reference to another three-Judge Bench judgment of this Court in the case of *Shamnsaheb M. Multtani vs. State of Karnataka* [(2001) 2 SCC 577] which was not noticed in the case of *Dalbir Singh* (supra). In that case, the accused initially had been charged with an offence under Section 302 IPC but was convicted for an offence under Section 304B IPC as according to the High Court there was no failure of justice. This Court found error in the judgment of the High Court convicting the accused of an offence under Section 304B as the accused was not put at notice of the adverse presumption that the Court is statutorily bound to draw on satisfaction of two ingredients of Section 304-B. Therefore, this Court remanded the matter. It also noticed the conflict of views expressed in the cases of *Lakhjit Singh* (supra) and *Sanagaraboina Sreenu* (supra) and mentioned that in 'cognate offences', the main ingredients are common and the one amongst them that is punishable with a lesser sentence can be regarded as a minor offence. The Court, finding that the ingredients of Sections 302 and 304B are different, held as follows:

"15. Section 222(1) of the Code deals with a case "when a person is charged with an offence consisting of several particulars". The section permits the court to convict the accused "of the minor offence, though he was not charged

with it". Sub-section (2) deals with a similar, but slightly different situation.

"222. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."

16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.

17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). As the word "cruelty" is explained as including, inter alia,

"harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand".

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he

caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?

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30. But the peculiar situation in respect of an offence under Section 304-B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts onto him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the

serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

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35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC."

29. This concept of punishing the accused for a less grave offence than the one for which he was charged is not unique to

the Indian Judicial System. It has its relevancy even under the English jurisprudence under the concept of alternative verdicts. In *R v. Coutts* (Appellant), [2006 UKHL 39], the appellant was convicted by the jury of the murder of the deceased on an indictment charging him with that crime alone. The deceased had died by accident when the appellant and she had been engaged in consensual sexual asphyxial activity. The House of Lords considered whether the issue of manslaughter should have been left to the jury as an alternative verdict which they could return under Section 6(2) of the Criminal Law Act, 1967. The Court of Appeal rejected the appellant's contention that this issue should have been left to the jury by the trial judge on the ground that for the judge to introduce the possibility of a verdict of manslaughter on these grounds would have transformed the nature of the case that the appellant was required to meet. The appellant argued in appeal that if the trial judge fails to leave to the jury an intermediate verdict in the alternative which is raised by credible evidence, that is an irregularity which will render the verdict unsafe. The Crown took the stand that this was a deliberate and sadistic killing. In resolving this issue, the House of Lords was simultaneously faced with the broader question concerning the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it. Lord Bingham of Cornhill spoke thus on behalf of his four learned colleagues:

> *"The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support.* I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule

> to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.
>
> (emphasis supplied)"

30. Therefore, the Lords were of the unanimous opinion that the judge should have left a manslaughter verdict to the jury and his failure to do so was a material irregularity. The Court of Appeal, following the advice of the House of Lords, quashed the appellant?s conviction and ordered a retrial.

31. As is evident from the above stated principles of law in various judgments, there is no absolute bar or impediment, in law, in punishing a person for an offence less grave than the offences for which the accused was charged during the course of the trial provided the essential ingredients for adopting such a course are satisfied.

32. In the present case, we are primarily concerned with an offence punishable under Section 396 IPC and in alternative for an offence under Section 302 of the IPC. The offence under Section 396 consists of two parts: firstly, dacoity by five or more persons, and secondly, committing of a murder in addition to the offence of dacoity. If the accused have committed both these offences, they are liable to be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and be liable to pay fine as well. Under Section 302 IPC, whoever commits murder shall be punished

with death or imprisonment for life and shall also be liable to pay fine. The offence of murder has been explained under Section 300 IPC. If the act by which the death is caused is done with the intention of causing death, it is murder. It will also be a murder, if it falls in any of the circumstances secondly, thirdly and fourthly of Section 300 and it is not so when it falls in the exception to that Section.

33. On the conjoint reading of Sections 396 and 302 IPC, it is clear that the offence of murder has been lifted and incorporated in the provisions of Section 396 IPC. In other words, the offence of murder punishable under Section 302 and as defined under Section 300 will have to be read into the provisions of offences stated under Section 396 IPC. In other words, where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to 'legislation by incorporation' which normally is applied between an existing statute and a newly enacted law. The expression 'murder' appearing in Section 396 would have to take necessarily in its ambit and scope the ingredients of Section 300 of the IPC. In our opinion, there is no scope for any ambiguity. The provisions are clear and admit no scope for application of any other principle of interpretation except the 'golden rule of construction', i.e., to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition. These provisions read collectively, put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences under Section 396. It will have the same connotation, meaning and ingredients as are contemplated under the provisions of Section 302 IPC.

34. In light of the principles afore-stated, now we may revert to the facts and circumstances of the case in hand. It is admittedly a case of circumstantial evidence and, thus, the evidence has to be examined in that context. There is no dispute to the fact that the charge under Sections 396 and 201

IPC had been framed against the accused. The Trial Court had acquitted the four accused but convicted the present appellant for an offence under Sections 302 and 201 while convicting another accused, namely Ahsan, for an offence punishable under Section 411 IPC. The judgment of the trial court was upheld by the High Court in so far as the acquittal of the four accused for the offences under Section 396 was concerned as well as the conviction of the present appellant under Section 396 IPC. However, the High Court acquitted Ahsan for the offence under Section 201 IPC which does not concern us in the present appeal. The charge being under Section 396 alone whether the accused could have been convicted for an offence under Section 302 IPC without alteration of charge is the short question involved in the case before us. Let us examine the evidence for conviction of the appellant on the basis of the circumstantial evidence. The High Court in paragraph 35 of its judgment has stated the following circumstances which undoubtedly point towards the guilt of the accused: -

"1. That the deceased (Jagdish Chandra) left his house/ shop for Nehtaur on 30.09.77 to realize the amount from customers.

2. That he was seen in Nehtaur Kasba by PW-2 Ved Prakash and PW-4 Gyan Chand on that day who saw him occupying taxi no. UPS 7293.

3. That the deceased was sitting in the taxi along with others and appellant Rafiq Ahmad was found on the driver seat;

4. That the taxi in question proceeded for Dhampur from Agency Chauraha, Nehtaur in the presence of PW-4 Gyan Chand;

5. That the appellant (Rafiq Ahmad) was arrested by the police on 2.10.77 alongwith his taxi and he made a confession to the IO in the presence of two public

witnesses that he had concealed the dead body in a sugarcane field near village kashmiri;

6. That subsequent recovery of the dad (sic) body of deceased (Jagdish Chandra) from the sugarcane field at the pointing out of the appellant in the night indicates that Rafiq Ahmad alongwith some others looted the cash and other valuables from the person of the deceased.

7. That Jagdish Chandra was done to death by the appellant (Rafiq Ahmad) in the night intervening 30.9.77/ 1.10.77 and the appellant with a view to screen himself from legal punishment caused disappearance of the dead body by throwing the same in the sugarcane field."

35. The above circumstances have to be examined along with the statements of Ved Prakash (PW2) and Gyan Chand (PW4), the witnesses who had last seen the deceased with the appellant. The statements of the Investigating Officer (PW11) and the witnesses including Pyare Lal (PW3), in whose presence the dead body was recovered at the behest of the appellant, by means of recovery memo Ex.PW Ex-Ka 3 are the other material pieces of evidence which would complete the chain of events and point undoubtedly towards the guilt of the accused. The accused, for the reasons best known to him, had taken up a stand of complete denial in his statement dated 20th February, 1981 recorded under Section 313 Cr.P.C. and opted not to explain his whereabouts at the relevant time. Furthermore, he was a regular taxi driver at the stand of Agency Chauraha. It is true that the statement under Section 313 Cr.P.C. cannot be the sole basis for conviction of the accused but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of events. It is clearly established from the evidence on record that the deceased was a regular trader and used to come to Nehtaur from where he was picked up by the appellant on the fateful day. These were certain definite circumstances clearly indicating towards the involvement of the

appellant in the commission of the crime. The prosecution has been able to establish its case beyond reasonable doubt on the basis of the circumstantial evidence. There is no significant link which is missing in the case put forward by the prosecution.

36. At this stage, we may refer to a Constitution Bench judgment of this Court in the case of *Shyam Behari v. State of Uttar Pradesh* [AIR 1957 S.C. 320] wherein the accused after being charged for an offence under Section 396 IPC was finally convicted under Section 302 IPC. The Court in the said judgment held as under:

"15. It is, however, unnecessary to do so because in the facts and circumstances of the present case the appellant is liable to be convicted of the offence under Section 302 Indian Penal Code without anything more. The charge under Section 396, Indian Penal Code comprised of two ingredients:- (1) the commission of the dacoity, and (2) the commission of the murder in so committing the dacoity. The first ingredient was proved without any doubt and was not challenged by the learned counsel for the appellant. The second ingredient also was proved in any event as regards the commission of the murder because the attention of the accused was focused not only on the commission of the offence while committing the dacoity but also on the individual part which he took in the commission of that murder. So far as he was concerned, he knew from the charge which was framed against him that he was sought to be made responsible not only for the commission of the dacoity but also for the commission of the murder in committing such dacoity. The evidence which was led on behalf of the prosecution specifically implicated him and he was named by the prosecution witnesses as the person who shot at Mendai while crossing the ditch of the Pipra Farm. His examination under section 342 of the Criminal Procedure Code also brought out that point specifically against him and he was questioned in that

behalf. Both the Courts below recorded their concurrent findings of fact in regard to the part taken by the appellant in the commission of the murder of Mendai. Under these circumstances it could not be urged that the appellant could not be convicted of the offence under Section 302, Indian Penal Code if such a charge could be made out against him (Vide our decision in Willie (William) Slaney v. State of Madhya Pradesh, Crl App No. 6 of 1955 D/- 31-10-1955 ((S) AIR 1956 SC 116) (F)"

37. The above Constitution Bench judgment of this Court, in law, squarely applies to the present case. We ought not be understood to say that the facts of both the cases are identical. In the case of *Shyam Behari* (supra), the accused had killed the deceased while retreating after committing the dacoity while in the present case the evidence, though circumstantial, is that the appellant had killed the accused brutally and then hid his dead body in the fields to destroy the evidence. Thus, suffice it to note that both the cases have some similarity in circumstances but the principle of law stated in *Shyam Behari's case* (supra) is squarely applicable to the present case.

38. For the reasons afore-recorded, we are of the considered view that no prejudice has been caused to the appellant by his conviction for an offence under Section 302 IPC though he was initially charged with an offence punishable under Section 396 IPC read with Section 201 IPC. Further, the nature of injuries namely three incised wounds, three abrasions and severing of the trachea, caused by a sharp-edged weapon as noticed by the High Court in para 34 of its judgment, indicate that the accused knew that the injury inflicted would be sufficient in the ordinary course of nature to cause death. The 'prejudice' has to be examined with reference to the rights and/or protections available to the accused. The incriminating evidence had been clearly put to the accused in his statement under Section 313 Cr.P.C. The circumstances which constitute an offence under Section 302 were literally put to him, as

Section 302 IPC itself is an integral part of an offence punishable under Section 396 IPC. The learned counsel appearing for the appellant has not been able to demonstrate any prejudice which the appellant has suffered in his right to defence, fair trial and in relation to the case of the prosecution. Once the appellant has not suffered any prejudice, much less a serious prejudice, then the conviction of the appellant under Section 302 IPC cannot be set aside merely for want of framing of a specific/alternate charge for an offence punishable under Section 302 IPC. It is more so because the dimensions and facets of an offence under Section 302 are incorporated by specific language and are inbuilt in the offence punishable under Section 396 IPC. Thus, on the application of principle of 'cognate offences', there is no prejudice caused to the rights of the appellant.

39. For the reasons afore-stated, we find no merit in this appeal and the same is dismissed.

D.G. Appeal dismissed.

PRATAP CHANDRA MEHTA

v.

STATE BAR COUNCIL OF M.P. & ORS.

(Civil Appeal No. 6482 of 2011)

AUGUST 9, 2011

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

State Bar Council of Madhya Pradesh Rules – rr. 121 and 122-A — Challenge to vires of r. 122-A, on the ground that s.15 of the Advocates Act, does not contemplate the framing of such Rule by State Bar Councils providing for removal of Chairman/Vice-Chairman by 'no confidence motion' – Held: Rule 122-A of the M.P. Rules contemplates the removal of a Chairman/Vice-Chairman by a motion of no confidence, passed by a specific majority of the members and subject to satisfaction of the conditions stated therein – It cannot be termed as vesting arbitrary powers in the elected body – Power delegated to the elected body is within the framework of the principal Act-s. 15, read with the other provisions, of the Advocates Act – Power to frame rules has to be given a wider scope, rather than a restrictive approach so as to render the legislative object achievable – s. 15 which delegates the Bar Councils the power to frame rules to 'carry out the purposes of this Chapter' are of generic nature – Thus, the provisions of rr. 121 and 122-A of the Rules are not ultra vires of the provisions of the Advocates Act, including s. 15 – These rules also do not suffer from the vice of excessive delegation – Amended Rules of the M.P. Rules received the approval of the Bar Council of India, particularly Rule 122-A and would not be invalidated for want of issuance of any notification – On facts, the Chairman of the State Bar Council had lost the confidence of majority of the elected members and thus, Resolution to hold special meeting to consider requisition of 'no confidence motion' cannot be faulted with - Advocates Act, 1961 – s.15.

Object and purposes of – Explained.

Administrative law – Delegated legislation – Guidelines for – Held: It is not necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies – In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be relevant factors to be considered by the Court.

Doctrines/Principles – Principles of natural justice – Applicability of, to removal of Chairman/Vice-Chairman of State Bar Council by 'no-confidence motion' – Held: Concept of just cause and right of hearing are not applicable to the elected officers where a person is so elected by majority in accordance with statutory rules – It also has no application to moving of a 'no-confidence motion in so far as these are controlled by specific provisions and are not arbitrary or unreasonable.

Words and Phrases:

'Election' – Meaning of – Held: Expression 'election' includes the whole procedure of election and is not confined to final result – Rejection or acceptance of nomination paper is included in the said expression.

The election to the State Bar Council were held and 'N' was elected as Member and then Chairman of the State Bar Council by its members. After the expiry of 2½ years, fresh elections were held and 'N' was again elected as member, and then the Chairman of the State Bar Council by its members. After issuance of notice in accordance with the State Bar Council Madhya Pradesh Rules, the General Body Meeting of the State Bar Council was held on 27th March, 2011. Requisitions were made relating to a 'no confidence motion' against the Chairman/ Vice-Chairman, and that there should be re-election of the Committees. The minutes were recorded. It was also

stated that the Chairman/Vice-Chairman had offered their resignation subject to withdrawal of 'no confidence motion'. It was resolved that the agenda of the special meeting would be circulated on the same day itself, by post, to all the members of the State Bar Council, whether present at the meeting or not and the next meeting would be held on 16th April, 2011. These notices were issued. The meeting was held on 16th April, 2011. During the course of the meeting on 16th April 2011, some of the members left the meeting. The Advocate General of Madhya Pradesh presided over the continuation of the meeting and the no-confidence motion against both the Chairman and the Vice Chairman was passed by majority of all the members present and the voting under Rule 122-A of the Rules.

Meanwhile, the appellant filed a writ petition challenging the *vires* of Rules 121 and 122-A relating to the term of, and procedure for passing a 'no confidence motion' against the Chairman/Vice-Chairman. The court directed that the meeting of the State Bar Council could be held on 16th April, 2011, but the Resolution, if passed, would not be given effect to, till further orders and passed order for listing the matter for hearing.

Two sets of minutes of the meeting dated 16th April, 2011 were recorded and the same were different. One set of minutes is only signed by the Secretary of the State Bar Council while the other is signed by the Secretary as well as by other members who passed the Resolution. In the Minutes of the meeting dated 16th April, 2011, it was specifically recorded that the Resolution is not to be given effect to in view of the orders passed by the High Court in the aforesaid Writ Petition. However, the copy of the proceeding was to be communicated to the Registrar General of the High Court of M.P. This Resolution was signed by the members present. Thereafter, another writ

petition was filed claiming same relief. The High Court dismissed both the writ petitions. Therefore, the appellants filed the instant appeals.

The questions which arose for consideration in these appeals are whether the provisions of Rules 121 and 122-A of the State Bar Council of Madhya Pradesh Rules are *ultra vires* Section 15 of the Advocates Act, 1961; was the delegation of legislative power under Section 15 of the Act excessive; whether despite the absence of the enabling provisions in the principal statute, namely, the Advocates Act, empowering subordinate State Bar Councils to enact provisions for removal of the office bearers of the State Bar Councils by 'no confidence motions', such power could be read into the general clause of Section 15(1) of the Act; and whether Rules 121 and 122-A of the M.P. Rules are invalid for want of prior approval from the Bar Council of India?

Dismissing the appeals, the Court

HELD: 1. The provisions of Rules 121 and 122-A (in particular) of the State Bar Council of Madhya Pradesh Rules are not *ultra vires* of the provisions, including the provisions of Section 15 of the Advocates Act. These rules also do not suffer from the vice of excessive delegation. In view of the language of Section 15(3) and the factual matrix, it is clear that the amended rules of the M.P. Rules had received the approval of the Bar Council of India, particularly Rule 122-A. The Rules would not be invalidated for want of issuance of any notification, as it is not the requirement in terms of Section 15(3) of the Act and in any case would be a curable irregularity at best. [Para 61] [1026-F-H; 1027-A-B]

2. 'Election' is an expression of wide connotation which embraces the whole procedure of election and is

not confined to final result thereof. Rejection or acceptance of nomination paper is included in this term. [Para 38] [1008-H; 1009-A]

N.P. Ponnuswami v. returning Officer,Namakkal Constituency **AIR (39) 952 SC 64: 1952 SCR 218 - referred to.**

3.1. The body which elects the Chairman or Vice-Chairman of a State Bar Council would and ought to have the right to oust him/her from that post, in the event the majority members of the body do not support the said person at that time. The provisions of Rule 122-A of the M.P. Rules make it clear, beyond doubt, that a 'no confidence motion' can be brought against the elected Chairman provided the conditions stated in the said Rules are satisfied. Section 15 of the Advocates Act empowers the State Bar Councils to frame Rules to carry out the purposes of Chapter II of the Act. Section 3 requires the constitution of the State Bar Councils. Section 3(3) contemplates that there shall be a Chairman and a Vice-Chairman of each State Bar Council elected by the State Bar Council in such manner as may be prescribed. Section 6 of the Act, details the functions to be performed by the State Bar Councils. Inter alia, the functions to be performed by the State Bar Councils include, under Sections 6(1)(d), to safeguard the rights, privileges and interests of the advocates on its roll. Under Section 6(1)(g), the function of the Bar Council is to provide for the election of its members and under Sections 6(1)(h) and 6(1)(i), the State Bar Council has to perform all other functions conferred on it by or under this Act and to do all other things necessary for discharging the aforesaid functions. Sections 6(1)(h) and 6(1)(i) have to be read and interpreted conjointly. There is no reason why the expression 'manner of election of its members' in Section 6(1)(g) should be given a

restricted meaning, particularly in light of Sections 6(1)(h) and 6(1)(i). The responsibility of the State Bar Councils to perform functions as per the legislative mandate contained in Section 6 of the Act is of a very wide connotation and scope. No purpose would be achieved by giving it a restricted meaning or by a strict interpretation. The State Bar Council has to be given wide jurisdiction to frame rules so as to perform its functions diligently and perfectly and to do all things necessary for discharging its functions under the Act. The term of office of the members of the State Bar Council is also prescribed under Chapter II, which shall be five years from the date of publication of the result of the election. On failure to provide for election, the Bar Council of India has to constitute a special committee to do so instead. Section 15(2) then provides that without prejudice to the generality of the foregoing powers, rules may be framed to provide for the preparation of electoral rolls and the manner in which the result shall be published. In terms of Section 15(2)(c), the manner of the election of the Chairman and the Vice-Chairman of the Bar Council and appointment of authorities which would decide any electoral disputes is provided. The expression 'manner of election of the Chairman' is an expression which needs to be construed in its wide connotation. The rules so framed by the State Bar Council shall become effective only when approved by the Bar Council of India in terms of Section 15(3) of the Advocates Act. [Para 39] [1009-E-H; 1010-A-H; 1011-A-C]

3.2. The power of the State Bar Council to frame rules under Section 15 of the Advocates Act as a delegate of the Bar Council of India has to be construed along with the other provisions of the Advocates Act, keeping in mind the object sought to be achieved by this Act. Greater emphasis is to be attached to the statutory provisions and to the other purposes stated by the

legislature under the provisions of Chapter II of the Advocates Act. This is an Act which has been enacted with the object of preparing a common roll of advocates, integrating the profession into one single class of legal practitioners, providing uniformity in classification and creating autonomous Bar Councils in each State and one for the whole of India. The functioning of the State Bar Council is to be carried out by an elected body of members and by the office-bearers who have, in turn, been elected by these elected members of the said Council. The legislative intent derived with the objects of the Act should be achieved and there should be complete and free democratic functioning in the State and All India Bar Councils. The power to frame rules has to be given a wider scope, rather than a restrictive approach so as to render the legislative object achievable. The functions to be performed by the Bar Councils and the manner in which these functions are to be performed suggest that democratic standards both in the election process and in performance of all its functions and standards of professional conduct which need to be adhered to. In other words, the interpretation furthering the object and purposes of the Act has to be preferred in comparison to an interpretation which would frustrate the same and endanger the democratic principles guiding the governance and conduct of the State Bar Councils. The provisions of the Advocates Act are a source of power for the State Bar Council to frame rules and it will not be in consonance with the principles of law to give that power a strict interpretation, unless restricted in scope by specific language. This is particularly so when the provisions delegating such power are of generic nature, such as Section 15(1) of the Act, which requires the Bar Councils to frame rules to 'carry out the purposes of this Chapter' and Section 15(2), which further uses generic terms and expressly states that the Bar Council is empowered to frame rules 'in particular and without

prejudice to the generality of the foregoing powers'. If one reads the provisions of clauses (a), (c), (g), (h) and (i) of Sub-section (2) of Section 15 of the Act, then, it is clear that framing of rules thereunder would guide and control the conduct or business of the State Bar Councils and ensure maintenance of the standards of democratic governance in the said Councils. Since the office bearers like the Chairman and the Vice-Chairman are elected by a representative body i.e. by the advocates who are the elected members of the Council, on the basis of the confidence bestowed by the advocates/electorate in the elected members, there seems to be no reason why that very elected body cannot move a 'no confidence motion' against such office bearers, particularly, when the rules so permit. [Para 40] [1011-H; 1012-A-F]

3.3. The Bar Council of India, also framed rules and permitted moving of 'no confidence motion' against its Chairman/Vice-Chairman subject to compliance of the conditions stated therein. Similarly, Rule 122-A of the M.P. Rules contemplates the removal of a Chairman/Vice-Chairman by a motion of no confidence, passed by a specific majority of the members and subject to satisfaction of the conditions stated therein. This provision, thus, can neither be termed as vesting arbitrary powers in the elected body, nor can it be said to be suffering from the vice of excessive delegation. The power delegated to the elected body is within the framework of the principal Act, i.e., Section 15, read with the other provisions, of the Advocates Act. In terms of Rule 120 of the M.P. Rules, a person can be elected as Chairman/Vice-Chairman only by majority and in case there is a tie, the election shall be decided by drawing of lots. Under Rule 118 of the M.P. Rules a Chairman/Vice-Chairman has to be elected from amongst its members for two years. In other words, the term of office of the

Chairman/Vice-Chairman is controlled by the fact that he has to be elected to that particular office. The removal contemplated under Rule 122-A is not founded on a disciplinary action but is merely a 'no confidence motion'. It is only the loss of confidence simpliciter i.e. the majority of the members considering, in their wisdom, that the elected Chairman/Vice-Chairman should not be permitted to continue to hold that office, which is the very basis for such removal. One must remember that Rules 118 to 122-B all come within Chapter XVIII of the M.P. Rules and, as such, have to be examined collectively. But for this Chapter, it cannot be even anticipated as to who and how the office of the Chairman/Vice-Chairman of the State Bar Council shall be appointed. [Para 41] [1012-H; 1013-A-E]

4.1. The language of the statute has to be examined before giving a provision an extensive meaning. The Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act, while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be the relevant factors to be considered by the Court. [Para 44] [1015-C-E]

4.2. In the instant case, the minimum guidelines of secrecy and fairness in election have been provided in Part IX of the Rules, which have been framed in exercise of the supervisory powers under Sections 49(1)(a), 49(1)(i) and 49(1)(j) of the Advocates Act. Further, clause (5) of this Part even extends to the State Bar Councils the power to independently resolve all election disputes through tribunals constituted for this purpose. Therefore, the powers delegated have an in-built element of

guidance that the Chairman/Vice-Chairman will be appointed and regulated by the majority members of the State Bar Council. Their conduct, and the conduct of the State Bar Council as a whole, is to be maintained in consonance with democratic principles and keeping the high professional standards of advocates in mind. Thus, it is not a power which falls beyond the purview and scope of Section 15 of the Advocates Act read in conjunction with other provisions, particularly Chapter II and also keeping in view the object of the Act. [Para 44] [1015-E-H; 1016-A]

4.3. The purpose of the Advocates Act is the democratic and harmonious functioning of the State Bar Councils, to achieve the object and purposes of the Act. It cannot be seen as to how the provisions of Rule 122-A fall foul of the ambit and scope of Section 15 of the Advocates Act and, for that matter, any other provisions of that Act. On the contrary, they are in line with the scheme of the parent Act. [Para 45] [1016-B-C]

O.N. Mohindroo v. Bar Council of Delhi **AIR 1968 SC 888;** *General Officer Commanding-in-Chief v. Subhash Chandra Yadav* **(1988) 2 SCC 351: 1988 (3) SCR 62;** *Kunj Behari Lal Butail v. State of H.P.* **(2000) 3 SCC 40: 2000 (1) SCR 1054;** *Global Energy Ltd. v. Central Electricity Regulatory Commission* **(2009) 15 SCC 570 – relied on.**

5.1. The appellant submitted that the recall of the Chairman/Vice-Chairman, by a smaller and distinct body of members of the State Bar Council, does not fall within the purview of the authority of the delegatee Council, under Section 15(2)(c) of the Advocates Act, i.e. to legislate on 'the manner of election'; and that the provisions of Rule 122-A are unsustainable. There is no merit in the contention as well as it has no substance. The election to the post of Chairman/Vice-Chairman of the State Bar Council is not by the larger body, i.e., the

advocates enrolled on the rolls of the State Bar Council, but is by a distinct body, i.e. elected members of the State Bar Council. Once they elect the Chairman/Vice-Chairman of the State Bar Council as per the scheme of Rules 118 to 123, then all actions taken by such body would have to be accepted by all concerned as correct, if they are within the domain of the rules governing such body. [Para 46] [1016-D-G]

Mohan Lal Tripathi v. District Magistrate **(1992) 4 SCC 80: 1992 (3) SCR 338;** *Ram Beti v. District Panchyat Raj Adhikari* **(1998) 1 SCC 680: 1997 (6) Suppl. SCR 582 – referred to.**

5.2. Though the language of the Rule 15 clearly shows that no matter once decided shall be reconsidered for a period of three months but clearly makes an exception that wherever 2/3rd majority of the members present of the State Bar Council permits, this bar will not operate. In other words, there is no absolute bar and the Rule makes out an exception when the matters could be reconsidered. But that is not the situation in the instant case. The first pre-requisite under this rule is that matter should be 'once decided', and then alone, the bar of re-consideration would operate; that too depending on the facts and circumstances of a given case. 'Once decided' obviously means the matter should be concluded or finally decided in contradistinction of being 'kept pending' or 'deferred'. [Para 50] [1019-F-H]

5.3. There is some dispute with regard to the recording of the minutes of this meeting. The minutes which were recorded by the respective parties are reproduced. There is no inclination to rely upon the minutes produced by the appellants, inasmuch as they are not signed by all the members present and voting. Even if, for the sake of arguments, the minutes produced by the appellants are taken to be correct, then it must

follow that both the meetings took place on 16th April, 2011. However, it is obvious from the record that in the 15th meeting of the General Body held on 27th March, 2011, no final decision was taken and it was decided to circulate the minutes and other papers of the meeting to all members. [Para 51] [1020-F-H; 1021-A]

5.4. The submission that by virtue of the bar under Rule 15 of the M.P. Rules, the Chairman and Vice-Chairman were elected to their respective posts in February 2011 and, as such, the election itself was a 'decision' which was incapable of being reconsidered and revised in the meetings of March and April, 2011; and that the limitation contained in Rule 15 of the M.P. Rules shall vitiate the decision of passing a 'no confidence motion', cannot be accepted. It is misconceived in law and on the facts of the instant case. Election is not a 'decision' as contemplated under Rule 15 of the M.P. Rules. It is not a matter on which the State Bar Council decides, as firstly, the said matter falls within the discretion of individual advocates on the rolls of the State Bar Council to elect the representative members of the said Councils, and secondly it falls within the discretion of such elected representatives to elect a person as Chairman/Vice-Chairman. It is not a 'decision' which relates to the matters as contemplated under the M.P. Rules. Passing of a 'no confidence motion' in law, therefore, cannot be termed as reconsideration of the decision taken. Once the Council is constituted in terms of the Act and the Rules framed thereunder, then it has to take decisions in the role of a Council in relation to various matters, including rejecting or passing a 'no confidence motion'. A statutory bar may exist in this respect, in some cases, but in its absence, the Court cannot infer or imply a time bar on challenging the results of election as a feature of common law or general

democratic principles. Thus, the bar contemplated under Rule 15 of the M.P. Rules does not operate, on merits, when applied to the facts of the instant case. [Paras 52, 53 and 54] [1021-B-H; 1022-A]

Ram Beti v. District Panchyat Raj Adhikari **(1998) 1 SCC 680: 1997 (6) Suppl. SCR 582 – referred to.**

5.5. It was submitted that the group supporting the Chairman/Vice-Chairman of the State Bar Council, in the meeting dated 16th April, 2011, had raised the issue that 'no confidence motion' and reconstitution of the committee could not be considered in view of the bar contained in Rule 15 of the M.P. Rules, in the form of 'a point of order' against the requisition asked for by the other group. The submission of the appellants that the matters were discussed and concluded, either through the February 2011 elections or in the 15th Meeting of the Council dated 27th March, 2011 is rejected as, according to the minutes, the meeting had only been deferred for issuance of appropriate agenda and requisition notice to all the members present or not present. Treating it as a valid point of order, the Chairman accepted the same and then he along with some members, walked out of the meeting. [Para 55] [1022-B-E]

5.6. The meeting then was presided over by the Advocate General, whereafter the 'no confidence motion' was passed. The approach adopted by the Chairman/ Vice-Chairman cannot be accepted as, on the peculiar facts and circumstances of the case, it ex facie was untenable and without any basis. It was the duty of the Chairman/Vice-Chairman to face the 'no confidence motion', as they were elected office bearers and if they had lost the confidence of majority group which elected them to this post and a 'no confidence motion' had been moved against them in terms of Rule 122-A, they were expected to face the consequences thereof. This, alone,

would have served the ends of democratic governance and proper functioning of the State Bar Council. [Para 56] [1022-F-H]

5.7. 'No confidence motion' is in *stricto senso* not removal from office, but a removal resulting from loss of confidence. It is relatable to no confidence and is not removal relatable to the conduct or improper behaviour of the elected person. Even the concept of 'term' under the Rules, is referable to and is controlled by a super-imposed limitation of no confidence. This tenure cannot be compared to a statutory tenure as is commonly understood in the service jurisprudence. The distinction between removal by way of 'no confidence motion' and removal as a result of disciplinary action or censure is quite well accepted in law. They are incapable of being inter-changed in their application and must essentially operate in separate fields. The Court has always prioritized harmonious functioning of the State Bar Council. [Para 58] [1023-D-G]

5.8. The concept of just cause and right of hearing, the features of common law, are not applicable to the elected offices where a person is so elected by majority in accordance with statutory rules. It would also have hardly any application to moving of a 'no confidence motion' in so far as these are controlled by specific provisions and are not arbitrary or unreasonable. There is nothing in Rule 122-A of the M.P. Rules that requires adherence to these two concepts when a motion of no confidence is moved against a sitting Chairman/Vice-Chairman. It does not imply that the action can be arbitrary or capricious and absolutely contrary to the spirit of the Rule. In the instant case, majority of the members had passed the 'no confidence motion' in the 16th Meeting of the State Bar Council on 16th April, 2011. It cannot be said that solely with the aid of General

Clauses Act, the power to elect would deem to include power to remove by a motion of no confidence, particularly, with reference to the facts and circumstances of the instant case. The power to requisition a 'no confidence motion' and pass the same, in terms of Rule 122-A of the M.P. Rules, is clear from the bare reading of the Rule, as relatable to loss of faith and confidence by the elected body in the elected office bearer. Rule 122-A of the M.P. Rules is not *ultra vires* the provisions of the Advocates Act, including Section 15. When the law so permits, there is no right for that office bearer to stay in office after the passing of the 'no confidence motion' and, in the facts and circumstances of the instant case, it is clearly established that the appellants had lost the confidence of the majority of the elected members and thus, the Resolution dated 16th April, 2011 cannot be faulted with. [Para 60] [1025-D-H; 1026-A-D]

Bar Council of Delhi v. Bar Council of India **AIR 1975 Del 200;** *Afjal Imam v. State of Bihar and Ors.* **JT 2011 (5) SC 19;** *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* **(1974) 2 SCC 706: 1975 (2) SCR 71;** *B.P. Singhal v. Union of India and Anr.* **JT 2010 (5) SC 640: 2010 (6) SCR 589 – referred to.**

Case Law Reference:

AIR 1968 SC 888	**Relied on.**	**Para 13**
1992 (3) SCR 338	**Referred to.**	**Para 37, 46**
1952 SCR 218	**Referred to.**	**Para 38**
1988 (3) SCR 62	**Relied on.**	**Para 42**
2000 (1) SCR 1054	**Relied on.**	**Para 43**
2009 (15) SCC 570	**Relied on.**	**Para 43**
1997 (6) Suppl. SCR 582	**Referred to.**	**Para 47, 53**

AIR 1975 Del 200	**Referred to.**	**Para 57, 60**
JT 2011 (5) 19	**Referred to.**	**Para 58**
1975 (2) SCR 71	**Referred to.**	**Para 59**
2010 (6) SCR 589	**Referred to.**	**Para 60**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6482 of 2011.

From the Judgment & Order dated 20.5.2011 of the High Court of M.P. at Jabalpur in W.P. No. 6372 of 2011.

WITH

C.A. No. 6483 of 2011

K.V. Vishwanathan, Fakhruddin, T.S. Doabia, Nikhil Majithia (for Pragati Neekhra), Raj Kishor Chaudhary, Raja Sharma, T. Mahipal, V.K. Verma, Sanjeev Sahdeva, Preet Pal Singh, Priyan and Arjun Garg for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1.Leave granted.

2. From the very simple facts of these cases, the following substantial questions of law and public importance arise for consideration of this Court:

(1) Whether the provisions of Rules 121 and 122-A of the State BarCouncil of Madhya Pradesh Rules (for short, the 'M.P. Rules') are *ultra vires* Section 15 of the Advocates Act, 1961 (for short, 'the Advocates Act'), *inter alia* for the reason that there is no nexus between the rule making power of the State Bar Councils and the powers provided under Section 15(1) or 15(2)(c) of the Advocates Act? Was the delegation of legislative power under

Section 15 of the Advocates Act excessive, inasmuch as it does not provide any guidelines for removal of office-bearers of the State Bar Councils?

(2) Whether despite the absence of the enabling provisions in the principal statute, namely, the Advocates Act, empowering subordinate State Bar Councils to enact provisions for removal of the office bearers of the State Bar Councils by 'no confidence motions', such power could be read into the general clause of Section 15(1) of the Advocates Act?

(3) Whether Rules 121 and 122-A of the M.P. Rules are invalid for want of prior approval from the Bar Council of India?

3. The necessary facts are that the Parliament enacted the Advocates Act on 19th May, 1961. Section 15 of the Advocates Act empowers the State Bar Councils to frame Rules to carry out the powers conferred upon the State Bar Councils under Sections 15(1), 15(2), 28(1) and 28(2) read with Chapter II and other provisions of the Advocates Act. The State Bar Council of Madhya Pradesh (for short 'the State Bar Council'), with the approval of the Bar Council of India, made and published the M.P. Rules in 1962. These M.P. Rules came to be amended on 27th April, 1975.

4. Section 15 of the Advocates Act provides that the State Bar Councils can frame/amend the Rules with prior approval of the Bar Council of India. Section 15(2)(a) of the Advocates Act read with Part III and IX of the Bar Council of India Rules (for short, 'the Rules') contemplates that election to the State Bar Council shall be held. In furtherance to this legislative mandate, the election to the State Bar Council were held in the year 2008 and Mr. Rameshwar Neekhra was elected as Member and then Chairman of the State Bar Council by its

members on 31st August, 2008. After the expiry of 2½ years, fresh elections were held on 12th February, 2011 and the said Mr. Neekhra was again elected as member, and then the Chairman of the State Bar Council by its members. He is stated to have secured 21 votes, out of a total 25 votes of the Members of the State Bar Council. Mr. Adarsh Muni Trivedi was elected as Vice-Chairman of the State Bar Council.

5. At the very threshold of the 15th Meeting of the General Body of the State Bar Council held on 27th March, 2011 at Jabalpur, a number of Members submitted two requisitions: one stated that due to lack of confidence in the Chairman and Vice-Chairman, a 'no confidence motion' should be issued; and the second requisition stated that, since the election of the Committees for the second term was not as per the constitution, re-election for the Committees may be conducted. They requested the State Bar Council to call a special meeting to consider these requisitions. It is also recorded in these Minutes that the Chairman and Vice-Chairman had offered their resignation, subject to withdrawal of the requisition of 'no confidence motion'. There was a long discussion, whereafter it was resolved that the agenda of the special meeting was to be circulated on the same day i.e. 27th March, 2011 by registered post. Copy of the resolution passed and the requisition motion of 'no confidence', would be circulated to all Hon'ble Members of the State Bar Council i.e. who were present and those who were not present. These Minutes, annexed as 'P-10' (colly) to the petition, read as under:

"Before the start of the meeting Hon'ble Members S/s Vinod Kumar Bhardwaj, Kuldeep Bhargava, Ghanshyam Singh, Prem Singh Bhadouria, Shivendra Upadhyay, Champa Lal Yadav, Dinesh Narayan Pathak, Khalid Noor Fakhruddin, Mrigendra Singh Baghel, Jai Prakash Mishra, Prabal Pratap Singh Solanki, Ku. Rashmi Ritu Jain and B.K. Upadhyay submitted two requisition motion of no confidence. In one of the requisition motion of no

confidence they have stated that they have no confidence in Chairman, Vice- Chairman and Treasurer therefore, they are moving no confidence motion against them. In the second requisition motion they have requested that since the election of the Committees for the second term were not as per the constitution therefore and even otherwise they want re-election for the Committees. For both the requisition motion they have requested to call a special meeting and consider their vote of no confidence against Chairman, Vice-Chairman and Treasurer. For another requisition motion they have requested to call a special meeting and consider their proposal. When the meeting was started both the requisition motion were placed before the Hon'ble Chairman. Shri Ganga Prasad Tiwari, Hon'ble Treasurer, Shri Rameshwar Neekhra, Hon'ble Chairman and Shri A.M. Trivedi, Hon'ble Vice-Chairman stated that they offer their resignation subject to withdrawal of requisition of no confidence motion. There had been long discussion and members S/s Vinod Kumar Bhardwaj, Prem Singh Badhouria, Champa Lal Yadav, Pratap Mehta, Vijay Kumar Choudhary, Ghanshyam Singh, Z.A. Khan, Kuldeep Bhargava, Khalid Noor Fakhruddin, Rajesh Pandey Mrigendra Singh Bhagel, Prabal Pratap Singh Solanki expressed their views. There had been divergent views in respect of withdrawal of no confidence motion as well as conditional resignation offered by Hon'ble Chairman, Vice-Chairman and Treasurer. As such it is resolved to hold a special meeting on 16th April, 2011 at Jabalpur from 12.30P.M. onwards in term of Rule 122(A) & (B) of State Bar Council of Madhya Pradesh Rules. It is resolved that agenda of the meeting be circulated today itself by registered post and copy of the resolution passed along with requisition motion of no confidence be circulated to all Hon'ble Members of the Council who are present and to them also who are not present today."

6. It appears from the record that in terms of the above

minutes of the 15th Meeting of the General Body of the State Bar Council held on 27th March, 2011, the notices of the 16th Meeting were also issued and circulated. The 16th Meeting of the General Body of the State Bar Council was decided to be held on 16th April, 2011 in the Meeting dated 27th March, 2011 itself.

7. After issuing the notice in accordance with the M.P. Rules, a meeting of the State Bar Council was held on 16th April, 2011. At this meeting, the 'no confidence motion' was moved by 13 members of the State Bar Council, in terms of Rule 122-A of the M.P. Rules, against both the Chairman and the Vice-Chairman. The parties to the present appeals are at some variance as to the manner, knowledge and the decision with which the meeting was closed. The respondents herein have contended that in this meeting, there was actual discussion of the 'no confidence motion' moved by some of the members of the State Bar Council, which was a part of the formal agenda notice issued by the Secretary of the State Bar Council. In the Minutes placed on record as Annexure R-16/6, it has been stated that item No.2 of the agenda, which was to consider the requisitioning of 'no confidence motion', was actually considered and the question arose as to whether Shri Rameshwar Neekhra, the Chairman could still preside over the meeting. There was some discussion on that issue, whereafter the Chairman along with the Secretary is stated to have left the meeting on 16th April 2011. The Advocate General had then presided over the meeting, and the 'no confidence motion' is stated to have been passed by majority of the members. It will be useful to refer to the Minutes of the Meeting, held on 16th April, 2011 on this issue, which are as follows:

> "Twelve of the Members have quit away the meeting on the ground that by virtue of Rule 15 of Chapter V no matter can be decided and reconsidered for a period of three months unless the Council by 2/3 of majority of the Members present shall permit. The affect of this rule is also

required to be considered by the Hon'ble High Court and all these issues are open before the Hon'ble High Court.

So far as the presiding over of the meeting is concerned, Rule 14 of Chapter V says that in the absence of any provision the matter is to be decided by the majority. That being so the majority of the Members present have decided to consider the No Confidence Motion hence this meeting is now being presided over by Advocate General to whom the majority has decide to preside.

Before the start of the Meeting Hon'ble Member Shri Prabal Pratap Singh Solanki has asked Shri Rameshwar Neekhra, Chairman to kindly decide that the Members are ready to participate in the No Confidence Motion but at that time Hon'ble Chairman quit the Meeting Hall along with his followers and also took away the Secretary saying that we are not going to participate in the No Confidence Motion.

At this Juncture Shri Vinod Kumar Bhardwaj, Hon'ble Member State Bar Council of Madhya Pradesh requested Shri R.D. Jain, Hon'ble Advocate General and Ex Official Member who remained present from the very beginning of the meeting and has watched all the proceedings & discussions which took place by the Hon'ble Members Shri Bhardwaj requested the Hon'ble Advocate General Shri R.D. Jain to preside over the meeting which was seconded by all the members present as following:

1. S/Shri Vinod Kumar Bhardwaj, (2) Kuldeep Bhargava (3) Jai Prakash Mishra (4) Shivendra Upadhyay (5) Ms. Rashmi Ritu Jain (6) Dinesh Narayan Pathak (7) Prem Singh Bhadouria (8) Champa Lal Yadav (9) Ghanshyam Singh (10) Mrigendra Singh Baghel (11) Prabal Pratap Singh Solanki (12) Khalid Noor Fakhruddin (13) Shri Ghanshyam Singh, Hon'ble Members.

Shri R.D. Jain, Hon'ble Adovate General and Ex

Officio Member stated that the meeting need not be adjourned and the Hon'ble Advocate General also read out the part of the order of Hon'ble High Court in WP No. 6372/11.

Item No. 2 Resolution No. 258/GB/2011

The Item No. 2 of the agenda was read over. The members are asked to give their vote for or against by raising their hands.

Since the majority of the Members of the Council have supported the motion by raising hands it stands passed under Rule 122(A).

The following Members are present in the house as per below:

S/Shri (1) Vinod Kumar Bhardwaj (2) Jai Prakash Mishra (3) Shivendra Upadhyay (4) Ms. Rashmi Ritu Jain (5) Kuldeep Bhargava (6) Dinesh Narayan Pathak (7) Prem Singh Bhadouria (8) Champa Lal Yadav (9) Ghanshyam Singh (10) Mrigendra Singh Baghel (11) Khalid Noor Fakhruddin (12) Prabal Pratap Singh Solanki (13) Bal Krishna Upadhyay have supported the motion and hence the motion stands passed by a majority of all the members present and the voting under Rule 122-A."

8. We may notice that two sets of minutes recorded differently for the same meeting have also been placed on record as Annexure P-10 (colly) and R-16/4 respectively. It needs to be noticed that one set of minutes is only signed by the Secretary of the State Bar Council while the other is signed by the Secretary as well as by other members who passed the Resolution.

9. In the Minutes of the meeting dated 16th April, 2011, it had been specifically recorded that the Resolution is not to be given effect to in view of the orders passed by the Madhya

Pradesh High Court on 15th April, 2011 in Writ Petition No. 6372 of 2011. However, the copy of the proceeding was to be communicated to the Registrar General of the High Court of Madhya Pradesh. This Resolution had been signed by the members present.

10. One Pratap Chandra Mehta had filed this above-mentioned Writ Petition No. 6372 of 2011, challenging the *vires* of Rules 121 and 122-A of the M.P. Rules. These Rules related to the term of, and procedure for passing a 'no confidence motion' against the Chairman, Vice-Chairman and the Treasurer etc. As already noticed, the Court had directed that the meeting of the State Bar Council could be held on 16th April, 2011, but the Resolution, if passed, would not be given effect to, till further orders. The matter was ordered to be listed for hearing on 25th April, 2011. In the meanwhile, another writ petition was also filed being Writ Petition No. 6628 of 2011 and the High Court in its final judgment observed that, in both the petitions same relief, on virtually the same grounds, had been claimed. The High Court had framed two basic points for decision:

1. Whether Rule 122-A, as framed under Section 15 of theAdvocates Act was, *ultra vires;* and

2. Whether the second Resolution, dated 16th April, 2011 was invalid?

11. Vide its detailed judgment dated 20th May, 2011, the High Court decided both the issues against the petitioners and dismissed the writ petitions while vacating the interim order. The High Court held as under:

> "22. On point (E) of para 16 above, it was urged from the petitioner's side that if Section 15(1) of the Act is taken to be the source of power for framing Rules prescribing the tenure for an elected chairman, and prescribing curtailment such tenure through a no-confidence motion, then such

> delegation to subordinate legislation must be struck down as it confers wholly unguided and thus unfettered powers upon the delegate subordinate legislative Authority. In reply it could not be shown that there is any express guidance or that any policy guidance can be deciphered from all or any of the provisions of the Act or from the scheme of the Act, regarding what tenure, if any, should be permitted, and if so under what circumstances and by what process, subject to what restrictions.
>
> 23. A totally misplaced reliance was placed upon the case of *V. Sudheer v. Bar Council of India* [(1993) 3 SCC 176] which merely says that the State Bar Council under Section 24(1)(e) of the Act could have prescribed pre-enrolment training, but the Bar Council of India could not do so under Section 49 of the Act. *'Hukam Chand v. Union of India* [(1972) 2 SCC 601] was also unnecessarily cited. It deals with power to frame a rule with retrospective effect and has no relevance here. Two decision of the Supreme Court in the case of 'Vasanlal Maganbhai vs. State of Bombay [AIR 1961 4(para) and in the case of *'Agricultural Market Committee vs. Shalimar Chemical Works'* reported in [(1997) 5 SCC 516 (para 26) were cited from the petitioners side, both laying down the same principle, which needs to be discussed. The relevant part of the latter (1997) decision reads "The principle which therefore emerges out is that the essential legislative function consists of the determination of the legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates". However, the words of the Supreme Court immediately following the above quoted words bring out the implication. They read "The effect of these

principles is that the delegate…….cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making rules, legislate on the field covered by the Act……". We do not find the rule in question to be widening or constricting the scope of either the Act or any policy laid down under the Act. Nor is the Rule in question legislating upon any field covered by the Act. To the same effect is cited the case of *'Addl. District Magistrate Vs. Sir Ra,'* (2005) 5 SCC 451 (para 16).

27. This brings us to the last point raised by the petitioners. The decisions of the Delhi and Kerala High Court reported respectively in AIR 1975 Del 200 'Bar Council of Delhi Vs. Bar Council of Kerala Vs…..' were read out before us. It was pointed out that in the Delhi case common law was used to justify an implied power of removal of the elected Chairman on the ground that the statute had not changed the common law. The correctness of the law laid down in that decision was assailed by placing reliance on AIR 1954 SC 210 *'Jagan Nath Vs. Jaswant Singh'*, (1982) 1 SCC 691 *'Jyoti Basu Vs. Debi Ghoshal',* (1984)1SCC 91 *'Arun Kumar Bose Vs. Mohd. Furkan Ansari '* and (1992) 4 SCC 80 *'Mohan Lal Tripathi Vs. District Magistrate'.* And it was argued that concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. In respect of the Kerala High Court decision it was argued that the Court fell in error in reading the power of removal as 'incidental'. It is not necessary to go into these arguments because as stated above the Rule regarding removal is not justified under Section 15(2) but under Section 15(1) of the Act, which is of wide amplitude and there is no reason to restrict the scope of Rule making power under Section 15(1) so as to exclude (i) prescription of tenure, or (ii) removal on a vote of no-confidence from the ambit of the Rule making power conferred by that provision.

28. Before moving on to the next issue, we may refer to a decision cited by the Respondent no.6 (of W.P. No. 6628). In this interesting decision by a Full Bench of Gujarat High Court in the case of *'N.B. Posia Vs. Director'* reported in AIR 2002 Guj 348 (PB) (relevant paragraphs are 46 and 66 of that law report) it has been held that though there was no provision in the Act or statutory Rules for removal of an elected Chairman of the Committee, yet (i) the words "ceasing to hold office for any reason" include the removal by a no-confidence motion and (ii) if a holder of an office if elected by a simple majority, he can be removed (through no-confidence motion) by a simple majority (even in absence of a statutory provision for such removal). With utmost respect to the said decision, we find ourselves totally unable to subscribe to either of the two propositions therein."

12. It is the legality and correctness of the above reasoning that has been questioned before us in the present appeals. We have already noticed that the questions which arise for consideration in the present cases are of some public importance and are matters which are likely to arise repeatedly in the conduct of affairs of the State Bar Councils. Before we proceed to discuss the legal aspects of the propositions involved in the present cases, it will be more appropriate for the Court to notice the scheme of the Advocates Act and the relevant provisions of the laws and rules.

13. The Parliament of India enacted the Advocates Act on 19th May, 1961 to amend and consolidate the laws relating to legal practitioners and to provide for the constitution of State Bar Councils and an All India Bar Council. The object of the Advocates Act is to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Though the Advocates Act relates to legal practitioners in its pith and substance, it is an enactment dealing with the qualifications, enrolment, right to practise and discipline of

advocates. It is not only implicit but clear from the provisions of the Advocates Act that once an advocate is enrolled by any State Bar Council, he becomes entitled to practise in all courts including the Supreme Court. Therefore, this is a legislation which deals with persons entitled to practise before the Supreme Court. In the case of *O.N. Mohindroo* vs. *Bar Council of Delhi & Ors.* [AIR 1968 SC 888] this Court held that:

> "(10) The object of the Act is thus to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Since the Act sets up one Bar, autonomous in its character, the Bar Councils set up thereunder have been entrusted with the power to regulate the working of the profession and to prescribe rules of professional conduct and etiquette, and the power to punish those who commit breach of such rules. The power of punishment is entrusted to the disciplinary committees ensuring a trial of an advocate by his peers. Section 35, 36 and 37 lay down the procedure for trying complaints, punishment and an appeal to the Bar Council of India from the orders passed by the State Bar Councils. As an additional remedy S. 38 provides a further appeal to the Supreme Court. Though the Act relates to the legal practitioners, in its pith and substance it is an enactment which concerns itself with the qualifications, enrollment, right to practise and discipline of the advocates. As provided by the Act once a person is enrolled by any one of the State Bar Councils, he becomes entitled to practise in all courts including the Supreme Court. As aforesaid, the Act creates one common Bar, all its members being of one class, namely, advocates. Since all those who have been enrolled have a right to practise in the Supreme Court and the High Courts, the Act is a piece of legislation which deals with persons entitled to practise before the Supreme Court and the High Courts. Therefore the Act must be held to fall within entries 77 and 78 of List I. As the power of

> legislation relating to those entitled to practise in the Supreme Court and the High Courts is carved out from the general power to legislate in relation to legal and other professions in entry 26 of List III, it is an error to say, as the High Court did, that the Act is a composite legislation partly falling under entries 77 and 78 of List I and partly under entry 26 of List III."

14. If one looks into the statement of objects and reasons for enacting the Advocates Act, it becomes clear that the Act seeks to implement the recommendations of the All India Bar Committee, made in the year 1953, after taking into account the recommendations of the Law Commission on the subject of Reform of Judicial Administration, and particularly, the recommendations relating to the Bar and to legal education. It was, therefore, conceptualized to legislate a law which will govern the State Councils and the All India Bar Councils in different specified fields. The main features of the Advocates Act were, the integration of the Bar into a single class of legal practitioners known as advocates; the establishment of a common roll of advocates, having a right to practise in any part of the country and in any court, including the Supreme Court; the prescription of uniform qualifications for the admission of persons to become advocates; the division of advocates into senior advocates and other advocates based on merit; and the creation of autonomous Bar Councils, one for the whole of India, i.e, the establishment of an All India Bar Council and one for each State. We may examine some of the relevant provisions of the Advocates Act.

15. Section 2(a) of the Advocates Act defines an 'advocate' to mean an advocate entered in any roll under the provisions of the Advocates Act.

'Bar Council' means a Bar Council constituted under the Advocates Act.

On the other hand, the 'Bar Council of India' means the Bar

Council constituted under Section 4 for the territories to which the Advocates Act extends.

The 'State Bar Council' means a Bar Council constituted under Section 3 of the Advocates Act.

The expression 'prescribed for the purposes of this Act' means prescribed by the rules made under the Advocates Act.

16. The constitution of State Bar Council is provided under Section 3 of the Advocates Act and as would be evident, this Section has been subjected to numerous amendments made from time to time. The constitution of the State Bar Council has been spelt out in Section 3(2); and Section 3(3) of the Advocates Act which provides that there shall be a Chairman and a Vice-Chairman of each State Bar Council, elected by the members, in such manner as may be prescribed. The Advocates Act, *inter alia,* imposes certain restrictions and the deeming provisions in terms of Sub-sections (3) and (3A) of Section 3 of the Advocates Act, that every person holding office as Chairman or as Vice-Chairman of any State Bar Council immediately before the commencement of the Advocates (Amendment) Act, 1977, shall, on such commencement, cease to hold office as the Chairman or Vice-Chairman, as the case may be, but, would continue to carry on the duties of his office until the persons elected as Chairman or Vice-Chairman, as the case may be, in accordance with the provisions of the Advocates Act, assume charge.

17. Section 3(4) of the Advocates Act requires that an advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as a member of the State Bar Council, unless he possesses such qualifications or satisfies such conditions as are prescribed in this behalf.

18. All elections to the State Bar Council are to be held in accordance with the provisions of the Act. Similarly, under Section 4 of the Advocates Act, Bar Council of India shall

consist of the persons stated under the Advocates Act. The provisions of the Advocates Act dealing with State Bar Councils under Section 3, are substantially similar to the provisions with respect to the Bar Council of India, under Section 4 of the Advocates Act. Every Bar Council shall be a body corporate having perpetual succession and a common seal, with power to acquire and hold property and to sue and be sued in its own name.

19. The functions of the State Bar Council and the Bar Council of India are prescribed under Sections 6 and 7 of the Advocates Act. Besides admitting persons as advocates on its rolls [Section 6(a)] and maintaining such rolls [Section 6(b)], it is for the State Bar Councils to provide for the elections of its members [Sections 6(g)] and to perform all other functions conferred on it by or under this Act [Section 6(h)]. Section 6(i) of the Advocates Act allows the State Bar Councils to do all other things necessary for discharging their functions.

20. Functions of the Bar Council of India are of a wider spectrum than that of the State Bar Council. Bar Council of India has to lay down standards of professional conduct and etiquette for the advocates, the procedure to be followed in Disciplinary Committees and to safeguard the rights, privileges and interest of advocates.

21. The Bar Council of India may, under Section 7(k) of the Advocates Act, provide for the election of its members. This provision is identical to Section 6(g) of the Advocates Act. Similarly, Sections 6(h) and 6(i) are equivalent to Sections 7(l) and 7(m) of the Advocates Act.

22. The election to the Bar Councils is for a specified tenure, which is stated under Section 8 of the Advocates Act. The term of the office of an elected member of a State Bar Council, other than an elected member thereof referred to in Section 54, shall be for five years from the date of publication of the results. The Bar Council of India has been vested with

the power of extending this period, for reasons to be recorded, and only in the event of the State Bar Council failing to provide for the election of its members before the expiry of its terms. This power is also regulated by an upper limitation of 6 months in such grant of extension.

23. Section 14 of the Advocates Act mandates that no election of a member to a Bar Council shall be called in question on the ground merely that due notice thereof has not been given to any person entitled to vote at the elections, if notice of the date has, not less than thirty days before that date, been published in the Official Gazette.

24. Section 15 of the Advocates Act is one of the most relevant provisions, which needs to be examined by this Court, as according to the contention raised by the appellants, Rule 122-A is *ultra vires* Section 15 of the Advocates Act. Section 15 of the Advocates Act gives power to the Bar Council to make rules to carry out the purposes of 'this Chapter'. 'This Chapter' means Chapter II of the Advocates Act. *Inter alia*, this Chapter deals with constitution, election and functions of the Bar Councils. It will be useful to refer to the relevant parts of the provisions of Section 15 of Chapter II of the Advocates Act, which are as under:

> "15. Power to make rules,- (1) A Bar Council may make rules to carry out the purposes of this chapter.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—
>
> a. (Note:- Subs. by Act 60 of 1973, sec.12) the election of members of the Bar Council by secret ballot including the conditions subject to which persons can exercise the right to vote by postal ballot , the preparation and revision of electoral rolls and the manner in which the results of elections shall be published];
>
> b. xxx xxx

> c. (Note:- Clause (c) ins. by Act 38 of 1977, sec. 5) the manner of election of the Chairman and the Vice-Chairman of the Bar council];
>
> d. xxxxxx
>
> e. xxxxxx
>
> f. the filling of casual vacancies in the Bar Council ;
>
> g. the power and duties of the Chairman and the Vice-Chairman of the bar Council ;
>
> (ga) . xxx xxx
>
> (gb) . xxx xxx
>
> h. xxx xxx
>
> i. the constitution and functions of any committee of the Bar council and the term of office of members of any such committee;
>
> (3) No rules made under this section by a State Bar Council shall have effect unless they have been approved by the Bar Council of India."

25. Chapter III of the Advocates Act deals with 'Admission and Enrolment of Advocates'.

Section 28 of the Advocates Act empowers the State Bar Councils to make rules to carry out the purposes of this Chapter, i.e., Chapter III.

26. Section 49 of the Advocates Act appears under Chapter VI, i.e., 'Miscellaneous' and empowers the Bar Council of India to make rules for discharging its functions under this Act and besides providing for specific powers, the Bar Council of India may prescribe rules under the residuary provisions of Section 49(1)(j) of the Advocates Act, whereby the Council is

empowered to make rules in regard to any other matter which may be prescribed. However, the rules framed would not come into force or take effect unless they have been approved by the Chief Justice of India and if the rules relate to Section 49(1)(e) of the Advocates Act they will not take effect unless they have been approved by the Central Government. Under Section 49A of the Advocates Act, the Central Government is vested with the general power of making rules and these rules could be framed for the whole of India or for all or any of the Bar councils. In the event of conflicts between the rules framed by the Central Government and the Bar Councils, the rules framed by the Central Government shall have precedence in terms of Section 49A(4) of the Advocates Act. We need not elaborate upon other provisions of the Advocates Act at this stage.

27. Now let us notice the relevant provisions in the Bar Council of India Rules (in short, the 'Rules') which were enacted in exercise of its rule making powers under the Advocates Act. This power of the Bar Council of India originates from clauses (c), (d), (e), (f) and (g) of Sub-section (2) of Section 15 read with Sections 4 and 10B of the Advocates Act.

28. Chapter I of Part II of the Rules deals with the matters relating to the Bar Council of India and particularly to the election of members of the Council. The election of the members of the Bar Council of India has to be conducted in terms of Rules 1 to 10 of the Rules. Rule 11 of the Rules makes it mandatory that a member of the Bar Council of India, who is elected as Chairman or Vice-Chairman or member of any Committee of the Council, shall cease to hold office as such Chairman or Vice-Chairman or member of Committee, on the expiry of his term as a member of the Bar Council of India. A restriction is further sought to be placed upon the right of the person to resign. A member can resign from the membership of the Bar Council of India only on the grounds which are genuine and not for the purposes of sharing of terms fixed by the statute. Under Rule 12(2) of the Rules, the Chairman or the Vice-Chairman

shall hold the office for a period of two years or until his term of office as member of the Bar Council of India ceases whichever is earlier. The election for the post of Chairman and Vice-Chairman has to be held at the meeting of the Bar Council of India and in accordance with the procedure prescribed under Rule 12 of the Rules. The Chairman and the Vice-Chairman perform the functions of exercising general control and supervision over the affairs of the Bar Council of India, save as otherwise provided in these Rules and subject to the resolutions of the Bar Council of India. Rule 22 of the Rules has significant bearing on the discussion in the present cases. This Rule relates to 'no confidence motion' against the Chairman, the Vice-Chairman, or any other office bearer, and its consequences. The Rule 22 reads as under:

> "On a motion of "No confidence" being passed by Bar Council of India by a Resolution passed by majority of not less than 3/4th of the Members present and voting and such majority passing "No Confidence Motion" is more than 2/3rd of the total number of Members constituting the Bar Council for the time being, the Chairman or Vice-Chairman or any other office bearer against whom the motion is passed shall cease to hold office forthwith.
>
> Notwithstanding anything contained in the Act or the Rules made thereon, the Chairman or Vice-Chairman shall not preside over the meeting in which motion of "No Confidence" is discussed against him and such meeting shall be convened on a notice of at least one month. The Chairman or the Vice-Chairman shall have the right to vote, speak or take part in the proceeding of the meeting."

29. The Committees excluding the Disciplinary Committees are to be constituted by the Bar Council of India under Chapter II. The framers of the Rules have taken a precaution that the decisions of the Bar Council of India should not be changed without reason and in violation of the relevant provisions. Rule 9 of Chapter II of the Rules provides that the

decision on any matter shall be by majority and, in the case of equality of votes, the Chairman of the meeting shall have a second or a casting vote. Rule 10 of the Rules puts a restriction on change of decisions. According to this Rule, no matter once decided, shall be re-considered for a period of 3 months unless the Bar Council of India by a two-third majority of the members present so permits. Under Rule 12 of the same Chapter, in the absence of the Chairman or the Vice-Chairman member at any meeting, a member chosen by the members of the Council shall preside at the meeting.

30. We have noticed these Rules to make a comparative study of the relevant M.P. Rules, to examine their impact in correct perspective. In exercise of the powers conferred by Sections 15(1), 15(2), 28(1) and 28(2), read with Chapter II and other provisions of the Advocates Act, the State Bar Council, with the approval of the Bar Council of India as required under Sections 15(3) and 28(3) of the Advocates Act, has framed the M.P. Rules. The M.P. Rules deal with different facets of functioning of the State Bar Council. It is not necessary for us to deal with all the aspects of the rules governing the functioning of the State Bar Council. The State Bar Council shall elect the members of each Committee in its Meeting as per Rule 1 of Chapter VI. In terms of Rule 3 of the same Chapter, the election to the Committee shall be conducted by the Chairman of the State Bar Council and in case the Chairman of the State Bar Council is a candidate for being elected as a member of any Committee, the State Bar Council, before proceeding with the elections to such Committee, shall appoint any one of its members who is not a candidate for election to such committee, to conduct the election to the said Committee and to declare the results under his signature.

31. Under Chapter XVI, Rule 110 of the M.P. Rules, it is obligatory on the part of the Chairman of the State Bar Council to call a meeting, which he shall preside over, when he receives a requisition for doing so, signed by not less than 3 members

of the State Bar Council. The Chairman has to exercise general control and supervision over all the matters of the State Bar Council.

32. The State Bar Council consists of 26 elected members and the Advocate General of the State. Rule 118 is the first rule that falls under Chapter XVIII and it requires that a State Bar Council shall elect a Chairman and a Vice-Chairman from amongst its members for two years. Rule 118 of the M.P. Rules came to be amended and, as per the amended Rule, the State Bar Council has to elect a Chairman and a Vice-Chairman from amongst its members for 2½ years vide Resolution No. 631 of 1998.

33. Rule 122-A of the M.P. Rules was amended by the State Bar Council sometime in the year 1975 and vide its Resolution dated 27th April, 1975, the amendments and newly added rules were sent for approval of the Bar Council of India. Again in its Resolution dated 9th March, 1980, the State Bar Council had recorded that to these amendments/newly added Rules, approval of the Bar Council of India had been obtained. It needs to be noticed that all the members of the State Bar Council had attended the meeting and were signatory to this Resolution. However, Rule 121, which was amended vide Resolution No. 631 of 1998 dated 24th January, 1998 is also stated to have received approval from the Bar Council of India. However, no notification in that regard is stated to have been issued as yet. There is some controversy whether Rule 121 under the same Chapter was amended and whether it attained the approval of the Bar Council of India. This question is not very material for us to examine inasmuch as under both Rules 118 and 121, the period of term of the elected Chairman and the Vice-Chairman is stated to be two years or till they cease to be members whichever is earlier. Besides the above facts, Section 15(3) of the Advocates Act requires that the rules framed by the State Bar Council should be approved by the Bar Council of India. It nowhere requires issuance of any notification

which, in some cases, can be a part of legislative provisions. In view of the above factual matrix, it has to be held that this controversy does not require any further consideration by the Court.

34. The provisions with which we are primarily concerned in the present case are contained in Chapter XVIII of the M.P. Rules. They read as under:

> "118. The Bar Council shall elect a Chairman and a Vice-Chairman from amongst its members for two years.
>
> 119. Any candidate for the office of Chairman or Vice-Chairman shall be proposed by one member and seconded by another member.
>
> 120. The election of Chairman or Vice-Chairman unless unanimously agreed upon by all the members present at the meeting, shall be by show of the hands. In case of the tie, the election shall be decided by drawing of lots.
>
> 121. The Chairman, the Vice-Chairman and the Treasurer of the Council, shall hold office for a period of two years or till they cease to be members whichever is earlier.
>
> 122-A The Chairman, Vice-Chairman or the Treasurer of the Council could be removed by a vote of no confidence passed by majority of the members, present and voting in a meeting of the Council especially called for the purpose, provided that at least 7 members of the Council have signed the requisition for holding such a special meeting, and such meeting shall be called within a period of 21 days from the date of receipt of the requisition by the secretary.
>
> 122-B That the Bar Council by a resolution may reconstitute any of its committee elected earlier by it, provided that the requisition for the purpose signed by at least 7 members of the Council is received by the Secretary, and such a special meeting shall be called within 21 days from the date of receipt of the requisition by the Secretary."

35. Rule 122-A of the above Rules deals with the removal of the Chairman, Vice-Chairman or the Treasurer of the State Bar Council by moving a 'no confidence motion'. Existence of such a provision is not exceptional, but is a common provision in any electoral system. Our parliamentary system is the most significant example of a democratic process, where the 'no confidence motion' under Article 75(3) of the Constitution is an integral part of the process of election. Similarly, under Rule 22 of the Rules, a provision has been made for moving a 'no confidence motion' and where such motion is passed by a majority of not less than three-fourth of the members, present and voting, and such majority passing the 'no confidence motion' is more than two-third of the total number of members constituting the State Bar Council for the time being, it results in the removal of the Chairman, Vice-Chairman or any other office bearer. Upon passing of such a resolution, the person shall cease to hold the office forthwith. Every democratic process is based upon the freedom to elect and freedom to remove, in accordance with law. Rule 122-A of the M.P. Rules contemplates moving of a 'no confidence motion' and upon such motion being passed by majority of the members, present and voting, the office bearer against whom such a motion is moved shall be liable to be removed from such office. For successful application of Rule 122-A, the law requires the following minimal conditions to be satisfied:

1. At least 7 members have signed the requisition calling for a meeting of the Council;
2. Such meeting shall be called within 21 days from the date of receipt of requisition by the Secretary.
3. Such 'no confidence motion' has to be passed by a majority of the members present and voting, in the

meeting of theCouncil, especially called for this purpose.

36. Once the above conditions are satisfied 'no confidence motion' can be passed and upon passing of such motion, the person is liable to be removed from the office which he held in the State Bar Council prior to the holding of such meeting. The spirit behind this provision is that where a person is elected by following a process of election to the post of an office in the State Bar Council, he could be removed by following the prescribed procedure in accordance with the Rules.

37. This Court in the case of *Mohan Lal Tripathi v. District Magistrate* [(1992) 4 SCC 80], examined the validity of a 'no confidence motion' passed by the Board on 28th March, 1990 under Section 87-A of the U.P. Municipalities Act against the President who was directly elected by the electorate under Section 43(2) of the Act. The basic argument raised was that he was sought to be removed or recalled by the other elected members, which was a smaller and different body than the one that had elected him and, thus, was violative of the democratic mandate. While rejecting this argument, the Court held as under:

"2. Democracy is a concept, a political philosophy, an ideal practised by many nations culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly. But electing representatives to govern is neither a 'fundamental right' nor a 'common law right' but a special right created by the statutes, or a 'political right' or 'privilege' and not a 'natural', 'absolute' or 'vested right'. 'Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied.' Right to remove an elected representative, too, must stem out of the statute as 'in the absence of a constitutional restriction it is within the power of a legislature to enact a law for the recall of officers'. Its existence or validity can be decided on the provision of the Act and not, as a matter

of policy. In the *American Political Dictionary* the right of recall is defined as, 'a provision enabling voters to remove an elected official from office before his or her term expired'. *American Jurisprudence* explains it thus, 'Recall is a procedure by which an elected officer may be removed at any time during his term or after a specified time by vote of the people at an election called for such purpose by a specified number of citizens'. It was urged that 'recall gives dissatisfied electors the right to propose between elections that their representatives be removed and replaced by another more in accordance with popular will' therefore the appellant could have been recalled by the same body, namely, the people who elected him. Urged Shri Sunil Gupta, learned counsel, that since, 'A referendum involves a decision by the electorate without the intermediary of representatives and, therefore, exhibits form of direct democracy' the removal of the appellant by a vote of no-confidence by the Board which did not elect him was subversive of basic concept of democracy. Academically the submission appeared attractive but applied as a matter of law it appears to have little merit. None of the political theorists, on whom reliance was placed, have gone to suggest that an elected representative can be recalled, only, by the persons or body that elected him. Recall expresses the idea that a "public officer is indeed a 'servant of the people' and can therefore be dismissed by them". In modern political set up direct popular check by recall of elected representative has been universally acknowledged in any civilised system. Efficacy of such a device can hardly admit of any doubt. But how it should be initiated, what should be the procedure, who should exercise it within ambit of constitutionally permissible limits falls in the domain of legislative power. 'Under a constitutional provision authorizing municipalities of a certain population to frame a charter for their own government consistent with and subject to the Constitution and laws of the State, and a

statutory provision that in certain municipalities the Mayor and members of the municipal council shall be elected at the time, in the manner, and for the term prescribed in the charter, a municipal corporation has authority to enact a recall provision'. Therefore, the validity or otherwise of a no-confidence motion for removal of a President, would have to be examined on applicability of statutory provision and not on political philosophy. The Municipality Act provides in detail the provisions for election of President, his qualification, resignation, removal etc. Constitutional validity of these provisions was not challenged, and rightly, as they do not militate, either, against the concept of democracy or the method of electing or removing the representatives. The recall of an elected representative therefore, so long it is in accordance with law cannot be assailed on abstract notions of democracy.

7. Value of 'historical evolution' of a provision or 'reference to what preceded the enactment'-as an external aid to understand and appreciate the meaning of a provision, its ambit or expanse has been judicially recognised and textually recommended. But this aid to construe any provision which is 'extremely hazardous' should be resorted to, only, if any doubt arises about the scope of the section or it is found to be 'sufficiently difficult and ambiguous to justify the construction of its evaluation in the statute book as a proper and logical course and secondly the object of the instant enquiry' should be 'to ascertain the true meaning of that part of the section which remains as it was and which there is no ground for thinking the substitution of a new proviso was intended to alter'. But 'considerations stemming from legislative history must not, however, override the plain words of a statute'. Neither Section 47-A nor 87-A on plain reading suffer from such defect as may necessitate ascertaining their intent and purpose from the earlier sections as they stood. That shall be clear when relevant part of the sections are extracted.

But even otherwise there appears no merit in the submission and for that purpose it appears appropriate to narrate, in brief, the history of these sections. When Act 2 of 1916 was enacted it provided for election of Chairman of the Board by a special resolution passed by the members under Section 43(1) of the Act. Sub-section (2) provided for ex-officio nomination by the Government of the Chairman in some municipalities. Section 48 empowered the Government to remove a Chairman after hearing and giving reasons. It did not contain any provision for removal of a Chairman by a vote of no-confidence. Ten years later Act 2 of 1926 brought about a very significant change in the Act by introducing Section 47-A and conferring power of removal of Chairman, other than ex-officio, by the members of the Board by expressing a vote of no-confidence against him. Section 48, too, was amended and a Chairman who failed to resign after a vote of no-confidence was liable to be removed, by the State Government. Thus it was as far back as 1926 that removal of the Chairman by elected representative found its way in the Act. In 1933 by Act No. 9 another important Section 87-A was added providing for tabling of no-confidence motion against the Chairman. In 1942 Section 47-A was omitted as the provision for resigning by the Chairman was provided for in Section 87-A itself. And hearing of the Chairman by State Government under Section 48 before removal in consequence of vote of no-confidence was deleted. Act 7 of 1949 introduced major changes in Sections 43 and 47-A, of the Act. Section 43 was substituted altogether and, it for the first time, provided for election of the Chairman simultaneously with members of the Board by the electorate directly. Section 47-A which had been omitted by Act 13 of 1942 was reintroduced and a Chairman against whom a vote of no-confidence was passed was required to resign. In the alternative he was permitted to recommend to State Government that the Board itself may be dissolved. And if the State

Government agreed with the President then it was the Board which was to go. The intention apparently was to keep a check on the power of Board, too, while taking action against the Chairman as if it was found that exercise of power by the Board was arbitrary and President was being removed for extraneous reasons then the Government could interfere and direct dissolution of the Board itself. Both the sections were amended once again in 1955 and by Act 1 the election of Chairman, known now as President, by the members of the Board was reintroduced, as, 'The experience of the working of the Boards since their constitution at the last general elections has generally been one of continuing conflict between Presidents elected by the popular vote on the one hand and the members on the other. This has greatly prejudiced the normal working of the Boards'. Section 47-A of the Act was substituted completely and it is in this shape that the section stands today. Section 43(1) was amended, once again, by Act 47 of 1976 and election of President by electorate was revived. In 1982 another change was made in this section by Act 17 and election of President by the members of Board was confined to municipalities other than a city declared as such under Section 3 having a population of less than one lakh inhabitants. Sub-section (2) provided for election of President of Board of such a City Municipality by the electorate directly. From 1982 onwards, therefore, the direct election of President by the electorate is confined to smaller Municipalities.

10. Even the strained construction of the proviso does not result in coming to the conclusion that there was a legislative omission of not providing for removal, by vote of no-confidence of a President elected by the electors. Merely because the proviso to Section 47-A prevents a Board from holding election of the President in those cases where he had made representation to the Government to supersede the Board, it cannot be

stretched to mean that sub-section (*a*) of Section 47-A cannot apply to a President elected under Section 43(2). The proviso is intended as check to prevent the Board from taking any step which may render the representation made by the President infructuous as if the Government accepts the representation then it is the Board under sub-section (3) which stands dissolved and not the President. That situation may not arise in election of a President under Section 43(2) as election of President by electors cannot take place immediately, therefore, there is no danger involved, of putting at naught the representation made by the President to State Government, as is in the case of Section 43(1). The proviso cannot be so construed as to nullify the operation of Section 47 2DA to a President elected by electorate. A proviso or an exception is incapable of controlling the operation of principal clause. Result of such construction would lead to absurdity as if Section 47-A is held not to apply to President elected under Section 43(2) he will not be liable to resign even though a vote of no-confidence has been passed against him under Section 87-A and it has been communicated to him. Merely because the proviso cannot apply to one of the situations that may arise cannot be reason to hold that Section 47-A(1)(*a*) did not apply to President elected by the electorate. 'If the language of the enacted part of the statute does not contain provision which are said to occur on it, you cannot derive those provisions by implication from a proviso'. Proviso could be used for adopting a construction as suggested either when there was some doubt about the scope of the section or there would have been at least some reasonable doubt about accepting one or the other construction as became necessary in *Jennings* v. *Kelly* on which reliance was placed by the learned counsel for appellant.

38. 'Election' is an expression of wide connotation which embraces the whole procedure of election and is not confined

to final result thereof. Rejection or acceptance of nomination paper is included in this term. This Court, in the case of *N.P. Ponnuswami v. returning Officer, Namakkal Constituency* [AIR (39) 1952 SC 64] held that the word 'election' has been used in Part XV of the Constitution in a broad sense, that is to say, to connote the entire procedure to be followed to return a candidate to the legislature and even the expression 'conduct of elections' in Article 324 specifically points to this wide meaning and the meaning which can be read consistently into other provisions occurring in the Constitution. In this case, the election process as contemplated under the relevant laws is that the members of a State Bar Council are elected by the electorate of advocates on the rolls of the State Bar Council from amongst the electorate itself. The elected members then elect a Chairman, a Vice-Chairman and the Treasurer of the State Bar Council as well as constitute various committees for carrying out different purposes under the provisions of the Advocates Act.

39. In other words, the body which elects the Chairman or Vice-Chairman of a State Bar Council always consists of members elected to that Council. The democratic principles would require that a person who attains the position of a Chairman or Vice-Chairman, as the case may be, could be removed by the same electorate or smaller body which elected them to that position by taking recourse to a 'no confidence motion' and in accordance with the Rules. The body that elects a person to such a position would and ought to have the right to oust him/her from that post, in the event the majority members of the body do not support the said person at that time. Even if, for the sake of argument, it is taken that this may not be generally true, the provisions of Rule 122-A of the M.P. Rules make it clear, beyond doubt, that a 'no confidence motion' can be brought against the elected Chairman provided the conditions stated in the said Rules are satisfied. As already noticed, the thrust of the challenge to the *vires* of Rule 122-A is primarily that Section 15 of the Advocates Act does not

contemplate the framing of such a Rule by the State Bar Councils. Rule 122-A is stated to be *ultra vires* Section 15 of the Advocates Act and, it is argued, that the introduction of such provision suffers from the vice of excessive delegation. Section 15 of the Advocates Act empowers the State Bar Councils to frame Rules to carry out the purposes of this Chapter. 'This Chapter' obviously means Chapter II of the Act. Let us examine what Chapter II contains. Section 3 requires the constitution of the State Bar Councils. Section 3(3) contemplates that there shall be a Chairman and a Vice-Chairman of each State Bar Council elected by the State Bar Council in such manner as may be prescribed. As already noticed above, another important provision is Section 6 of the Act, which details the functions to be performed by the State Bar Councils. *Inter alia,* the functions to be performed by the State Bar Councils include, under Sections 6(1)(d), to safeguard the rights, privileges and interests of the advocates on its roll. Under Section 6(1)(g), the function of the Bar Council is to provide for the election of its members and under Sections 6(1)(h) and 6(1)(i), the State Bar Council has to perform all other functions conferred on it by or under this Act and to do all other things necessary for discharging the aforesaid functions. In our view, Sections 6(1)(h) and 6(1)(i) have to be read and interpreted conjointly. We see no reason why the expression 'manner of election of its members' in Section 6(1)(g) should be given a restricted meaning, particularly in light of Sections 6(1)(h) and 6(1)(i). The responsibility of the State Bar Councils to perform functions as per the legislative mandate contained in Section 6 of the Act is of a very wide connotation and scope. No purpose would be achieved by giving it a restricted meaning or by a strict interpretation. The State Bar Council has to be given wide jurisdiction to frame rules so as to perform its functions diligently and perfectly and to do all things necessary for discharging its functions under the Act. The term of office of the members of the State Bar Council is also prescribed under Chapter II, which shall be five years from the date of publication of the result of the election. On failure to provide for election, the Bar Council

of India has to constitute a special committee to do so instead. Section 15(2) then provides that without prejudice to the generality of the foregoing powers, rules may be framed to provide for the preparation of electoral rolls and the manner in which the result shall be published. In terms of Section 15(2)(c), the manner of the election of the Chairman and the Vice-Chairman of the Bar Council and appointment of authorities which would decide any electoral disputes is provided. The expression 'manner of election of the Chairman' again is an expression which needs to be construed in its wide connotation. The rules so framed by the State Bar Council shall become effective only when approved by the Bar Council of India in terms of Section 15(3) of the Advocates Act.

40. The power of the State Bar Council to frame rules under Section 15 of the Advocates Act as a delegate of the Bar Council of India has to be construed along with the other provisions of the Advocates Act, keeping in mind the object sought to be achieved by this Act. In this regard, greater emphasis is to be attached to the statutory provisions and to the other purposes stated by the legislature under the provisions of Chapter II of the Advocates Act. This is an Act which has been enacted with the object of preparing a common roll of advocates, integrating the profession into one single class of legal practitioners, providing uniformity in classification and creating autonomous Bar Councils in each State and one for the whole of India. The functioning of the State Bar Council is to be carried out by an elected body of members and by the office-bearers who have, in turn, been elected by these elected members of the said Council. The legislative intent derived with the above stated objects of the Act should be achieved and there should be complete and free democratic functioning in the State and All India Bar Councils. The power to frame rules has to be given a wider scope, rather than a restrictive approach so as to render the legislative object achievable. The functions to be performed by the Bar Councils and the manner in which these functions are to be performed suggest that

democratic standards both in the election process and in performance of all its functions and standards of professional conduct which need to be adhered to. In other words, the interpretation furthering the object and purposes of the Act has to be preferred in comparison to an interpretation which would frustrate the same and endanger the democratic principles guiding the governance and conduct of the State Bar Councils. The provisions of the Advocates Act are a source of power for the State Bar Council to frame rules and it will not be in consonance with the principles of law to give that power a strict interpretation, unless restricted in scope by specific language. This is particularly so when the provisions delegating such power are of generic nature, such as Section 15(1) of the Act, which requires the Bar Councils to frame rules to 'carry out the purposes of this Chapter' and Section 15(2), which further uses generic terms and expressly states that the Bar Council is empowered to frame rules 'in particular and without prejudice to the generality of the foregoing powers'. If one reads the provisions of clauses (a), (c), (g), (h) and (i) of Sub-section (2) of Section 15 of the Act, then, it is clear that framing of rules thereunder would guide and control the conduct or business of the State Bar Councils and ensure maintenance of the standards of democratic governance in the said Councils. Since the office bearers like the Chairman and the Vice-Chairman are elected by a representative body i.e. by the advocates who are the elected members of the Council, on the basis of the confidence bestowed by the advocates/electorate in the elected members, there seems to be no reason why that very elected body cannot move a 'no confidence motion' against such office bearers, particularly, when the rules so permit.

41. The Bar Council of India, as already noticed, has also framed rules and permitted moving of 'no confidence motion' against its Chairman/Vice-Chairman subject to compliance of the conditions stated therein. Similarly, Rule 122-A of the M.P. Rules contemplates the removal of a Chairman/Vice-Chairman

by a motion of no confidence, passed by a specific majority of the members and subject to satisfaction of the conditions stated therein. This provision, thus, can neither be termed as vesting arbitrary powers in the elected body, nor can it be said to be suffering from the vice of excessive delegation. The power delegated to the elected body is within the framework of the principal Act, i.e., Section 15, read with the other provisions, of the Advocates Act. In terms of Rule 120 of the M.P. Rules, a person can be elected as Chairman/Vice-Chairman only by majority and in case there is a tie, the election shall be decided by drawing of lots. Under Rule 118 of the M.P. Rules a Chairman/Vice-Chairman has to be elected from amongst its members for two years. In other words, the term of office of the Chairman/Vice-Chairman is controlled by the fact that he has to be elected to that particular office. The removal contemplated under Rule 122-A is not founded on a disciplinary action but is merely a 'no confidence motion'. It is only the loss of confidence *simpliciter* i.e. the majority of the members considering, in their wisdom, that the elected Chairman/Vice-Chairman should not be permitted to continue to hold that office, which is the very basis for such removal. One must remember that Rules 118 to 122-B all come within Chapter XVIII of the M.P. Rules and, as such, have to be examined collectively. But for this Chapter, it cannot be even anticipated as to who and how the office of the Chairman/Vice-Chairman of the State Bar Council shall be appointed.

42. Now, let us examine some judgments to substantiate what we have aforestated. In the case of *General Officer Commanding-in-Chief v. Subhash Chandra Yadav* [(1988) 2 SCC 351], this Court stated the principle that the rules framed under the provisions of a statute form part of the statute, i.e., the rules have statutory force. But a rule can have the effect of a statutory provision provided it satisfies two conditions: (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview

of the rule making power of the statutory authority framing the rule.

43. In the case of *Kunj Behari Lal Butail v. State of H.P.* [(2000) 3 SCC 40], this Court noticed that it is very common for the legislature to provide general rule making power to carry out the purposes of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed thereunder satisfy this test of functionality. This test will determine if the rule falls foul of such general power conferred on the delegatee. If the rule making power is expressed in usual general form, then it has to be seen if the rules made are protected by the limits prescribed by the parent Act. Still in the case of *Global Energy Ltd. v. Central Electricity Regulatory Commission* [(2009) 15 SCC 570], this Court was concerned with the validity of clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004 and dealing with this aspect, the Court expressed the view that in some cases guidelines could be assumed, by necessary implication, as already laid down and, while relying upon the case of Kunj Behari *Lal Butail* (supra), the Court held as under:

> "26. We may, in this connection refer to a decision of this Court in *Kunj Behari Lal Butail* v. *State of H.P.*[1] wherein a three-Judge Bench of this Court held as under: (SCC p. 47, para 14)
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> "14. We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."

27. The power of the regulation-making authority, thus, must

be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualifications therefor. Provisions for imposition of general conditions of licence or conditions laying down the pre-qualifications therefor and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of licence also."

44. The above enunciated principles clearly show that the language of the statute has to be examined before giving a provision an extensive meaning. The Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act, while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be the relevant factors to be considered by the Court. In the present case, the minimum guidelines of secrecy and fairness in election have been provided in Part IX of the Rules, which have been framed in exercise of the supervisory powers under Sections 49(1)(a), 49(1)(i) and 49(1)(j) of the Advocates Act. Further, clause (5) of this Part even extends to the State Bar Councils the power to independently resolve all election disputes through tribunals constituted for this purpose. Therefore, the powers delegated have an in-built element of guidance that the Chairman/Vice-Chairman will be appointed and regulated by the majority members of the State Bar Council. Their conduct, and the conduct of the State Bar Council as a whole, is to be maintained in consonance with democratic principles and keeping the high professional standards of advocates in mind. Thus, it is not a power which falls beyond the purview and scope of Section 15 of the Advocates Act read

in conjunction with other provisions, particularly Chapter II and also keeping in view the object of the Act.

45. Purposive construction, to a large extent, would help to resolve the controversy raised in the present case. The purpose of the Advocates Act is the democratic and harmonious functioning of the State Bar Councils, to achieve the object and purposes of the Act. We are unable to see how the provisions of Rule 122-A fall foul of the ambit and scope of Section 15 of the Advocates Act and, for that matter, any other provisions of that Act. On the contrary, they are in line with the scheme of the parent Act.

46. Having dealt with the primary aspect of this case, now we would consider the contention that the recall of the Chairman/Vice-Chairman, by a smaller and distinct body of members of the State Bar Council, does not fall within the purview of the authority of the delegatee Council, under Section 15(2)(c) of the Advocates Act, i.e. to legislate on 'the manner of election'. Even on this ground, according to the appellants, the provisions of Rule 122-A are unsustainable. We find no merit in this contention as well as it has no substance. The election to the post of Chairman/Vice-Chairman of the State Bar Council is not by the larger body, i.e., the advocates enrolled on the rolls of the State Bar Council, but is by a distinct body, i.e. elected members of the State Bar Council. Once they elect the Chairman/Vice-Chairman of the State Bar Council as per the scheme of Rules 118 to 123, then all actions taken by such body would have to be accepted by all concerned as correct, if they are within the domain of the rules governing such body. We do not consider it necessary to deliberate on this issue in any greater detail. Suffice it to refer to the judgment of this Court in the case of *Mohan Lal Tripathi* (supra), where the Court was concerned with an elected candidate, who, in terms of the statute, was elected by a larger electorate and was recalled by smaller representative body rather than by the electorate itself. Similar arguments were raised that the recall was violative of

the spirit and purpose of the election and was arbitrary, irrational and violative of the democratic norms. These arguments were rejected by the Court, after detailed deliberation and examining the fields of democratic norms. We have already referred in paragraph 37 of this judgment, the relevant parts of the said discussion.

47. Similarly, in the case of *Ram Beti v. District Panchyat Raj Adhikari* [(1998) 1 SCC 680], the Court was dealing with a situation where a Pradhan of the Panchayat was removed by the Gram Panchayat, a smaller body, instead of removal by the Gram Sabha which had elected him. They questioned the validity of Section 14 of the U.P. Panchayati Raj, Act, 1947. The Court, while rejecting the contentions, as are even being raised before us in the present case, held as under:

> "6…. It is no doubt true that under Section 11(1) of the Act provision is made for holding of two general meetings of the Gram Sabha in each year as well as for requisitioning of a meeting by one-fifth of the members. But the legislature, in its wisdom, thought it proper that the matter of removal of a Pradhan, instead of being considered at the meeting of the Gram Sabha, should be considered by the members of the Gram Panchayat. The considerations which weighed with this Court for upholding the validity of sub-section (2) of Section 87-A of the U.P. Municipalities Act, 1916 relating to the removal of the President of a Municipal Board in Mohan Lal Tripathi are, in our opinion, also applicable to the removal of the Pradhan of the Gram Sabha. Although under Section 14 of the Act the power of removal of a Pradhan is conferred on the members of the Gram Panchayat, which is a smaller body than the Gram Sabha, but the members of the Gram Pancyhayat, having been elected by the members of the Gram Sabha, represent the same electorate which has elected the Pradhan. The removal of a Pradhan by two-third members of the Gram Sabha through their representatives. Just as

> the Municipal Board is visualized as a body entrusted with the responsibility to keep a watch on the President, whether elected by it or by the electorate, so also the Gram Panchayat is visualized as a body entrusted with the responsibility to keep a watch on the Pradhan who is not elected by it and is elected by the members of the Gram Sabha. An arbitrary functioning of a Pradhan is disregard of the statute or his acting contrary to the interests of the electorate could be known to the members of the Gram Panchayat only and, in the circumstances, it is but proper that the members of the Gram Panchayat are empowered to take action for removal of the Pradhan, if necessary. It is no doubt true that in Section 11 of the Act provision is made for holding two general meetings of the Gram Sabha in each year and for requisitioning of a meeting of the Gram Sabha by one-fifth of its members. But, at the same time, we cannot lose sight of the fact that the number of members of the Gram Sabha is also fairly large. It would range from one thousand to more than three thousand. Elections to public offices even at village level give rise to sharp polarization of the electorate on caste or communal basis. The possibility of disturbance of law and order in a meeting of the Gram Sabha called for considering a motion for removal of the Pradhan cannot be excluded. Moreover, there cannot also be due deliberation of a serious matter as no-confidence motion by a very large body of persons. While amending Section 14 of the Act so as to confer the power to remove the Pradhan of a Gram Sabha on the members of the Gram Panchayat the legislature must have taken into consideration the prevailing social environment. Moreover, by way of safeguard against any arbitrary exercise of the power of removal it is necessary that the motion must be passed by a majority of two-thirds of the members present and voting.

7. For the reasons aforementioned we are unable to hold

that Section 14 of the Act, insofar as it empowers the members of the Gram Panchayat to remove the Pradhan of a Gram Sabha by moving a motion of no confidence, is unconstitutional and void being violative of the concept of democracy or is arbitrary and unreasonable so as to be hit by Article 14 of the Constitution."

48. For the reasons aforestated, as well as the reasons recorded in the above reproduced judgments, which, with respect, we adopt, we have no hesitation in rejecting this contention of the appellants.

49. The next argument that was raised on behalf of the appellants is that, in view of Rule 15 of Chapter V of the M.P. Rules, the State Bar Council is debarred from re-considering the same matter for a period of three months, and as such, the decision passing 'no confidence motion' is vitiated because of the limitation contained in the said Rule. Rule 15 of Chapter V reads as under:

"No matter once decided shall be reconsidered for a period of three months unless the Council by a two-third majority of the members present, so permits."

50. Though the language of the above Rule clearly shows that no matter once decided shall be reconsidered for a period of three months but clearly makes an exception that wherever 2/3rd majority of the members present of the State Bar Council permits, this bar will not operate. In other words, there is no absolute bar and the Rule makes out an exception when the matters could be reconsidered. But that is not the situation in the present case. The first pre-requisite under this rule is that matter should be 'once decided', and then alone, the bar of re-consideration would operate; that too depending on the facts and circumstances of a given case. 'Once decided' obviously means the matter should be concluded or finally decided in contradistinction of being 'kept pending' or 'deferred'.

Therefore, we must now examine, whether the matter in relation to 'no confidence motion' had been finally decided at any point of time before the date on which the 'no confidence motion' is stated to have been passed. This also we are proceeding to consider on the assumption that the matter related to 'no confidence motion', for the sake of arguments, would be covered under Rule 15 of the M.P. Rules.

51. After issuance of a notice in accordance with the M.P. Rules, admittedly, the 15th Meeting of the General Body of the State Bar Council was held on 27th March, 2011 at Jabalpur, during which two requisitions were made: one, relating to a 'no confidence motion' against the Chairman/Vice-Chairman, and second, that there should be re-election of the Committees. In the minutes, it was also stated that the Chairman/Vice-Chairman had offered their resignation subject to withdrawal of 'no confidence motion'. There were discussions on this matter and it was resolved that the agenda of the meeting would be circulated on the same day itself, by post, to all the members of the State Bar Council, whether present at the meeting or not and the next meeting would be held on 16th April, 2011 at Jabalpur. These notices were issued and as decided the meeting was held on 16th April, 2011. During the course of the meeting on 16th April 2011, some of the members left the meeting, the Advocate General of Madhya Pradesh presided over the continuation of the meeting and the 'no confidence motion' was passed on the same day. Of course, there is some dispute with regard to the recording of the minutes of this meeting. We have already reproduced the minutes which were recorded by the respective parties. We are not very inclined to rely upon the minutes produced by the appellants, inasmuch as they are not signed by all the members present and voting. Even if, for the sake of arguments, we take that the minutes produced by the appellants are correct, then it must follow that both the meetings took place on 16th April, 2011. However, it is obvious from the record that in the 15th meeting of the General Body held on 27th March, 2011, no final decision

had been taken and it was decided to circulate the minutes and other papers of the meeting to all members.

52. Another ancillary argument to the above is that by virtue of the bar under Rule 15 of the M.P. Rules, the Chairman and Vice-Chairman were elected to their respective posts in February 2011 and, as such, the election itself was a 'decision' which was incapable of being reconsidered and revised in the meetings of March and April, 2011. According to the appellants, the limitation contained in Rule 15 of the M.P. Rules shall vitiate the decision of passing a 'no confidence motion'. This argument is also misconceived in law and on the facts of the present case. Election is not a 'decision' as contemplated under Rule 15 of the M.P. Rules. It is not a matter on which the State Bar Council decides, as firstly, this matter falls within the discretion of individual advocates on the rolls of the State Bar Council to elect the representative members of the said Councils, and secondly it falls within the discretion of such elected representatives to elect a person as Chairman/Vice-Chairman. It is not a 'decision' which relates to the matters as contemplated under the M.P. Rules. Passing of a 'no confidence motion' in law, therefore, cannot be termed as reconsideration of the decision taken.

53. Once the Council is constituted in terms of the Act and the Rules framed thereunder, then it has to take decisions in the role of a Council in relation to various matters, including rejecting or passing a 'no confidence motion'. This is even clear from the case of *Ram Beti* (supra) wherein it was held that the smaller representative body is better equipped to make a recall decision and it has more information in its hands, to make such a recall decision. The decision is, therefore, substantially different in character from the election decision. A statutory bar may exist in this respect, in some cases, but in its absence, the Court cannot infer or imply a time bar on challenging the results of election as a feature of common law or general democratic principles.

54. Thus, the bar contemplated under Rule 15 of the M.P. Rules does not operate, on merits, when applied to the facts of the present case. Thus, we have no hesitation in rejecting this contention, raised by the appellants.

55. It is also the contention of the appellants that the group supporting the Chairman/Vice-Chairman of the State Bar Council, in the meeting dated 16th April, 2011, had raised the issue that 'no confidence motion' and reconstitution of the committee could not be considered in view of the bar contained in Rule 15 of the M.P. Rules, in the form of 'a point of order' against the requisition asked for by the other group. Firstly, we have already rejected the contention of the appellants that the matters were discussed and concluded, either through the February 2011 elections or in the 15th Meeting of the Council dated 27th March, 2011, as, according to the minutes, the meeting had only been deferred for issuance of appropriate agenda and requisition notice to all the members present or not present. Treating it as a valid point of order, the Chairman had accepted the same and then he along with some members, had walked out of the meeting.

56. As indicated above, the meeting then was presided over by the Advocate General, Madhya Pradesh, whereafter the 'no confidence motion' was passed. We are unable to accept the approach adopted by the Chairman/Vice-Chairman as, on the peculiar facts and circumstances of this case, it *ex facie* was untenable and without any basis. It was the duty of the Chairman/Vice-Chairman to face the 'no confidence motion', as they were elected office bearers and if they had lost the confidence of majority group which elected them to this post and a 'no confidence motion' had been moved against them in terms of Rule 122-A, they were expected to face the consequences thereof. This, alone, would have served the ends of democratic governance and proper functioning of the State Bar Council. Therefore, in our considered view, even on this issue, the appellants cannot succeed.

57. Then it is contended that removal from an office is punitive. It being punitive, there has to be a just cause and adherence to the principles of natural justice by granting hearing before the removal from office is given effect to. To clarify, it is submitted that removal from an elected office, even in face of a valid rule, would have to meet these twin requirements of just cause and hearing, before a person can be removed from office. On the other hand, the learned counsel appearing for the respondents, while relying upon the judgment of the Delhi High Court in the case of *Bar Council of Delhi v. Bar Council of India* [AIR 1975 Del 200], contended that by application of the General Clauses Act, 1897 even in absence of any specific provision, the right of persons to elect a Chairman/Vice-Chairman would include the right to undo the same by moving a 'no confidence motion'.

58. It needs to be noticed at the very threshold of consideration of this submission that 'no confidence motion' cannot be equated in law to removal relatable to a disciplinary action or as a censure. It is *stricto senso* not removal from office, but a removal resulting from loss of confidence. It is relatable to no confidence and is not removal relatable to the conduct or improper behaviour of the elected person. Even the concept of 'term' under the Rules, is referable to and is controlled by a super-imposed limitation of no confidence. This tenure cannot be compared to a statutory tenure as is commonly understood in the service jurisprudence. The distinction between removal by way of 'no confidence motion' and removal as a result of disciplinary action or censure is quite well accepted in law. They are incapable of being inter-changed in their application and must essentially operate in separate fields. The Court has always prioritized harmonious functioning of the State Bar Council. In the case of *Afjal Imam v. State of Bihar and others*, [JT 2011 (5) 19], the recall of a Mayor and the re-election of a different Mayor in his place has been held to implicitly shorten the term of the appointees of the previous

Mayor, if such is in the interest of smooth functioning of the body.

59. Noticing this distinction, a Bench of this Court in the case of *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* [(1974) 2 SCC 706], while dealing with the question whether grounds for removal must necessarily be specified when passing a motion of no confidence, noticed the difference between 'no confidence motion' and a censure motion and described the same as follows:

> "19…..It does not, however, follow therefrom that the ground must also be specified when a motion of no confidence is actually passed against a President. It is pertinent in this context to observe that there is a difference between a motion of no confidence and a censure motion. While it is necessary in the case of a censure motion to set out the ground or charge on which it is based, a motion of no confidence need not set out a ground or charge. A vote of censure presupposes that the persons censured have been guilty of some impropriety or lapse by act or omission and it is because of that lapse or impropriety that they are being censured. It may, therefore, become necessary to specify the impropriety or lapse while moving a vote of censure. No such consideration arises when a motion of no confidence is moved. Although a ground may be mentioned when passing a motion of no confidence, the existence of a ground is not a prerequisite of a motion of no confidence. There is no legal bar to the passing of a motion of no confidence against an authority in the absence of any charge of impropriety or lapse on the part of that authority. The essential connotation of a no-confidence motion is that the party against whom such motion is passed has ceased to enjoy the confidence of the requisite majority of members. We may in the above context refer to page 591 of *Practise and Procedure of Parliament,* Second Ed. by Kaul and Shakdher wherein it is observed as under:

"A no-confidence motion in the Council of Ministers is distinct from a censure motion. Whereas, a censure motion must set out the grounds or charge on which it is based and is moved for the specific purpose of censuring the Government for certain policies and actions, a motion of no confidence need not set out any grounds on which it is based. Even when grounds are mentioned in the notice and read out in the House, they do not form part of the no-confidence motion."

60. Still, in another case, titled *B.P. Singhal v. Union of India & Anr.* [JT 2010 (5) SC 640], the Court, while dealing with the doctrine of pleasure in relation to the term of the office of the Governor, for a tenure of 5 years, noticed that Article 156(1) of the Constitution dispenses with the need to assign reasons or the need to give notice in the event of removal. But the need to act fairly and reasonably still cannot be dispensed with. Exception was carved out against acting in a manner which is arbitrary, capricious or unreasonable. In face of the above enunciated principles, we are of the considered view that the concept of just cause and right of hearing, the features of common law, are not applicable to the elected offices where a person is so elected by majority in accordance with statutory rules. It would also have hardly any application to moving of a 'no confidence motion' in so far as these are controlled by specific provisions and are not arbitrary or unreasonable. There is nothing in Rule 122-A of the M.P. Rules that requires adherence to these two concepts when a motion of no confidence is moved against a sitting Chairman/Vice-Chairman. Of course, it does not imply that the action can be arbitrary or capricious and absolutely contrary to the spirit of the Rule. There is no dispute in the facts of the present case that majority of the members had passed the 'no confidence motion' in the 16th Meeting of the State Bar Council on 16th April, 2011. We are not able to accept the view taken by the High Court of Delhi in the case of *Bar Council of Delhi* (supra)

in saying that solely with the aid of General Clauses Act, the power to elect would deem to include power to remove by a motion of no confidence, particularly, with reference to the facts and circumstances of this case. The power to requisition a 'no confidence motion' and pass the same, in terms of Rule 122-A of the M.P. Rules, is clear from the bare reading of the Rule, as relatable to loss of faith and confidence by the elected body in the elected office bearer. We have already discussed in some detail and concluded that Rule 122-A of the M.P. Rules is not *ultra vires* the provisions of the Advocates Act, including Section 15. When the law so permits, there is no right for that office bearer to stay in office after the passing of the 'no confidence motion' and, in the facts and circumstances of the present case, it is clearly established that the appellants had lost the confidence of the majority of the elected members and thus the Resolution dated 16th April, 2011 cannot be faulted with.

61. Before concluding the judgment we would proceed to record our conclusions and answer the three questions posed at the outset of the judgment as follows:

Answers to:

Question No. 1

We hold that the provisions of Rules 121 and 122-A (in particular) of the M.P. Rules are not *ultra vires* of the provisions, including the provisions of Section 15, of the Advocates Act. These rules also do not suffer from the vice of excessive delegation.

Question No. 2

In view of our answer to Question No. 1, there is no need for us to specifically answer this question.

Question No. 3

In view of the language of Section 15(3) of the Advocates Act and the factual matrix afore-noticed by us, it is clear that the amended rules of the M.P. Rules had received the approval of the Bar Council of India, particularly Rule 122-A. The Rules would not be invalidated for want of issuance of any notification, as it is not the requirement in terms of Section 15(3) of the Advocates Act and in any case would be a curable irregularity at best.

For the reasons afore-stated, we dismiss these appeals.

N.J. Appeals dismissed.

CENTRAL BOARD OF SECONDARY EDUCATION & ANR.

v.

ADITYA BANDOPADHYAY & ORS.

(Civil Appeal No. 6454 of 2011)

AUGUST 09, 2011

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

Right to Information Act, 2005:

ss. 8 (1)(e), 2 (f), 2(i), 2(j), 3, 24 and 9 – Public examination – Examinee's right to inspect his evaluated answer books in a public examination or taking certified copies – Scope of – Held: Every examinee has the right to access his evaluated answer-books, by either inspecting them or take certified copies thereof, unless the evaluated answer-books are found to be exempted u/s. 8(1)(e) – Answer-book is a document or record in terms of s. 2(i) and as such the evaluated answer-book is also an 'information' under the Act – Under s. 3, the citizens have the right to access to all information held by or under the control of any public authority except those excluded or exempted under the Act – Examining bodies (Universities, Examination Boards, CBSE etc.) are neither security nor intelligence organisations – Disclosure of information with reference to answer-books also does not involve infringement of any copyright – Thus, the exemption u/ss. 24 and 9 would not apply to them.

*s. 22 – Overriding effect of – Right of an examinee seeking inspection of his answer books or seeking certified copies thereof – Effect of decision of this Court in *Maharashtra State Board of Secondary Education v, Paritosh B. Sheth on such right – Held: Decision of this Court in *Maharashtra State Board and the subsequent decisions following the same, would not affect or interfere with the right*

of the examinee seeking inspection of answer-books or taking certified copies thereof – RTI Act enables/entitles the student to have access to the answer-books as 'information' and inspect them and take certified copies thereof – s. 22 provides that the provisions of the Act would have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force – Thus, the provisions of the RTI Act would prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations – As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of s. 8(1), the examining body would be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations.

s. 8(1)(e) – Whether examining body holds the evaluated answer books "in a fiduciary relationship" and thus, has no obligation to give inspection of the evaluated answer books u/s. 8 (1)(e) – Held: Examining body does not hold the evaluated answer books in a fiduciary relationship, qua the examiner – Not being information available to an examining body in its fiduciary relationship, the exemption u/s. 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books and the examining bodies will have to permit inspection sought by the examinees.

Right of inspection of the evaluated answer books or seeking certified copies thereof by examinee – Limitations, conditions or safeguards to such right – Held: Portions of answer-books containing information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, should be removed, covered, or otherwise severed

from the non-exempted part of the answer-books, u/s. 10 – Right to access information does not extend beyond the period during which the examining body is expected to retain the answer-books – s. 8(3) nowhere provides that records or information have to be maintained for a period of twenty years or more nor override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority.

s. 8 – Interpretation of – Held: Is not to be construed strictly, literally and narrowly – When s. 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

Enforcement of RTI Act – Held: Should be enforced strictly – Necessary information under clause (b) of s. 4(1) relating to securing transparency and accountability in the working of public authorities and in discouraging corruption to be brought to light – Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens – Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty.

Object and reasons of the RTI Act – Explained.

Words and Phrases:

Term 'fiduciary' and 'fiduciary relationship' – Meaning of.

Respondent No. 1 appeared for the Secondary School Examination, 2008 conducted by appellant-Central Board of Secondary Education (CBSE). He was disappointed with his marks and thus, he made an application for inspection and re-evaluation of his

answer-books. CBSE rejected the same. Respondent No. 1 filed a writ petition seeking a declaration that the action of CBSE in excluding the provision of re-evaluation of answer-sheets, in regard to the examinations held by it was illegal, unreasonable and violative of the provisions of the Constitution of India; for a direction to CBSE to appoint an independent examiner for re-evaluating his answer-books and issue a fresh marks card on the basis of re-evaluation; for a direction to CBSE to produce his answer-books in regard to the 2008 Secondary School Examination and that too into court for inspection by the first respondent; and for quashing the communication of CBSE. The Division Bench of the High Court disposed of the said writ petition along with the connected writ petitions directing CBSE to grant inspection of the answer books to the examinees who sought information, but rejected the prayer made by the examinees for re-evaluation of the answer-books, as that was not a relief that was available under Right to Information Act, 2005. Therefore, the appellant-CBSE filed the instant appeal.

The questions which arose for consideration in these appeals are whether an examinee's right to information under the Right to Information Act, 2005 includes a right to inspect his evaluated answer books in a public examination or taking certified copies thereof; whether the decisions of this Court in *_Maharashtra State Board of Secondary Education v, Paritosh B. Sheth_ and other cases, in any way affect or interfere with the right of an examinee seeking inspection of his answer books or seeking certified copies thereof; whether an examining body holds the evaluated answer books "in a fiduciary relationship" and consequently has no obligation to give inspection of the evaluated answer books under section 8 (1)(e) of RTI Act; and if the examinee is entitled to inspection of the evaluated answer books or seek certified copies thereof, whether such right is subject to

any limitations, conditions or safeguards.

Disposing of the appeals, the Court

HELD: 1. The order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is upheld, subject to the clarifications regarding the scope of the Right to Information Act, 2005 and the safeguards and conditions subject to which 'information' should be furnished. [Para 38] [1093-F]

2.1. The definition of 'information' in Section 2(f) of the RTI Act refers to any material in any form which includes records, documents, opinions, papers among several other enumerated items. The term 'record' is defined in Section 2(i) of the said Act as including any document, manuscript or file among others. When a candidate participates in an examination and writes his answers in an answer-book and submits it to the examining body for evaluation and declaration of the result, the answer-book is a document or record. When the answer-book is eval uated by an examiner appointed by the examining body, the evaluated answer-book becomes a record containing the 'opinion' of the examiner. Therefore, the evaluated answer-book is also an 'information' under the RTI Act. [Para 11] [1066-C-E]

2.2. Section 3 of RTI Act provides that subject to the provisions of this Act all citizens shall have *the right to information*. **The term** '*right to information*' **is defined in Section 2(j) as the right to information accessible under the Act which is held by or under the control of any public authority. Having regard to Section 3, the citizens have the right to access to all information held by or under the control of any public authority except those excluded or exempted under the Act. The object of the Act is to empower the citizens to fight against corruption and hold**

the Government and their instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority. Certain safeguards have been built into the Act so that the revelation of information will not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The RTI Act provides access to information held by or under the control of public authorities and not in regard to information held by any private person. The Act provides the exclusions by way of exemptions and exceptions (under Sections 8, 9 and 24) in regard to information held by public authorities. Having regard to the scheme of the RTI Act, the right of the citizens to access any information held or under the control of any public authority, should be read in harmony with the exclusions/exemptions in the Act. [Para 12] [1066-F-H; 1067-A-B-H; 1068-A]

2.3. The examining bodies (Universities, Examination Boards, CBSC etc.) are neither security nor intelligence organisations and therefore, the exemption under Section 24 would not apply to them. The disclosure of information with reference to answer-books does not also involve infringement of any copyright and therefore, Section 9 would not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer-books fall under any of the categories of exempted 'information' enumerated in clauses (a) to (j) of sub-section (1) Section 8, they would be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof. Every examinee would have the right to access his evaluated answer-books, by either inspecting them or take certified copies thereof, unless the evaluated answer-books are found to be

exempted under Section 8(1)(e) of the RTI Act. [Paras 13 and 14] [1068-C-F]

3.1. The principles laid down in decisions such as ****Maharashtra State Board* that denial of re-evaluation of answer-books or denial of disclosure by way of inspection of answer books, to an examinee, under Rule 104(1) and (3) of the Maharashtra Secondary and Higher Secondary Board Rules, 1977 was not violative of principles of natural justice and Articles 14 and 19 of the Constitution of India, depend upon the provisions of the rules and regulations of the examining body. If the rules and regulations of the examining body provide for re-evaluation, inspection or disclosure of the answer-books, then none of the principles in *Maharashtra State Board* or other decisions following it, would apply or be relevant. There has been a gradual change in trend with several examining bodies permitting inspection and disclosure of the answer-books. [Para 16] [1072-D-E]**

3.2. A provision barring inspection or disclosure of the answer-books or re-evaluation of the answer-books and restricting the remedy of the candidates only to re-totalling is valid and binding on the examinee. In the case of CBSE, the provisions barring re-evaluation and inspection contained in Bye-law No.61, are akin to Rule 104 considered in *Maharashtra State Board*. As a consequence if an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in totaling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the

examinee, as a citizen to seek access to the answer books, as information. [Para 17] [1072-F-H; 1073-A-B]

3.3. In the cases referred, the High Court rightly denied the prayer for re-evaluation of answer-books sought by the candidates in view of the bar contained in the rules and regulations of the examining bodies. It is also not a relief available under the RTI Act. Therefore, the question whether re-evaluation should be permitted or not, did not arise for consideration. What arose for consideration is the question whether the examinee is entitled to inspect his evaluated answer-books or take certified copies thereof. This right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer-books as 'information' and inspect them and take certified copies thereof. Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of Section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations. Therefore, the decision of this Court in *Maharashtra State Board* and the subsequent decisions following the same, will not affect or interfere with the right of the examinee seeking inspection of answer-books or taking certified copies thereof. [Para 18] [1073-B-H]

Maharashtra State Board of Secondary Education vs. Paritosh B. Sheth* **1984 (4) SCC 27; *Parmod Kumar Srivastava vs. Chairman, Bihar* ***PAC*** **2004 (6) SCC 714: 2004 (3) Suppl. SCR 372;** *Board of Secondary Education vs. Pavan Ranjan P* **2004 (13) SCC 383;** *Board of Secondary Education vs. S* **2007 (1) SCC 603;** *Secretary, West Bengal Council of Higher Secondary Education vs. I Dass* **2007 (8) SCC 242: 2007 (10) SCR 464 – referred to.**

4.1. Section 8(1) enumerates the categories of information which are exempted from disclosure under the provisions of the RTI Act. This exemption is subject to the condition that if the competent authority (as defined in Section 2(e) of RTI Act) is satisfied that the larger public interest warrants the disclosure of such information, the information will have to be disclosed. [Para 19] [1074-B-C]

4.2. The term 'fiduciary' and 'fiduciary relationship' refer to different capacities and relationship, involving a common duty or obligation. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term '*fiduciary relationship'* is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected

not to disclose the thing or information to any third party. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. [Paras 20 and 21] [1074-D; 1077-B-E]

Bristol and West Building Society vs. Mothew **1998 Ch. 1;** *Wolf vs.Superior Court* **2003 (107) California Appeals, 4th 25 – referred to.**

Black's Law Dictionary **7th Edition, p 640;** *American Restatements* (Trusts and Agency); *Corpus Juris Secundum* **Vol. 36A 381;** *Words and Phrases, Permanent Edition* **Vol. 16A, 41 - referred to.**

4.3. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to students who participate in an examination, as a government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words 'information available to a person in his fiduciary relationship' are used in Section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary. That kind of fiduciary relationship is not found between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body. [Para 22] [1077-H; 1078-A-E]

4.4. The duty of examining bodies is to subject the candidates who have completed a course of study or a period of training in accordance with its curricula, to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed

the course of study or training. Other specialized Examining Bodies may simply subject candidates to a process of verification by an examination, to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good and in public interest. It cannot be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body. [Para 23] [1078-F-H; 1079-A-B; 1080-A-B]

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

4.5. Section 8 (1)(e) provides that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen *information available to a person in his fiduciary relationship***. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself. One of the duties of the fiduciary is to make thorough disclosure of all relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, would be liable to make a full disclosure of the evaluated answer-books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer-books to anyone else. If a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer-book, Section 8(1)(e) would operate as an exemption to prevent access to any third party and would not operate as a bar**

for the very person who wrote the answer-book, seeking inspection or disclosure of it. [Para 24] [1080-B-G]

4.6. An evaluated answer book of an examinee is a combination of two different 'informations'. The first is the answers written by the examinee and second is the marks/assessment by the examiner. When an examinee seeks inspection of his evaluated answer-books or seeks a certified copy of the evaluated answer-book, the information sought by him is not really the answers he has written in the answer-books (which he already knows), nor the total marks assigned for the answers (which has been declared). What he really seeks is the information relating to the break-up of marks, that is, the specific marks assigned to each of his answers. When an examinee seeks 'information' by inspection/certified copies of his answer-books, he knows the contents thereof being the author thereof. When an examinee is permitted to examine an answer-book or obtain a certified copy, the examining body is not really giving him some information which is held by it in trust or confidence, but is only giving him an opportunity to read what he had written at the time of examination or to have a copy of his answers. Therefore, in furnishing the copy of an answer-book, there is no question of breach of confidentiality, privacy, secrecy or trust. The real issue therefore, is not in regard to the answer-book but in regard to the marks awarded on evaluation of the answer-book. Even here the total marks given to the examinee in regard to his answer-book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is how many marks were given by the examiner to each of his answers so that he can assess how his performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the

answer book but in regard to the evaluation by the examiner. [Para 25] [1080-H; 1081-A-F]

4.7. The examining body engages or employs hundreds of examiners to do the evaluation of thousands of answer books. The question is whether the information relating to the 'evaluation' (that is assigning of marks) is held by the examining body in a fiduciary relationship. The submission that even if fiduciary relationship does not exist with reference to the examinee, it exists with reference to the examiner who evaluates the answer-books, has no merit. The examining body entrusts the answer-books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer-book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer-books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words the examining body is the 'principal' and the examiner is the agent entrusted with the work, that is, evaluation of answer-books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copy-right or proprietary right, or

confidentiality right in regard to the evaluation. Therefore, the examining body does not hold the evaluated answer books in a fiduciary relationship, qua the examiner. Therefore, an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under Section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption under Section 8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees. [Para 26] [1081-G-H; 1082-A-F]

5.1. When an examining body engages the services of an examiner to evaluate the answer-books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that his name and particulars would not be disclosed to the candidates whose answer-books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator, and head-examiner who deal with the answer book. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore, exempted from disclosure under Section 8(1)(g) of RTI

Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer-books either by permitting inspection or by granting certified copies, such access would have to be given only to that part of the answer-book which does not contain any information or signature of the examiners/co-ordinators/scrutinisers/head examiners, exempted from disclosure under Section 8(1)(g) of RTI Act. Those portions of the answer-books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer-books, under Section 10 of RTI Act. [Para 28] [1083-B-H; 1084-A]

5.2. The right to access information does not extend beyond the period during which the examining body is expected to retain the answer-books. In the case of CBSE, the answer-books are required to be maintained for a period of three months and thereafter, they are liable to be disposed of/destroyed. Some other examining bodies are required to keep the answer-books for a period of six months. The fact that right to information is available in regard to answer-books does not mean that answer-books would have to be maintained for any longer period than required under the rules and regulations of the public authority. The obligation under the RTI Act is to make available or give access to *existing information* or information which is expected to be preserved or maintained. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information would be entitled to such information only if he seeks the information when it is available with the public authority. The power of the

Information Commission under Section 19(8) of the RTI Act to require a public authority to take any such steps as may be necessary *to secure compliance with the provision of the Act,* **does not include a power to direct the *public authority* to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority. [Para 29] [1084-B-G]**

5.4. Section 8(3) nowhere provides that records or information have to be maintained for a period of twenty years. The period for which any particular records or information has to be maintained would depend upon the relevant statutory rule or regulation of the public authority relating to the preservation of records. Section 8(3) provides that information relating to any occurrence, event or matters which has taken place and occurred or happened *twenty years before the date* on which any request is made under Section 6, shall be provided to any person making a request. This means that where any information required to be maintained and preserved for a period beyond twenty years under the rules of the public authority, is exempted from disclosure under any of the provisions of Section 8(1) of RTI Act, then, notwithstanding such exemption, access to such information shall have to be provided by disclosure thereof, after a period of twenty years except where they relate to information falling under clauses (a), (c) and (i) of Section 8(1). In other words, Section 8(3) provides that any protection against disclosure that may be available, under clauses (b), (d) to (h) and (j) of section 8(1) would cease to be available after twenty years in regard to records which are required to be preserved for more than twenty years. Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, Section 8(3) would not prevent destruction in accordance with the Rules.

Section 8(3) of RTI Act is not therefore, a provision requiring all 'information' to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority. [Para 30] [1085-A-G]

5.5. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. [Para 33] [1089-F-H; 1090-A-C]

5.6. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of

exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act that is Section 8 of the Freedom to Information Act, 2002. The Courts and Information Commissions enforcing the provisions of RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act. [Para 34] [1090-D-F]

5.7. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of Section 3 and the definitions of 'information' and 'right to information' under clauses (f) and (j) of Section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in Section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act. [Para 35] [1090-G-H; 1091-A-C]

5.8. Section 19(8) of RTI Act has entrusted the Central/State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act. The power under Section 19(8) of the Act however does not extend to requiring a public authority to take any steps which are not required or contemplated to secure compliance with the provisions of the Act or to issue directions beyond the provisions of the Act. The power under Section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act, in particular ensure that every public authority maintains its records duly catalogued and indexed in the manner and in the form which facilitates the right to information and ensure that the records are computerized, as required under clause (a) of Section 4(1) of the Act; and to ensure that the information enumerated in clauses (b) and (c) of Sections 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub-Sections (3) and (4) of Section 4 of the Act. If the 'information' enumerated in clause (b) of Section 4(1) of the Act are effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act. [Para 36] [1091-F-H; 1092-A-F]

5.9. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of

Section 4(1) which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information,(that is information other than those enumerated in Section 4(1)(b) and (c)), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it would adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties. [Para 37] [1092-G-H; 1093-A-F]

State of Uttar Pradesh v. Raj Narain **(1975) 4 SCC 428:1975 (3) SCR 333;** *Dinesh Trivedi v. Union of India* **(1997) 4 SCC 306:1997 (3) SCR 93;** *People's Union for Civil Liberties v. Union of India* **(2004) 2 SCC 476: 2004 (1) SCR 232 – referred to.**

Case Law Reference:

1984 (4) SCC 27	**Referred to.**	**Para 6**
2004 (3) Suppl. SCR 372	**Referred to.**	**Para 6**
2004 (13) SCC 383	**Referred to.**	**Para 6**
2007 (1) SCC 603	**Referred to.**	**Para 6**
2007 (10) SCR 464	**Referred to.**	**Para 6**
1975 (3) SCR 333	**Referred to.**	**Para 10**
1997 (3) SCR 93	**Referred to.**	**Para 10**
2004 (1) SCR 232	**Referred to.**	**Para 10**

CIVIL APPELALTE JURISDICTION : Civil Appeal No. 6454 of 2011.

From the Judgment & Order datd 5.2.2009 of the High Court at Calcutta in Writ Petition 18189 (W) of 2008.

WITH

C.A. Nos. 6456, 6457-6458, 6459, 6461, 6462, 6464, 6465-6468 of 2011.

Parag P. Tripathi, ASG, Bhaskar P. Gupta, Mahabir Singh, P.K. Goswami, Tapash Ray, Dr. Rajiv Dhawan, Tara Chandra Sharma, Neelam Sharma, Rupesh Kumar, Ajay Sharma, Pijush K. Roy, Mithilesh Kr. Singh, Ranajit Chatterjee, Shankar Divate, Anuj Bhandari, Pramod Dayal, Nikunj Dayal, Rakesh Agarwal, Pulkit Agarwal, Payal Dayal, Parthiv Goswami, S. Hariharan, Rajiv Mehta, Saurendra Betal, D.M. Nargolkar, L.C. Agrawala, F.I. Choudhary, Rameshwar Prasad Goyal, Abhijit Sengupta, B.P. Yadav, Sampa Sengupta Ray, Anmia Kujur, Ranjan Mukherjee, Azem H. Laskar, Divya Jyoti Jaipuriar, Jyoti Mendiratta, Navin Prakash, Sunil Kumar Verma, Rekha Pandey for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. For convenience, we will refer to the facts of the first case.

2. The first respondent appeared for the Secondary School Examination, 2008 conducted by the Central Board of Secondary Education (for short 'CBSE' or the 'appellant'). When he got the mark sheet he was disappointed with his marks. He thought that he had done well in the examination but his answer-books were not properly valued and that improper valuation had resulted in low marks. Therefore he made an application for inspection and re-evaluation of his answer-books. CBSE rejected the said request by letter dated 12.7.2008. The reasons for rejection were:

(i) The information sought was exempted under Section 8(1)(e) of RTI Act since CBSE shared fiduciary relationship with its evaluators and maintain confidentiality of both manner and method of evaluation.

(ii) The Examination Bye-laws of the Board provided that no candidate shall claim or is entitled to re-evaluation of his answers or disclosure or inspection of answer book(s) or other documents.

(iii) The larger public interest does not warrant the disclosure of such information sought.

(iv) The Central Information Commission, by its order dated 23.4.2007 in appeal no. ICPB/A-3/CIC/2006 dated 10.2.2006 had ruled out such disclosure."

3. Feeling aggrieved the first respondent filed W.P. No.18189(W)/2008 before the Calcutta High Court and sought the following reliefs : (a) for a declaration that the action of CBSE in excluding the provision of re-evaluation of answer-sheets, in regard to the examinations held by it was illegal, unreasonable and violative of the provisions of the Constitution of India; (b) for a direction to CBSE to appoint an independent examiner for re-evaluating his answer-books and issue a fresh marks card on the basis of re-evaluation; (c) for a direction to

CBSE to produce his answer-books in regard to the 2008 Secondary School Examination so that they could be properly reviewed and fresh marks card can be issued with re-evaluation marks; (d) for quashing the communication of CBSE dated 12.7.2008 and for a direction to produce the answer-books into court for inspection by the first respondent. The respondent contended that section 8(1)(e) of Right to Information Act, 2005 ('RTI Act' for short) relied upon by CBSE was not applicable and relied upon the provisions of the RTI Act to claim inspection.

4. CBSE resisted the petition. It contended that as per its Bye-laws, re-evaluation and inspection of answer-books were impermissible and what was permissible was only verification of marks. They relied upon the CBSE Examination Bye-law No.61, relevant portions of which are extracted below:

"61. Verification of marks obtained by a Candidate in a subject

(i) A candidate who has appeared at an examination conducted by the Board may apply to the concerned Regional Officer of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answer's have been evaluated and that there has been no mistake in the totalling of marks for each question in that subject and that the marks have been transferred correctly on the title page of the answer book and to the award list and whether the supplementary answer book(s) attached with the answer book mentioned by the candidate are intact. No revaluation of the answer book or supplementary answer book(s) shall be done.

(ii) Such an application must be made by the candidate within 21 days from the date of the declaration of result for Main Examination and 15 days for Compartment Examination.

(iii) All such applications must be accompanied by

payment of fee as prescribed by the Board from time to time.

(iv) *No candidate shall claim, or be entitled to, revaluation of his/her answers or disclosure or inspection of the answer book(s) or other documents.*

xxxx

(vi) In no case the verification of marks shall be done in the presence of the candidate or anyone else on his/her behalf, nor will the answer books be shown to him/her or his/her representative.

(vii) Verification of marks obtained by a candidate will be done by the officials appointed by or with the approval of the Chairman.

(viii) The marks, on verification will be revised upward or downward, as per the actual marks obtained by the candidate in his/her answer book.

xxxx

62. *Maintenance of Answer Books*

The answer books shall be maintained for a period of three months and shall thereafter be disposed of in the manner as decided by the Chairman from time to time."

(emphasis supplied)

CBSE submitted that 12 to 13 lakhs candidates from about 9000 affiliated schools across the country appear in class X and class XII examinations conducted by it and this generates as many as 60 to 65 lakhs of answer-books; that as per Examination Bye-law No.62, it maintains the answer books only for a period of three months after which they are disposed of. It was submitted that if candidates were to be permitted to seek re-evaluation of answer books or inspection thereof, it will

create confusion and chaos, subjecting its elaborate system of examinations to delay and disarray. It was stated that apart from class X and class XII examinations, CBSE also conducts several other examinations (including the All India Pre-Medical Test, All India Engineering Entrance Examination and Jawahar Navodaya Vidyalaya's Selection Test). If CBSE was required to re-evaluate the answer-books or grant inspection of answer-books or grant certified copies thereof, it would interfere with its effective and efficient functioning, and will also require huge additional staff and infrastructure. It was submitted that the entire examination system and evaluation by CBSE is done in a scientific and systemic manner designed to ensure and safeguard the high academic standards and at each level utmost care was taken to achieve the object of excellence, keeping in view the interests of the students. CBSE referred to the following elaborate procedure for evaluation adopted by it :

"The examination papers are set by the teachers with at least 20 years of teaching experience and proven integrity. Paper setters are normally appointed from amongst academicians recommended by then Committee of courses of the Board. Every paper setter is asked to set more than one set of question papers which are moderated by a team of moderators who are appointed from the academicians of the University or from amongst the Senior Principals. The function of the moderation team is to ensure correctness and consistency of different sets of question papers with the curriculum and to assess the difficulty level to cater to the students of different schools in different categories. After assessing the papers from every point of view, the team of moderators gives a declaration whether the whole syllabus is covered by a set of question papers, whether the distribution of difficulty level of all the sets is parallel and various other aspects to ensure uniform standard. The Board also issues detailed instructions for the guidance of the moderators in order to

ensure uniform criteria for assessment.

The evaluation system on the whole is well organized and fool-proof. All the candidates are examined through question papers set by the same paper setters. Their answer books are marked with fictitious roll numbers so as to conceal their identity. The work of allotment of fictitious roll number is carried out by a team working under a Chief Secrecy Officer having full autonomy. The Chief Secrecy Officer and his team of assistants are academicians drawn from the Universities and other autonomous educational bodies not connected with the Board. The Chief Secrecy Officer himself is usually a person of the rank of a University professor. No official of the Board at the Central or Regional level is associated with him in performance of the task assigned to him. The codes of fictitious roll numbers and their sequences are generated by the Chief Secrecy Officer himself on the basis of mathematical formula which randomize the real roll numbers and are known only to him and his team. This ensures complete secrecy about the identification of the answer book so much so, that even the Chairman, of the Board and the Controller of Examination of the Board do not have any information regarding the fictitious roll numbers granted by the Chief Secrecy Officer and their real counterpart numbers.

At the evaluation stage, the Board ensures complete fairness and uniformity by providing a marking scheme which is uniformity applicable to all the examiners in order to eliminate the chances of subjectivity. These marking schemes are jointly prepared at the Headquarters of the Board in Delhi by the Subject Experts of all the regions. The main purpose of the marking scheme is to maintain uniformity in the evaluation of the answer books.

The evaluation of the answer books in all major subjects including mathematics, science subjects is done in

centralized "on the spot" evaluation centers where the examiners get answer book in interrupted serial orders. Also, the answer books are jumbled together as a result of which the examiners, say in Bangalore may be marking the answer book of a candidate who had his examination in Pondicherry, Goa, Andaman and Nicobar islands, Kerala, Andhra Pradesh, Tamil Nadu or Karnataka itself but he has no way of knowing exactly which answer book he is examining. The answer books having been marked with fictitious roll numbers give no clue to any examiner about the state or territory it belongs to. It cannot give any clue about the candidate's school or centre of examination. The examiner cannot have any inclination to do any favour to a candidate because he is unable to decodify his roll number or to know as to which school, place or state or territory he belongs to.

The examiners check all the questions in the papers thoroughly under the supervision of head examiner and award marks to the sub parts individually not collectively. They take full precautions and due attention is given while assessing an answer book to do justice to the candidate. Re-evaluation is administratively impossible to be allowed in a Board where lakhs of students take examination in multiple subjects.

There are strict instructions to the additional head examiners not to allow any shoddy work in evaluation and not to issue more than 20-25 answer books for evaluation to an examiner on a single day. The examiners are practicing teachers who guard the interest of the candidates. There is no ground to believe that they do unjust marking and deny the candidates their due. It is true that in some cases totaling errors have been detected at the stage of scrutiny or verification of marks. In order to minimize such errors and to further strengthen and to improve its system, from 1993 checking of totals and other

aspects of the answers has been trebled in order to detect and eliminate all lurking errors.

The results of all the candidates are reviewed by the Results Committee functioning at the Head Quarters. The Regional Officers are not the number of this Committee. This Committee reviews the results of all the regions and in case it decides to standardize the results in view of the results shown by the regions over the previous years, it adopts a uniform policy for the candidates of all the regions. No special policy is adopted for any region, unless there are some special reasons. This practice of awarding standardized marks in order to moderate the overall results is a practice common to most of the Boards of Secondary Education. The exact number of marks awarded for the purpose of standardization in different subjects varies from year to year. The system is extremely impersonalized and has no room for collusion infringement. It is in a word a scientific system."

CBSE submitted that the procedure evolved and adopted by it ensures fairness and accuracy in evaluation of answer-books and made the entire process as foolproof as possible and therefore denial of re-evaluation or inspection or grant of copies cannot be considered to be denial of fair play or unreasonable restriction on the rights of the students.

5. A Division Bench of the High Court heard and disposed of the said writ petition along with the connected writ petitions (relied by West Bengal Board of Secondary Education and others) by a common judgment dated 5.2.2009. The High Court held that the evaluated answer-books of an examinee writing a public examination conducted by statutory bodies like CBSE or any University or Board of Secondary Education, being a 'document, manuscript record, and opinion' fell within the definition of "information" as defined in section 2(f) of the RTI Act. It held that the provisions of the RTI Act should be interpreted in a manner which would lead towards dissemination

of information rather than withholding the same; and in view of the right to information, the examining bodies were bound to provide inspection of evaluated answer books to the examinees. Consequently it directed CBSE to grant inspection of the answer books to the examinees who sought information. The High Court however rejected the prayer made by the examinees for re-evaluation of the answer-books, as that was not a relief that was available under RTI Act. RTI Act only provided a right to access information, but not for any consequential reliefs. Feeling aggrieved by the direction to grant inspection, CBSE has filed this appeal by special leave.

6. Before us the CBSE contended that the High Court erred in (i) directing CBSE to permit inspection of the evaluated answer books, as that would amount to requiring CBSE to disobey its Examination Bye-law 61(4), which provided that no candidate shall claim or be entitled to re-evaluation of answer books or disclosure/inspection of answer books; (ii) holding that Bye-law 61(4) was not binding upon the examinees, in view of the overriding effect of the provisions of the RTI Act, even though the validity of that bye-law had not been challenged; (iii) not following the decisions of this court in *Maharashtra State Board of Secondary Education vs. Paritosh B. Sheth* [1984 (4) SCC 27], *Parmod Kumar Srivastava vs. Chairman, Bihar PAC* [2004 (6) SCC 714], *Board of Secondary Education vs. Pavan Ranjan P* [2004 (13) SCC 383], *Board of Secondary Education vs. S* [2007 (1) SCC 603] and *Secretary, West Bengal Council of Higher Secondary Education vs. I Dass* [2007 (8) SCC 242]; and (iv) holding that the examinee had a right to inspect his answer book under section 3 of the RTI Act and the examining bodies like CBSE were not exempted from disclosure of information under section 8(1)(e) of the RTI Act. The appellants contended that they were holding the "information" (in this case, the evaluated answer books) in a fiduciary relationship and therefore exempted under section 8(1)(e) of the RTI Act.

7. The examinees and the Central Information Commission contended that the object of the RTI Act is to ensure maximum disclosure of information and minimum exemptions from disclosure; that an examining body does not hold the evaluated answer books, in any fiduciary relationship either with the student or the examiner; and that the information sought by any examinee by way of inspection of his answer books, will not fall under any of the exempted categories of information enumerated in section 8 of the RTI Act. It was submitted that an examining body being a public authority holding the 'information', that is, the evaluated answer-books, and the inspection of answer-books sought by the examinee being exercise of 'right to information' as defined under the Act, the examinee as a citizen has the right to inspect the answer-books and take certified copies thereof. It was also submitted that having regard to section 22 of the RTI Act, the provisions of the said Act will have effect notwithstanding anything inconsistent in any law and will prevail over any rule, regulation or bye law of the examining body barring or prohibiting inspection of answer books.

8. On the contentions urged, the following questions arise for our consideration :

(i) Whether an examinee's right to information under the RTI Act includes a right to inspect his evaluated answer books in a public examination or taking certified copies thereof?

(ii) Whether the decisions of this court in *Maharashtra State Board of Secondary Education* [1984 (4) SCC 27] and other cases referred to above, in any way affect or interfere with the right of an examinee seeking inspection of his answer books or seeking certified copies thereof?

(iii) Whether an examining body holds the evaluated answer books "in a fiduciary relationship" and consequently has no obligation to give inspection of the evaluated answer books under section 8 (1)(e) of RTI Act?

(iv) If the examinee is entitled to inspection of the evaluated answer books or seek certified copies thereof, whether such right is subject to any limitations, conditions or safeguards?

Relevant Legal Provisions

9. To consider these questions, it is necessary to refer to the statement of objects and reasons, the preamble and the relevant provisions of the RTI Act. RTI Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right of information recognized under article 19 of the Constitution. The preamble to the Act declares the object sought to be achieved by the RTI Act thus:

> "An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.
>
> Whereas the Constitution of India has established democratic Republic;
>
> And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal."

Chapter II of the Act containing sections 3 to 11 deals with right to information and obligations of public authorities. Section 3 provides for right to information and reads thus: "*Subject to the provisions of this Act, all citizens shall have the right to information*." This section makes it clear that the RTI Act gives a right to a citizen to only access information, but not seek any consequential relief based on such information. Section 4 deals with obligations of public authorities to maintain the records in the manner provided and publish and disseminate the information in the manner provided. Section 6 deals with requests for obtaining information. It provides that applicant making a request for information shall not be required to give any reason for requesting the information or any personal details except those that may be necessary for contacting him. Section 8 deals with exemption from disclosure of information and is extracted in its entirety:

"8. Exemption from disclosure of information — (1) Notwithstanding anything contained in this Act, *there shall be no obligation to give any citizen,-*

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under secton 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

(emphasis supplied)

Section 9 provides that without prejudice to the provisions of section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright. Section 10 deals with severability of exempted information and sub-section (1) thereof is extracted below:

"(1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

Section 11 deals with third party information and sub-section (1) thereof is extracted below:

"(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party."

The definitions of *information, public authority, record and right to information* in clauses (f), (h), (i) and (j) of section 2 of the RTI Act are extracted below:

"(f) *"information"* means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

(h) *"public authority"* means any authority or body or institution of self- government established or constituted-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

(i) *"record"* includes-

(a) any document, manuscript and file;

(b) any microfilm, microfiche and facsimile copy of a document;

(c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device;

(j) *"right to information"* means the right to information

accessible under this Act which is held by or under the control of any public authority and includes the right to-

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

Section 22 provides for the Act to have overriding effect and is extracted below:

"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

10. It will also be useful to refer to a few decisions of this Court which considered the importance and scope of the right to information. In *State of Uttar Pradesh v. Raj Narain* - (1975) 4 SCC 428, this Court observed:

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. *The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech,* though not absolute, is a factor which should make one wary, when secrecy is

claimed for transactions which can, at any rate, have no repercussion on public security."

(emphasis supplied)

In *Dinesh Trivedi v. Union of India* – (1997) 4 SCC 306, this Court held:

"In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. ……Implicit in this assertion is the proposition that in transaction which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.

To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers is Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and

we think the answer is to maintain a fine balance which would serve public interest."

In *People's Union for Civil Liberties v. Union of India* - (2004) 2 SCC 476, this Court held that right of information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India and such a right is subject to any reasonable restriction in the interest of the security of the state and subject to exemptions and exceptions.

Re : Question (i)

11. The definition of 'information' in section 2(f) of the RTI Act refers to any material in any form which includes records, documents, opinions, papers among several other enumerated items. The term 'record' is defined in section 2(i) of the said Act as including any document, manuscript or file among others. When a candidate participates in an examination and writes his answers in an answer-book and submits it to the examining body for evaluation and declaration of the result, the answer-book is a document or record. When the answer-book is evaluated by an examiner appointed by the examining body, the evaluated answer-book becomes a record containing the 'opinion' of the examiner. Therefore the evaluated answer-book is also an 'information' under the RTI Act.

12. Section 3 of RTI Act provides that subject to the provisions of this Act all citizens shall have *the right to information*. The term '*right to information'* is defined in section 2(j) as the right to information accessible under the Act which is held by or under the control of any public authority. Having regard to section 3, the citizens have the right to access to all information held by or under the control of any public authority except those excluded or exempted under the Act. The object of the Act is to empower the citizens to fight against corruption and hold the Government and their instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority. Certain

safeguards have been built into the Act so that the revelation of information will not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The RTI Act provides access to information held by or under the control of public authorities and not in regard to information held by any private person. The Act provides the following exclusions by way of exemptions and exceptions (under sections 8, 9 and 24) in regard to information held by public authorities:

(i) Exclusion of the Act in entirety under section 24 to intelligence and security organizations specified in the Second Schedule even though they may be "public authorities", (except in regard to information with reference to allegations of corruption and human rights violations).

(ii) Exemption of the several categories of information enumerated in section 8(1) of the Act which no public authority is under an obligation to give to any citizen, notwithstanding anything contained in the Act [however, in regard to the information exempted under clauses (d) and (e), the competent authority, and in regard to the information excluded under clause (j), Central Public Information Officer/State Public Information Officer/the Appellate Authority, may direct disclosure of information, if larger public interest warrants or justifies the disclosure].

(iii) If any request for providing access to information involves an infringement of a copyright subsisting in a person other than the State, the Central/State Public Information Officer may reject the request under section 9 of RTI Act.

Having regard to the scheme of the RTI Act, the right of the citizens to access any information held or under the control

of any public authority, should be read in harmony with the exclusions/exemptions in the Act.

13. The examining bodies (Universities, Examination Boards, CBSC etc.) are neither security nor intelligence organisations and therefore the exemption under section 24 will not apply to them. The disclosure of information with reference to answer-books does not also involve infringement of any copyright and therefore section 9 will not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer-books fall under any of the categories of exempted 'information' enumerated in clauses (a) to (j) of sub-section (1) section 8, they will be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof.

14. The examining bodies contend that the evaluated answer-books are exempted from disclosure under section 8(1)(e) of the RTI Act, as they are 'information' held in its fiduciary relationship. They fairly conceded that evaluated answer-books will not fall under any other exemptions in sub-section (1) of section 8. Every examinee will have the right to access his evaluated answer-books, by either inspecting them or take certified copies thereof, unless the evaluated answer-books are found to be exempted under section 8(1)(e) of the RTI Act.

Re : Question (ii)

15. In *Maharashtra State Board,* this Court was considering whether denial of re-evaluation of answer-books or denial of disclosure by way of inspection of answer books, to an examinee, under Rule 104(1) and (3) of the Maharashtra Secondary and Higher Secondary Board Rules, 1977 was violative of principles of natural justice and violative of Articles 14 and 19 of the Constitution of India. Rule 104(1) provided that no re-evaluation of the answer books shall be done and on an

application of any candidate verification will be restricted to checking whether all the answers have been examined and that there is no mistake in the totalling of marks for each question in that subject and transferring marks correctly on the first cover page of the answer book. Rule 104(3) provided that no candidate shall claim or be entitled to re-evaluation of his answer-books or inspection of answer-books as they were treated as confidential. This Court while upholding the validity of Rule 104(3) held as under :

> "…. the "process of evaluation of answer papers or of subsequent verification of marks" under Clause (3) of Regulation 104 does not attract the principles of natural justice since no decision making process which brings about adverse civil consequences to the examinees in involved. The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer-books and determining whether there has been a proper and fair valuation of the answers by the examiners."
>
> So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations…. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act … and there is no scope for interference by the Court unless the particular provision impugned before it can be said to

> suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.
>
> It was perfectly within the competence of the Board, rather it was its plain duty, to apply its mind and decide as a matter of policy relating to the conduct of the examination as to whether disclosure and inspection of the answer books should be allowed to the candidates, whether and to what extent verification of the result should be permitted after the results have already been announced and whether any right to claim revaluation of the answer books should be recognised or provided for. All these are undoubtedly matters which have an intimate nexus with the objects and purposes of the enactment and are, therefore, with in the ambit of the general power to make regulations…."

This Court held that Regulation 104(3) cannot be held to be unreasonable merely because in certain stray instances, errors or irregularities had gone unnoticed even after verification of the concerned answer books according to the existing procedure and it was only after further scrutiny made either on orders of the court or in the wake of contentions raised in the petitions filed before a court, that such errors or irregularities were ultimately discovered. This court reiterated the view that "the test of reasonableness is not applied in vacuum but in the context of life's realities" and concluded that realistically and practically, providing all the candidates inspection of their answer books or re-evaluation of the answer books in the presence of the candidates would not be feasible. Dealing with the contention that every student is entitled to fair play in examination and receive marks matching his performance, this court held :

> "What constitutes fair play depends upon the facts and

circumstances relating to each particular given situation. If it is found that every possible precaution has been taken and all necessary safeguards provided to ensure that the answer books inclusive of supplements are kept in safe custody so as to eliminate the danger of their being tampered with and that the evaluation is done by the examiners applying uniform standards with checks and crosschecks at different stages and that measures for detection of malpractice, etc. have also been effectively adopted, in such cases it will not be correct on the part of the Courts to strike down, the provision prohibiting revaluation on the ground that it violates the rules of fair play. It appears that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer books has made the system as fool proof as can be possible and is entirely satisfactory. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in the Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against asking for revaluation….

This Court concluded that if inspection and verification in the presence of the candidates, or revaluation, have to be allowed as of right, it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking etc. of the candidate, besides leading to utter confusion on account of the enormity of the labour and time involved in the process. This court concluded :

"… the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in

relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded."

16. The above principles laid down in *Maharashtra State Board* have been followed and reiterated in several decisions of this Court, some of which are referred to in para (6) above. But the principles laid down in decisions such as *Maharashtra State Board* depend upon the provisions of the rules and regulations of the examining body. If the rules and regulations of the examining body provide for re-evaluation, inspection or disclosure of the answer-books, then none of the principles in *Maharashtra State Board* or other decisions following it, will apply or be relevant. There has been a gradual change in trend with several examining bodies permitting inspection and disclosure of the answer-books.

17. It is thus now well settled that a provision barring inspection or disclosure of the answer-books or re-evaluation of the answer-books and restricting the remedy of the candidates only to re-totalling is valid and binding on the examinee. In the case of CBSE, the provisions barring re-evaluation and inspection contained in Bye-law No.61, are akin to Rule 104 considered in *Maharashtra State Board*. As a consequence if an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in

totaling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the examinee, as a citizen to seek access to the answer books, as information.

18. In these cases, the High Court has rightly denied the prayer for re-evaluation of answer-books sought by the candidates in view of the bar contained in the rules and regulations of the examining bodies. It is also not a relief available under the RTI Act. Therefore the question whether re-evaluation should be permitted or not, does not arise for our consideration. What arises for consideration is the question whether the examinee is entitled to inspect his evaluated answer-books or take certified copies thereof. This right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer-books as 'information' and inspect them and take certified copies thereof. Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations. Therefore, the decision of this Court in *Maharashtra State Board* (supra) and the subsequent decisions following the same, will not affect or interfere with the right of the examinee seeking inspection of answer-books or taking certified copies thereof.

Re : Question (iii)

19. Section 8(1) enumerates the categories of information which are exempted from disclosure under the provisions of the RTI Act. The examining bodies rely upon clause (e) of section 8(1) which provides that there shall be no obligation on any public authority to give any citizen, information available to it in its fiduciary relationship. This exemption is subject to the condition that if the competent authority (as defined in section 2(e) of RTI Act) is satisfied that the larger public interest warrants the disclosure of such information, the information will have to be disclosed. Therefore the question is whether the examining body holds the evaluated answer-books in its fiduciary relationship.

20. The term 'fiduciary' and 'fiduciary relationship' refer to different capacities and relationship, involving a common duty or obligation.

(20.1) *Black's Law Dictionary* (7th Edition, Page 640) defines 'fiduciary relationship' thus:

> "A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships – such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client – require the highest duty of care. Fiduciary relationships usually arise in one of four situations : (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer."

(20.2) The *American Restatements* (Trusts and Agency) define 'fiduciary' as one whose intention is to act for the benefit of another as to matters relevant to the relation between them. The *Corpus Juris Secundum* (Vol. 36A page 381) attempts to define *fiduciary* thus :

> "A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman, law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.
>
> The word 'fiduciary,' as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust, or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note."

(20.3) *Words and Phrases, Permanent Edition* (Vol. 16A, Page 41) defines '*fiducial relation'* thus :

> "There is a technical distinction between a 'fiducial relation' which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and 'confidential relation' which includes the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.
>
> Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

(20.4) In *Bristol and West Building Society vs. Mothew* [1998 Ch. 1] the term *fiduciary* was defined thus :

> "A *fiduciary* is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty….. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

(20.5) In *Wolf vs. Superior Court* [2003 (107) California Appeals, 4th 25] the California Court of Appeals defined *fiduciary relationship* as under :

> "any relationship existing between the parties to the transaction where one of the parties is duty bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating

to the interests of the other party without the latter's knowledge and consent."

21. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term '*fiduciary relationship'* is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are : a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.

22. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference

to students who participate in an examination, as a government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words 'information available to a person in his fiduciary relationship' are used in section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary – a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically/infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a share-holder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body.

23. The duty of examining bodies is to subject the candidates who have completed a course of study or a period of training in accordance with its curricula, to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed the course of study or training. Other specialized Examining Bodies may simply subject candidates to a process of verification by an examination, to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good

and in public interest. This Court has explained the role of an examining body in regard to the process of holding examination in the context of examining whether it amounts to 'service' to a consumer, in *Bihar School Examination Board vs. Suresh Prasad Sinha* – (2009) 8 SCC 483, in the following manner:

> "The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its "services" to any candidate. Nor does a student who participates in the examination conducted by the Board, hires or avails of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-a-vis other examinees. The process is not therefore availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination……. The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-books or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service-provider for a consideration, nor convert the examinee into a consumer ……."

It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body.

24. We may next consider whether an examining body would be entitled to claim exemption under section 8(1)(e) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee. That section provides that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen *information available to a person in his fiduciary relationship*. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself. One of the duties of the fiduciary is to make thorough disclosure of all relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer-books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer-books to anyone else. If A entrusts a document or an article to B to be processed, on completion of processing, B is not expected to give the document or article to anyone else but is bound to give the same to A who entrusted the document or article to B for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer-book, section 8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer-book, seeking inspection or disclosure of it.

25. An evaluated answer book of an examinee is a combination of two different 'informations'. The first is the answers written by the examinee and second is the marks/

assessment by the examiner. When an examinee seeks inspection of his evaluated answer-books or seeks a certified copy of the evaluated answer-book, the information sought by him is not really the answers he has written in the answer-books (which he already knows), nor the total marks assigned for the answers (which has been declared). What he really seeks is the information relating to the break-up of marks, that is, the specific marks assigned to each of his answers. When an examinee seeks 'information' by inspection/certified copies of his answer-books, he knows the contents thereof being the author thereof. When an examinee is permitted to examine an answer-book or obtain a certified copy, the examining body is not really giving him some information which is held by it in trust or confidence, but is only giving him an opportunity to read what he had written at the time of examination or to have a copy of his answers. Therefore, in furnishing the copy of an answer-book, there is no question of breach of confidentiality, privacy, secrecy or trust. The real issue therefore is not in regard to the answer-book but in regard to the marks awarded on evaluation of the answer-book. Even here the total marks given to the examinee in regard to his answer-book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is how many marks were given by the examiner to each of his answers so that he can assess how is performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the answer book but in regard to the evaluation by the examiner.

26. This takes us to the crucial issue of evaluation by the examiner. The examining body engages or employs hundreds of examiners to do the evaluation of thousands of answer books. The question is whether the information relating to the 'evaluation' (that is assigning of marks) is held by the examining body in a fiduciary relationship. The examining bodies contend that even if fiduciary relationship does not exist with reference

to the examinee, it exists with reference to the examiner who evaluates the answer-books. On a careful examination we find that this contention has no merit. The examining body entrusts the answer-books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer-book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer-books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words the examining body is the 'principal' and the examiner is the agent entrusted with the work, that is, evaluation of answer-books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copy-right or proprietary right, or confidentiality right in regard to the evaluation. Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.

27. We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption under section 8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees.

Re : Question (iv)

28. When an examining body engages the services of an examiner to evaluate the answer-books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that his name and particulars would not be disclosed to the candidates whose answer-books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator, and head-examiner who deal with the answer book. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore exempted from disclosure under section 8(1)(g) of RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer-books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer-book which does not contain any information or signature of the examiners/co-ordinators/scrutinisers/head examiners, exempted from disclosure under section 8(1)(g) of RTI Act. Those portions of the answer-books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer-books, under section 10 of RTI Act.

29. The right to access information does not extend beyond the period during which the examining body is expected to retain the answer-books. In the case of CBSE, the answer-books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/ destroyed. Some other examining bodies are required to keep the answer-books for a period of six months. The fact that right to information is available in regard to answer-books does not mean that answer-books will have to be maintained for any longer period than required under the rules and regulations of the public authority. The obligation under the RTI Act is to make available or give access to *existing information* or information which is expected to be preserved or maintained. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority. For example, with reference to answer-books, if an examinee makes an application to CBSE for inspection or grant of certified copies beyond three months (or six months or such other period prescribed for preservation of the records in regard to other examining bodies) from the date of declaration of results, the application could be rejected on the ground that such information is not available. The power of the Information Commission under section 19(8) of the RTI Act to require a public authority to take any such steps as may be necessary *to secure compliance with the provision of the Act,* does not include a power to direct the *public authority* to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority.

30. On behalf of the respondents/examinees, it was contended that having regard to sub-section (3) of section 8 of RTI Act, there is an implied duty on the part of every public authority to maintain the information for a minimum period of twenty years and make it available whenever an application was

made in that behalf. This contention is based on a complete misreading and misunderstanding of section 8(3). The said sub-section nowhere provides that records or information have to be maintained for a period of twenty years. The period for which any particular records or information has to be maintained would depend upon the relevant statutory rule or regulation of the public authority relating to the preservation of records. Section 8(3) provides that information relating to any occurrence, event or matters which has taken place and occurred or happened *twenty years before the date* on which any request is made under section 6, shall be provided to any person making a request. This means that where any information required to be maintained and preserved for a period beyond twenty years under the rules of the public authority, is exempted from disclosure under any of the provisions of section 8(1) of RTI Act, then, notwithstanding such exemption, access to such information shall have to be provided by disclosure thereof, after a period of twenty years except where they relate to information falling under clauses (a), (c) and (i) of section 8(1). In other words, section 8(3) provides that any protection against disclosure that may be available, under clauses (b), (d) to (h) and (j) of section 8(1) will cease to be available after twenty years in regard to records which are required to be preserved for more than twenty years. Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, section 8(3) will not prevent destruction in accordance with the Rules. Section 8(3) of RTI Act is not therefore a provision requiring all 'information' to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority.

31. The effect of the provisions and scheme of the RTI Act is to divide 'information' into the three categories. They are :

(i) Information which promotes *transparency and accountability* in the working of every public authority, disclosure of which may also help in containing or discouraging corruption (enumerated in clauses (b) and (c) of section 4(1) of RTI Act).

(ii) Other information held by public authority (that is all information other than those falling under clauses (b) and (c) of section 4(1) of RTI Act).

(iii) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.

Information under the third category does not fall within the scope of RTI Act. Section 3 of RTI Act gives every citizen, the right to 'information' held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon public authorities to *suo moto publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access them by having recourse to section 6 of RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category.

32. The information falling under the first category, enumerated in sections 4(1)(b) & (c) of RTI Act are extracted below :

"**4. Obligations of public authorities**.-(1) Every public authority shall—

(a) xxxxxx

(b) publish within one hundred and twenty days from the enactment of this Act,—

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the *procedure followed in the decision making process, including channels of supervision and accountability;*

(iv) *the norms set by it for the discharge of its functions;*

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency,

indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorisations granted by it;

(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers;

(xvii) such other information as may be prescribed; and thereafter update these publications every year;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(emphasis supplied)

Sub-sections (2), (3) and (4) of section 4 relating to dissemination of information enumerated in sections 4(1)(b) & (c) are extracted below:

"(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) *to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.*

(3) For the *purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.*

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority."

(emphasis supplied)

33. Some High Courts have held that section 8 of RTI Act is in the nature of an exception to section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that therefore section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The preamble to the Act specifically states that the

object of the Act is to harmonise these two conflicting interests. While sections 3 and 4 seek to achieve the first objective, sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore when section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

34. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act that is section 8 of Freedom to Information Act, 2002. The Courts and Information Commissions enforcing the provisions of RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting section 8 and the other provisions of the Act.

35. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of section 3 and the definitions of 'information' and 'right to information' under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the

Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

36. Section 19(8) of RTI Act has entrusted the Central/ State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act. Sub-clause (i) empowers a Commission to require the public authority to provide access to information if so requested in a particular 'form' (that is either as a document, micro film, compact disc, pendrive, etc.). This is to secure compliance with section 7(9) of the Act. Sub-clause (ii) empowers a Commission to require the public authority to appoint a Central Public Information Officer or State Public Information Officer. This is to secure compliance with section 5 of the Act. Sub-clause (iii) empowers the Commission to require a public authority to publish certain information or categories of information. This is to secure compliance with section 4(1) and (2) of RTI Act. Sub-clause (iv) empowers a Commission to require a public authority to make necessary changes to its practices relating to the maintenance, management and destruction of the records. This is to secure compliance with clause (a) of section 4(1) of the Act. Sub-clause (v) empowers a Commission to require the public authority to increase the

training for its officials on the right to information. This is to secure compliance with sections 5, 6 and 7 of the Act. Sub-clause (vi) empowers a Commission to require the public authority to provide annual reports in regard to the compliance with clause (b) of section 4(1). This is to ensure compliance with the provisions of clause (b) of section 4(1) of the Act. The power under section 19(8) of the Act however does not extend to requiring a public authority to take any steps which are not required or contemplated to secure compliance with the provisions of the Act or to issue directions beyond the provisions of the Act. The power under section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act, in particular ensure that every public authority maintains its records duly catalogued and indexed in the manner and in the form which facilitates the right to information and ensure that the records are computerized, as required under clause (a) of section 4(1) of the Act; and to ensure that the information enumerated in clauses (b) and (c) of sections 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub-sections (3) and (4) of section 4 of the Act. If the 'information' enumerated in clause (b) of section 4(1) of the Act are effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act.

37. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information,(that is information other than those enumerated in section 4(1)(b)

and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties.

Conclusion

38. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act and the safeguards and conditions subject to which 'information' should be furnished. The appeals are disposed of accordingly.

N.J. Appeals disposed of.

STATE OF TAMIL NADU & ORS.
v.
K. SHYAM SUNDER & ORS.
(Civil Appeal Nos.6015-6027 of 2011)

AUGUST 9, 2011

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

Tamil Nadu Uniform System of School Education Act, 2010:

Object of its enactment – Held: To enforce the uniform education system in the State of Tamil Nadu in order to impart quality education to all children, without any discrimination on the ground of their economic, social or cultural background.

s.3 (amended by Act 2011) – Validity of – The Act 2010 was enacted to enforce the uniform education system in the State of Tamil Nadu and was held constitutionally valid by High Court and Supreme Court – After change of State Government, tenders invited for publishing text books taught under the old system and subsequent thereto, it was decided in the Cabinet meeting not to implement the uniform education system – The new Government amended the Act 2010 by the Amendment Act 2011 – Held: Whole exercise of amending the Act 2010 was carried out most hurriedly – The entire exercise by the Government was arbitrary, discriminatory and oppressive to students, teachers and parents – One crore twenty lacs students could not be expected to revert back to the syllabus and textbooks applicable prior to 2010 after the academic term of 2011-12 has begun as they would be utterly confused and would be put to enormous stress – State Government should have acted bearing in mind that "destiny of a nation rests with its

youths" – Tamil Nadu Uniform System of School Education (Amendment) Act, 2011.

s.18 – Scope of – Discussed.

TAMIL NADU UNIFORM SYSTEM OF SCHOOL EDUCATION (AMENDMENT) ACT, 2011:

Validity of the Act – Held: Not valid – High Court as well as the Supreme Court had upheld the validity of the Act 2010 – The Amendment Act nullified the effect of the judgment of the High Court approved by Supreme Court and repealed the Act 2010 – Passing the Act 2011, amounted to nullify the effect of the High Court and Supreme Court's judgments and such an act simply tantamounted to subversive of law – Thus, the Amendment Act was an arbitrary piece of legislation and violative of Article 14 and was mere pretence to do away the Uniform System of Education in terms of Act 2010 – s.18 of Act 2010 itself enabled the Government to issue any executive direction to remove any difficulty to enforce the statutory provisions of the Act 2010 – Thus, it was not permissible for the legislature to annul the effect of the said judgments by the Amendment Act 2011 – Tamil Nadu Uniform System of School Education Act, 2010 – Constitution of India, 1950 – Article 14.

ADMINISTRATIVE LAW:

Change of policy with the change of Government – Propriety – Held: The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing – Unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power – The principles of governance have to be tested on the touchstone of justice, equity, fair play – In the instant case, Uniform Education system was brought in

terms of the Act 2010 – Change of government – Before the first Cabinet meeting of the new Government, tenders invited to publish the books under the old education system – This would show that there was a pre-determined political decision to scrap the Act 2010 which was arbitrary and oppressive to students, teachers and parents – Tamil Nadu Uniform System of School Education (Amendment) Act, 2011.

Colourable legislation – Held: When power is exercised in bad faith to attain ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal, it is called colourable exercise of power – The action becomes bad where the true object is to reach an end different from the one for which the power is entrusted, guided by an extraneous consideration, whether good or bad but irrelevant to the entrustment – If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant – On the other hand, if the legislature lacks competence, the question of motive does not arrive at all – Therefore, whether a statute is constitutional or not is, thus, always a question of power of the legislature to enact that Statute – Legislation.

Expert body's opinion – Scope of interference by court – Held: Courts lack expertise especially in disputes relating to policies of pure academic educational matters – Therefore, generally it should abide by the opinion of the Expert Body – Normally the courts should be slow to interfere with the opinions expressed by the experts – It would normally be wise and safe for the courts to leave such decisions to experts who are more familiar with the problems they face than the courts generally can be.

State action – Arbitrariness in – Held: Whenever there is arbitrariness in State action, whether it be of the legislature or of the executive, Article 14 of the Constitution immediately springs into action and strikes down such State action.

CONSTITUTION OF INDIA, 1950:

Article 13(2) – Held: Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part-III of the Constitution and provides that any law made in contravention of this Clause shall, to the extent of contravention be void – The legislative competence can be adjudged with reference to Articles 245 and 246 of the Constitution read with the three lists given in the Seventh Schedule as well as with reference to Article 13(2) – The effect of the declaration of a statute as unconstitutional amounts to as if it has never been in existence – Rights cannot be built up under it; contracts which depend upon it for their consideration are void – The unconstitutional act is not the law – It confers no right and imposes no duties.

Article 21-A – Right to education – Held: Is a fundamental right u/Article 21-A – The right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background – Education.

DOCTRINES/PRINCIPLES:

Doctrine of lifting veil – Held: In order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act – Thus, courts may examine with some strictness the substance of the legislation and for that purpose, the court has to look behind the form and appearance thereof to discover the true character and nature of the legislation – Its purport and intent have to be determined – In order to do so it is permissible in law to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the

legislature resolved to cure and the true reason for the remedy.

What cannot be done directly, cannot be done indirectly – Held: It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud" – An authority cannot be permitted to evade a law by "shift or contrivance" – Maxim.

EDUCATION/EDUCATIONAL INSTITUTIONS:

Uniform Education system – Historical background for implementation of – Discussed.

LEGISLATION:

Conditional legislation – Held: In case the legislature wants to delegate its power in respect of the implementation of the law enacted by it, it must provide sufficient guidelines, conditions, on fulfillment of which, the Act would be enforced by the delegate – Conferring unfettered, uncanalised powers without laying down certain norms for enforcement of the Act tantamounts to abdication of legislative power by the legislature which is not permissible in law – More so, where the Act has already come into force, such a power cannot be exercised just to nullify its commencement thereof – Administrative law.

Amending Act, if struck down whether old law would revive – Held: Where the Amendment Act is struck down by the court being invalid, on the ground of arbitrariness in view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part-III of the Constitution, such Act can be described as void ab-initio – In such a situation, the Act which stood repealed, stands revived

automatically – This proposition of law is, however, not applicable so far as subordinate legislation is concerned – Constitution of India, 1950 – Article 13(2).

Bringing a legislation in order to nullify the judgment of a competent court – Held: Would amount to trenching upon the judicial power and no legislation is permissible which is meant to set aside the result of the mandamus issued by a court even though, the amending statute may not mention such an objection – The rights embodied in a judgment could not be taken away by the legislature indirectly – The legislature cannot by bare declaration, without anything more, directly overrule, reverse or override a judicial decision – However it can, in exercise of the plenary powers conferred upon it by Articles 245 and 246 of the Constitution, render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision is based – The legislature, in order to revalidate the law, can re-frame the conditions existing prior to the judgment on the basis of which certain statutory provisions had been declared ultra vires and unconstitutional – Judgment.

INTERPRETATION OF STATUTES:

Reading of statement of Objects and Reasons while interpreting statute – Held: The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy – The Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of the particular Act or even for judging the reasonableness of the classifications made by such Act.

JUDGMENT/ORDER:

Nullifying the judgment of a competent court by bringing a legislation – Permissibility – Held: A judicial pronouncement of a competent court cannot be annulled by the legislature in exercise of its legislative powers for any reason whatsoever.

In the State of Tamil Nadu, there were different Boards. Each Board had its own syllabus and prescribed different types of textbooks. This resulted in disparity in standard of education. In order to remove the disparity, State Government appointed Committee for suggesting a uniform system of school education. During the intervening period, the Right of Children to Free and Compulsory Education Act, 2009 was enacted.

The Cabinet of the State Government decided on 29.8.2009 to implement uniform system of school education. To give effect to the decision of the Cabinet, the Tamil Nadu Uniform System of School Education Act, 2010 was enacted. Section 3 of the Act 2010 provided that the Act would commence: in Standards I & VI from the academic year 2010-11; and in Standards II to V and VII to X from the academic year 2011-12. Sub-section(2) thereof required every school in the State to follow the norms fixed by the Board for giving instruction in each subject and follow the norms for conducting examination as may be specified by the Board. The Board approved the curriculum and textbooks for Standards I and VI on 22.3.2010 and the books were printed.

Several writ petitions came to be filed challenging the validity of 2010 Act. The High Court by judgment dated 30.4.2010 held that the provisions of Sections 11, 12 and 14 of the Act 2010 were unconstitutional and struck down the same and issued elaborate directions for implementation of the common syllabus and the textbooks for Standards I and VI by the academic year

2010-11; and for all other Standards by the academic year 2011-12 or until the State made the norms and the syllabus and prepared the textbooks in advance for the same. Further directions were issued by the Court to the State Government to bring the provisions of the Act 2010 in consonance with the Act 2009 and notify the Academic Authority and the State Advisory Council under the Act 2009. The State was also directed to indicate approved textbooks from which private unaided schools could choose those which are suitable for their schools. The Court further directed the Government to amend the Act, to say that the common/uniform syllabus was restricted to curricular subjects which the schools were bound to follow, but not in respect of the co-curricular subjects.

The judgment of the High Court was duly approved by the Supreme Court by order dated 10.9.2010. The Board approved the syllabus for uniform system. However, on 16.5.2011, there was change of the State Government. The new Government amended the Act 2010 by the Amendment Act 2011, by which it substituted Section 3 by a new Section providing that the schools would follow the common syllabus as may be specified by the Board for each subject in Standards I to X from such academic year as may be notified by the Government in the official Gazette. The amendment also omitted Sections 11, 12 and 14 from the Act 2010 since those Sections were struck down by the High Court as unconstitutional. New academic session was to commence on 1.6.2011 and the Amendment Act 2011 came into force on 7.6.2011.

Several writ petitions were filed challenging the Amendment Act. The High Court by order dated 10.6.2011 stayed the operation of the Amendment Act 2011, but gave liberty to the State Government to conduct a detailed study of the common syllabus and common

textbooks. The said interim order was challenged before the Supreme Court. The Supreme modified the said interim order by order dated 14.6.2011 *inter-alia*, directing that the academic Scheme in force for the Academic year 2010-11 for Standards I and VI would continue to be in force in all respects for the Academic year 2011-12 as well; that each text book and to what extent the amended syllabus would be applicable to every course, should be finally determined by the High Court keeping in view the amended provisions of the Act and its impact; and constitution of a committee of experts, which the State Government had already undertaken to appoint, to examine ways and means for implementing the uniform education system, common syllabus, and the textbooks which were to be provided for Standards II to V and VII to X under the Act 2010.

The Expert Committee was constituted and gave its report to the High Court. The High Court considered the said report by judgment dated 18.7.2011, found fault with the report of the Expert Committee and struck down Section 3 of Amendment Act 2011. It held that the Committee so constituted may not be justified in submitting the report stating that the entire uniform system of education be scrapped and the text books already provided for be discarded; that the Expert Committee has mis-directed itself as it ought to have proceeded primarily to examine the ways and means of implementing the uniform system of education, curiously the Committee, in its final report concluded that no text book can be used for the academic year 2011-12; that the Committee members were not of the unanimous opinion that the uniform syllabus and common text books have to be discarded from the current year; that in the order dated 10.6.2011, the High Court had directed the Government to notify the approved text books after

conducting the study with a view to comply with the direction issued earlier on 30.4.2010. This direction was issued to enable the schools to choose from the multiple text books. However, these orders and directions were discarded by the State; that the State had exceeded its power in bringing the Amending Act to postpone an enactment which has already come into force. As there was a sudden change in the policy of the Government from its predecessor immediately after coming into power the Court had to see the impact of the amendment, notwithstanding the competence of the legislature to pass an Amendment Act; that if the law was passed only ostensibly but was in truth and substance, one for accomplishing an unauthorized object, the court would be entitled to lift the veil and judicially review the case; that the State has sought to achieve indirectly what could not be achieved directly as it was prevented from doing so in view of the judgment of the Division Bench which upheld the validity of the Parent Act 2010; that the Amendment Act 2011 is an arbitrary piece of legislation and violative of Article 14 of the Constitution and the Amendment Act 2011 was merely a pretence to do away with the uniform system of education under the guise of putting on hold the implementation of the Parent Act, which the State was not empowered to do so; that if the impugned Amending Act has to be given effect to, it would result in unsettling various issues and the larger interest of children would be jeopardized. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1.1. In post-Constitutional era, an attempt has been made to create an egalitarian society removing disparity amongst individuals, and in order to achieve that purpose, education is one of the most important and

effective means. After independence, there has been an earnest effort to bring education out of commercialism/ mercantilism. In the year 1951, the Secondary School Commission was constituted as per the recommendation of Central Advisory Board of Education and an idea was mooted by the Government to prepare textbooks and a common syllabus in education for all students. In 1964-1966, the report on National Education Policy was submitted by the Kothari Commission providing for common schools suggesting that public funded schools be opened for all children irrespective of caste, creed, community, religion, economic conditions or social status. Quality of education imparted to a child should not depend on wealth or class. Tuition fee should not be charged from any child, as it would meet the expectations of parents with average income and they would be able to send their children to such schools. The recommendations by the Kothari Commission were accepted and reiterated by the Yashpal Committee in the year 1991. It was in this backdrop that in Tamil Nadu, there has been a demand from the public at large to bring about a common education system for all children. In the year 2006, in view of the struggle and campaign and constant public pressure, the Committee under the Chairmanship of Dr. S. Muthukumaran, former Vice-Chancellor of Bharathidasan University was appointed which recommended to introduce a common education system after abolishing the four different Boards which was then in existence in the State. Subsequent thereto, the Committee constituted of Shri M.P. Vijayakumar, IAS was appointed to look into the recommendations of Dr. S. Muthukumaran Committee which also submitted its recommendations to the Government to implement a common education system upto Xth standard. [Para 6] [1138-D-H; 1139-A-C]

1.2. The right to education is a Fundamental Right

under Article 21-A inserted by the 86th amendment of the Constitution. Even before the said amendment, this Court has treated the right to education as a fundamental right. There has been a campaign that right to education under Article 21-A of Indian Constitution be read in conformity with Articles 14 and 15 of the Constitution and there must be no discrimination in quality of education. Thus, a common syllabus and a common curriculum is required. The right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background. The propagators of this campaign canvassed that uniform education system would achieve the code of common culture, removal of disparity, depletion of discriminatory values in human relations. It would enhance the virtues and improve the quality of human life, elevate the thoughts which advance our constitutional philosophy of equal society. In future, it may prove to be a basic preparation for uniform civil code as it may help in diminishing opportunities to those who foment fanatic and fissiparous tendencies. [Para 7] [1139-D-H; 1140-A-C]

Miss Mohini Jain v. State of Karnataka & Ors. **AIR 1992 SC 1858: 1992 (3) SCR 658;** *Unni Krishnan, J.P. & Ors. etc. etc. v. State of A.P & Ors. Etc.* **AIR 1993 SC 2178: 1993 (1) SCR 594;** *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.* **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587;** *Rohit Singhal & Ors. v. Principal, Jawahar N. Vidyalaya & Ors.* **AIR 2003 SC 2088: 2002 (5) Suppl. SCR 515;** *State of Orissa v. Mamta Mohanty* **(2011) 3 SCC 436;** *Osmania University Teachers' Assn. v. State of A.P. & Anr.* **AIR 1987 SC 2034. – relied on.**

Brown v. Board of Education, **347 U.S. 483 (1954);** *Plessy v. Ferguson* **163 U.S. 537 (1896) – referred to.**

2. The legal issues involved in the instant case are:

I <u>CHANGE OF POLICY WITH THE CHANGE OF GOVERNMENT:</u>

The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The principles of governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate. Unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law. [Paras 16, 20] [1145-G-H; 1147-C]

Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc. **AIR 2003 SC 2562;** *State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors.* **AIR 2006 SC 1846;** *State of U.P. & Anr. v. Johri Mal* **AIR 2004 SC 3800;** *State of Haryana v. State of Punjab & Anr.* **AIR 2002 SC 685;** *M.I. Builders Pvt. Ltd. v. V. Radhey Shyam Sahu & Ors.* **AIR 1999 SC 2468 – relied on.**

II. <u>COLOURABLE LEGISLATIONS:</u>

When power is exercised in bad faith to attain ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal, it is called colourable exercise of power. The action becomes bad where the true object is to reach an end different from the one for which the power is entrusted, guided by an

extraneous consideration, whether good or bad but irrelevant to the entrustment. When the custodian of power is influenced in exercise of its power by considerations outside those for promotion of which the power is vested, the action becomes bad for the reason that power has not been exercised bonafide for the end design. The doctrine of malafide does not involve any question of bonafide or malafide on the part of legislature as in such a case, the Court is concerned to a limited issue of competence of the particular legislature to enact a particular law. If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant. On the other hand, if the legislature lacks competence, the question of motive does not arrive at all. Therefore, whether a statute is constitutional or not is, thus, always a question of power of the legislature to enact that Statute. [Paras 21, 22] [1147-E-H; 1148-A]

The State of Punjab & Anr. v. Gurdial Singh & Ors. **AIR 1980 SC 319;** *K.C. Gajapati Narayan Deo & Ors. v. State of Orissa* **AIR 1953 SC 375: 1954 SCR 1;** *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited & Anr.* **AIR 1977 SC 2279:1978 (1) SCR 338;** *K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr.* **AIR 1985 SC 551: 1985 (2) SCR 579;** *Welfare Assocn. A.R.P., Maharashtra & Anr. v. Ranjit P. Gohil & Ors.* **AIR 2003 SC 1266: 2003 (2) SCR 139;** *State of Kerala & Anr. v. Peoples Union for Civil Liberties, Kerala State Unit & Ors.* **(2009) 8 SCC 46: 2009 (11) SCR 142 – relied on.**

III. <u>LAWS CONTRAVENING ARTICLE 13(2):</u>

The legislative competence can be adjudged with reference to Articles 245 and 246 of the Constitution read with the three lists given in the Seventh Schedule as well as with reference to Article 13(2) of the Constitution which prohibits the State from making any law which

takes away or abridges the rights conferred by Part-III of the Constitution and provides that any law made in contravention of this Clause shall, to the extent of contravention be void. The effect of the declaration of a statute as unconstitutional amounts to as if it has never been in existence. Rights cannot be built up under it; contracts which depend upon it for their consideration are void. The unconstitutional act is not the law. It confers no right and imposes no duties. More so, it does not uphold any protection nor create any office. In legal contemplation it remains not operative as it has never been passed. In case the statute had been declared unconstitutional, the effect being just to ignore or disregard. [Pars 23, 25] [1148-F-G; 1150-A-D]

Deep Chand & Ors. v. State of U.P. & Ors. **AIR 1959 SC 648: 1959 Suppl. SCR 8;** *Mohd. Shaukat Hussain Khan v. State of A.P.* **AIR 1974 SC 1480: 1978 (1) SCR 338;** *Behram Khurshid Pesikaka v. State of Bombay* **AIR 1955 SC 123: 1955 SCR 613;** *Mahendra Lal Jaini v. State of Uttar Pradesh & Ors.* **AIR 1963 SC 1019: 1963 Suppl. SCR 912 – relied on.**

IV. <u>DOCTRINE OF LIFTING THE VEIL:</u>

In order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act. Thus, courts may examine with some strictness the substance of the legislation and for that purpose, the court has to look behind the form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent have to be determined. In order to do so it is permissible in law to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease

which the legislature resolved to cure and the true reason for the remedy. [Para 26] [1150-E-G]

Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. & Ors. **AIR 1954 SC 119: 1954 SCR 674;** *Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & Ors.* **AIR 1959 SC 942: 1959 Suppl. SCR 503;** *Hamdard Dawakhana & Anr. v. Union of India & Ors.* **AIR 1960 SC 554:1960 SCR 671 – relied on.**

V. INTERFERENCE BY COURT WITH EXPERT BODY'S OPINION:

Undoubtedly, the Court lacks expertise especially in disputes relating to policies of pure academic educational matters. Therefore, generally it should abide by the opinion of the Expert Body. Normally the courts should be slow to interfere with the opinions expressed by the experts. It would normally be wise and safe for the courts to leave such decisions to experts who are more familiar with the problems they face than the courts generally can be. [para 27] [1157-B-C]

The University of Mysore & Anr. v. C.D. Govinda Rao & Anr. **AIR 1965 SC 491: 1964 SCR 576;** *Km. Neelima Misra v. Dr. Harinder Kaur Paintal & Ors.* **AIR 1990 SC 1402: 1990 (2) SCR 84;** *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.* **AIR 2010 SC 1285: 2010 (3) SCR 190;** *Dr. Basavaiah v. Dr. H.L. Ramesh & Ors.* **(2010) 8 SCC 372: 2010 (9) SCR 227;** *State of H.P. & Ors. v. H.P. Nizi Vyavsayik Prishikshan Kendra Sangh* **(2011) 6 SCC 597 – relied on.**

VI. WHAT CANNOT BE DONE DIRECTLY-CANNOT BE DONE INDIRECTLY:

It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely,

meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "*quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud.*" An authority cannot be permitted to evade a law by "shift or contrivance". [Para 28] [1151-F]

Jagir Singh v. Ranbir Singh **AIR 1979 SC 381: 1979 (2) SCR 282;** *M.C. Mehta v. Kamal Nath & Ors.* **AIR 2000 SC 1997: 2000 (1) Suppl. SCR 389;** *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.* **JT 2010 (11) SC 273 – relied on.**

VII. CONDITIONAL LEGISLATION:

As the legislature cannot carry out each and every function by itself, it may be necessary to delegate its power for certain limited purposes in favour of the executive. Delegating such powers itself is a legislative function. Such delegation of power, however, cannot be wide, uncanalised or unguided. The legislature while delegating such power is required to lay down the criteria or standard so as to enable the delegatee to act within the framework of the statute. The principle on which the power of the legislature is to be exercised is required to be disclosed. It is also trite that essential legislative functions cannot be delegated. Delegation cannot be extended to "repealing or altering in essential particulars of laws which are already in force in the area in question". The legislature while delegating such powers has to specify that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation. While doing so, the legislature must retain in its own hands the essential legislative functions and what can be delegated, is the task of subordinate legislation necessary for

implementing the purpose and object of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on consideration of the provisions of the particular Act with which the Court has to deal including its preamble. In case the legislature wants to delegate its power in respect of the implementation of the law enacted by it, it must provide sufficient guidelines, conditions, on fulfillment of which, the Act would be enforced by the delegatee. Conferring unfettered, uncanalised powers without laying down certain norms for enforcement of the Act tantamounts to abdication of legislative power by the legislature which is not permissible in law. More so, where the Act has already come into force, such a power cannot be exercised just to nullify its commencement thereof. [Paras 29, 30, 34] [1151-H; 1152-A-G; 1154-C-D]

re: Article 143, Constitution of India and Delhi Laws Act ***(1912) etc.,*** **AIR 1951 SC 332: 1951 SCR 747;** *The Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.* **AIR 1968 SC 1232: 1968 SCR 251;***Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr.* **AIR 1954 SC 569: 1955 SCR 290;** *Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore v. Corporation of the City of Bangalore by its Commissioner, Bangalore City* **AIR 1962 SC 1263: 1961 SCR 698;** *Hamdard Dawakhana v. Union of India* **AIR 1960 SC 554: 1960 SCR 671;** *Basant Kumar Sarkar & Ors. v. The Eagle Rolling Mills Ltd. & Ors.* **AIR 1964 SC 1260: 1964 SCR 913 – relied on.**

VIII. <u>LEGISLATIVE ARBITRARINESS:</u>

Whenever there is arbitrariness in State action, whether it be of the legislature or of the executive, Article

14 immediately springs into action and strikes down such State action. [Para 35] [1154-E-F]

Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors. **AIR 1981 SC 487: 1981 (2) SCR 79;** *E.P. Royappa v. State of Tamil Nadu & Anr.* **AIR 1974 SC 555: 1974 (2) SCR 348;** *Smt. Meneka Gandhi v. Union of India & Anr.* **AIR 1978 SC 597: 1978 (2) SCR 621;** *M/s. Sharma Transport rep. by D.P. Sharma v. Government of A.P. & Ors.* **AIR 2002 SC 322: 2001 (5) Suppl. SCR 390;** *Bombay Dyeing & Manufacturing Co. Ltd. (3) v. Bombay Environmental Action Group & Ors.* **AIR 2006 SC 1489: 2006 (2) SCR 920;** *Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board & Ors.* **AIR 2007 SC 2276: 2007 (7) SCR 430;** *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited & Ors.* **AIR 2009 SC 2337: 2009 (3) SCR 668 – relied on.**

IX. <u>AMENDING ACT-IF STRUCK DOWN-WHETHER OLD LAW WILL REVIVE:</u>

When the statute is amended, the process of substitution of statutory provisions consists of two parts:- the old rule is made cease to exist; and the new rule is brought into existence in its place. In other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. There is another limb of this legal proposition, that is, where the Amendment Act is struck down by the Court being invalid, on the ground of arbitrariness in view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part-III of the Constitution, such Act can be described as *void ab-initio* meaning thereby unconstitutional, still born or having no existence at all. In such a situation, the Act which stood repealed, stands revived automatically. In case the Amending Act is struck down by the court for want of legislative competence or is violative of any of the

fundamental rights enshrined in Part III of the Constitution, it would be un-enforceable in view of the provision under Article 13(2) of the Constitution and in such circumstances the old Act would revive, but not otherwise. This proposition of law is, however, not applicable so far as subordinate legislation is concerned. [Paras 40, 42, 43, 45] [1155-G-H; 1156-A-B-F; 1157-B-C-F-G]

Bhagat Ram Sharma v. Union of India & Ors. **AIR 1988 SC 740: 1988 SCR 1034;** *State of Rajasthan v. Mangilal Pindwal* **AIR 1996 SC 2181: 1996 (3) Suppl. SCR 98;** *Koteswar Vittal Kamath v. K.Rangappa Baliga & Co.* **AIR 1969 SC 504: 1969 (3) SCR 40;** *Firm A.T.B. Mehtab Majid and Co. v. State of Madras & Anr.* **AIR 1963 SC 928: 1963 Suppl. SCR 435;** *State of Uttar Pradesh & Ors. v. Hirendra Pal Singh & Ors.* **(2011) 5 SCC 305: 2010 (15) SCR 854;** *Ameer-un-Nissa Begum v. Mahboob Begum & Ors.* **AIR 1955 SC 352;** *B.N. Tewari v. Union of India & Ors.* **AIR 1965 SC 1430: 1965 SCR 421;** *India Tobacco Co. Ltd. v. CTO, Bhavanipore & Ors.* **AIR 1975 SC 155: 1975 (2) SCR 612;** *Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors.* **AIR 1986 SC 515: 1985 (2) SCR 287;** *West U.P. Sugar Mills Assn. v. State of U.P.* **AIR 2002 SC 948: 2002 (1) SCR 897;** *Zile Singh v. State of Haryana & Ors.* **(2004) 8 SCC 1: 2003 (4) Suppl. SCR 1104;** *State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit & Ors.* **(2009) 8 SCC 46: 2008 (12) SCR 1141;** *Harbilas Rai Bansal v. State of Punjab & Anr.* **AIR 1996 SC 857: 1995 (6) Suppl. SCR 178 – relied on.**

X. <u>WHETHER LEGISLATURE CAN OVERRULE THE JUDGMENT OF THE COURT:</u>

Bringing a legislation in order to nullify the judgment of a competent court would amount to trenching upon the judicial power and no legislation is permissible which is meant to set aside the result of the mandamus issued by a court even though, the amending statute may not

mention such an objection. The rights embodied in a judgment could not be taken away by the legislature indirectly. The legislature cannot by bare declaration, without anything more, directly overrule, reverse or override a judicial decision. However it can, in exercise of the plenary powers conferred upon it by Articles 245 and 246 of the Constitution, render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision is based. A judicial pronouncement of a competent court cannot be annulled by the legislature in exercise of its legislative powers for any reason whatsoever. The legislature, in order to revalidate the law, can re-frame the conditions existing prior to the judgment on the basis of which certain statutory provisions had been declared ultra vires and unconstitutional. [Paras 49-51] [1159-F-H; 1160-A-D]

Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors. **AIR 1970 SC 192: 1970 (1) SCR 388 – Followed.**

S.R. Bhagwat & Ors. v. State of Mysore **AIR 1996 SC 188: 1995 (3) Suppl. SCR 545;** *Re, Cauvery Water Disputes Tribunal* **AIR 1992 SC 522: 1991 (2) Suppl. SCR 497;** *G.C. Kanungo v. State of Orissa* **AIR 1995 SC 1655: 1995 (1) Suppl. SCR 510;** *Madan Mohan Pathak & Anr. v. Union of India & Ors.* **AIR 1978 SC 803: 1978 (3) SCR 334;** *K. Sankaran Nair (Dead) through LRs. v. Devaki Amma Malathy Amma & Ors.* **(1996) 11 SCC 428: 1995 (4) Suppl. SCR 493;** *A. Manjula Bhashini & Ors. v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & Anr.* **(2009) 8 SCC 431: 2009 (10) SCR 634 – relied on.**

XI. <u>READING OF THE STATEMENT OF OBJECTS AND REASONS: WHILE INTERPRETING THE STATUTORY PROVISIONS:</u>

The Statement of Objects and Reasons appended to

the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of the particular Act or even for judging the reasonableness of the classifications made by such Act. [Paras 52, 54] [1160-F; 1161-E]

Kavalappara Kottarathil Kochuni @ Moopil Nayar v. The States of Madras and Kerala & Ors. **AIR 1960 SC 1080:** *Tata Power Company Ltd. v. Reliance Energy Ltd. & Ors.* **(2009) 16 SCC 659: 2009 (9) SCR 625 – relied on.**

CASE ON MERITS.

3. In the instant case, as the Expert Committee had submitted a report and most of the members had given their opinion on different issues, it is evident from the same that each member had pointed out certain defects in the curriculum as well as in the text books etc. There was no unanimity on any particular issue, as each member had expressed a different opinion on different issues/subjects. The counter affidavits were filed before the High Court by the Secretary to the Government Education Department labeling the Act 2010 as illegal, irrational and unconstitutional. [Paras 56, 57] [1161-H; 1162-A-B]

3.2. Section 18 of the Act 2010 enables the State Government to remove difficulties, if any, in implementation of the said Act. Therefore, the amendment itself was totally unwarranted. If the State

Government was facing any difficulty, the same could have been removed by issuing a Government order under Section 18 of the Act which conferred all residuary powers on it. The nature of the defect as canvassed by the State counsel was reflected in the pleadings that indicated an undesirable inclusion of certain chapters that did not subserve the purpose of a uniform standard and multicultural educational pattern. The contention was that such material may damagingly divert the mind of the young students towards a motivated attempt of individualistic glorification. In the opinion of the court, if such material did create any adverse impact or was otherwise targeted towards unwanted propaganda without any contribution towards the educational standard sought to be achieved, then such material upon a thorough investigation and deliberation by the Expert Committee could be deleted with the aid of Section 18 of the Act 2010. The State Government while introducing the Amendment Act 2011 did not appropriately focus attention on the provision of Section 18 that was inclusive of all powers that may be required to remove such difficulties. Had the said provision been carefully noted, there would have been no occasion to suspend the implementation of the Act 2010. What could have been done with the help of a needle was unnecessarily attempted by wielding a sword from the blunt side. Not only this the said provision was not even pointed out by the State machinery before the High Court nor did its legal infantry chose to examine the same. The High Court while dealing with the validity of the provisions of the Act 2010, had already conceded liberty to the State Government to remove defects and had on the other hand, struck down the offending provisions in Section 14 thereof empowering the State Government to compel the Education Board to be bound on questions of policy. Thus, the State Government was left with sufficient powers to deal with the nature of defects appropriately

under the said judgment with a statutory power available for that purpose under Section 18 of the Act 2010. Statement of Objects and Reasons given to the Amendment Act 2011 revealed a very sorry state of affairs and pointed out towards the intention of the legislature not to enforce the Act 2010 at all. A perusal of Clause 9 showed the Government intended to introduce a more appropriate system to ensure the improvement of quality education, meaning thereby, that the State had no intention to enforce the uniform education system as provided under the Act 2010. [Paras 60-61] [1169-G; 1165-A-H; 1162-A-C-E]

4. The legislature in its wisdom had enforced the Act 2010 providing for common syllabus and text books for Standards I and VI from the academic year 2010-2011 and for Standards II to V and VII to X from the academic year 2011-2012, the validity of this law was upheld by the High Court by judgment and order dated 30.4.2010 and by this Court by order dated 10.9.2010. Certain directions were issued by the High Court which could be carried out easily by the State exercising its administrative powers without resorting to any legislative function. By the Amendment Act, even the application of Act 2010, so far as Standards I and VI were concerned, was also withdrawn without realising that students who have studied in academic year 2010-11 would have difficulty in the next higher class if they were given a different syllabus and different kind of text books. The Amendment Act 2011 provided that the students in Standards I and VI would also revert back to the old system which had already elapsed. The Amendment Act 2011, in fact, nullified the earlier judgment of the High Court dated 30.4.2010, duly approved by the order of this Court dated 10.9.2010, which tantamounts to repealing of the Act 2010, as unfettered and uncanalised power has been bestowed upon the Government to notify the

commencement of the uniform education system. State Government may submit only to the extent that the High Court itself had given option to the State to implement the Common Education System after ensuring compliance of directions issued by the High Court itself. However, no such liberty was available to the State so far as Standards I and VI were concerned. [Paras 64-65] [1167-G-H; 1168-A-E]

5. After the new Government was sworn in on 16.5.2011, tenders were invited to publish books being taught under the old system on 21.5.2011 and subsequent thereto, it was decided in the Cabinet meeting on 22.5.2011 not to implement the uniform education system. Whole exercise of amending the Act 2010 was carried out most hurriedly. However, proceeding in haste itself cannot be a ground of challenge to the validity of a Statute though proceeding in haste amounts to arbitrariness and in such a fact-situation the administrative order becomes liable to be quashed. The facts revealed that tenders were invited on 21.5.2011 for publishing the text books, taught under the old system even prior to Cabinet meeting dated 22.5.2011. Thus, a decision was already taken not to implement the Common Education System. If one crore twenty lacs students are now to revert back to the multiple syllabus with the syllabus and textbooks applicable prior to 2010 after the academic term of 2011-12 has begun, they would be utterly confused and would be put to enormous stress. Students cannot be put to so much strain and stress unnecessarily. The entire exercise by the Government is therefore arbitrary, discriminatory and oppressive to students, teachers and parents. The State Government should have acted bearing in mind that "destiny of a nation rests with its youth". Personality of a child is developed at the time of basic education during his formative years of life. Their career should not be left in dolorific conditions with uncertainty to such a great

extent. The younger generation has to compete in global market. Education is not a consumer service nor the educational institution can be equated with shops, therefore, "there are statutory prohibitions for establishing and administering educational institution without prior permission or approval by the authority concerned." Thus, the State Government could, by no means be justified in amending the provisions of Section 3 of the Act 2010, particularly in such uncertain terms. Undertaking given by the Advocate General to the High Court that the Act 2010 would be implemented in the academic year 2012-13, cannot be a good reason to hold the Act 2011 valid. [Paras 66-67] [1168-F-H; 1169-A-F]

6. Submissions advanced on behalf of the appellants that it is within the exclusive domain of the legislature to fix the date of commencement of an Act, and court has no competence to interfere in such a matter, is totally misconceived for the reason that the legislature in its wisdom had fixed the dates of commencement of the Act though in a phased manner. The Act commenced into force accordingly. The courts intervened in the matter in peculiar circumstances and passed certain orders in this regard also. The legislature could not wash off the effect of those judgments at all. [Para 68] [1169-G-H; 1170-A]

A.K. Roy v. Union of India & Anr. **AIR 1982 SC 710: 1982 (2) SCR 272;** *Aeltemesh Rein v. Union of India & Ors.* **AIR 1988 SC 1768: 1988 (2) Suppl. SCR 223;** *Union of India v. Shree Gajanan Maharaj Sansthan* **(2002) 5 SCC 44: 2002 (3) SCR 600;** *Common Cause v. Union of India & Ors.* **AIR 2003 SC 4493: 2003 (4) Suppl. SCR 471 – Distinguished.**

7. The Amendment Act 2011, to the extent it applies to enforcement of Act 2010, nullified the judgment of the High Court dated 30.4.2010 duly approved by this Court by order dated 10.9.2010. Thus, the conclusion reached

by the High Court in this regard is upheld. [Para 69] [1170-D]

The summary of the conclusions are:

(i) The Act 2010 was enacted to enforce the uniform education system in the State of Tamil Nadu in order to impart quality education to all children, without any discrimination on the ground of their economic, social or cultural background.

(ii) The Act itself provided for its commencement giving the academic years though, in phased programme i.e. for Standards I to VI from the academic year 2010-2011; and for other Standards from academic year 2011-2012, thus, enforcement was not dependent on any further notification.

(iii) The validity of the Act was challenged by various persons/ institutions and societies, parents of the students, but mainly by private schools organisations, opposing the common education system in the entire State. The writ petitions were dismissed upholding the validity of the Act. However, few provisions, particularly, the provisions of Sections 11, 12 and 14 were struck down by the High Court by judgment and order dated 30.4.2010. The said judgment of the High Court was duly approved by a speaking order of this Court dated 10.9.2010. Certain directions had been given in the said judgment by the High Court which could have been complied with by issuing executive directions. Moreover, directions issued by the High Court could be complied with even by changing the Schedule as provided in the judgment dated 30.4.2010 itself.

(iv) Section 18 of the Act 2010 itself enabled the Government to issue any executive direction to

remove any difficulty to enforce the statutory provisions of the Act 2010. The Act 2010 itself provided for an adequate residuary power with the government to remove any difficulty in enforcement of the Act 2010, by issuing an administrative order.

(v) Justification pleaded by the State that Amendment Act 2011 was brought to avoid contempt proceedings as the directions issued by the High Court could not be complied with, is totally a misconceived idea and not worth acceptance.

(vi) The new government took over on 16.5.2011 and immediately thereafter, the Government received representations from various private schools/ organizations on 17th/18th May, 2011 to scrap the uniform education system. As most of these representations were made by the societies/ organisations who had earlier challenged the validity of the Act 2010 and met their waterloo in the hierarchy of the courts, such representations were, in fact, not even maintainable and, thus could not have been entertained by the Government.

(vii) Before the first Cabinet meeting of the new Government on 22.5.2011, i.e. on 21.5.2011, tenders were invited to publish the books under the old education system. It shows that there had been a pre-determined political decision to scrap the Act 2010. The Cabinet on 22.5.2011 had taken a decision to do away with the Act 2010 and brought the Ordinance for that purpose.

(viii) There was no material before the Government on the basis of which, the decision not to implement the Act 2010 could be taken as admittedly the Expert Committee had not done any exercise of reviewing the syllabus and textbooks till then.

(ix) The validity of the said decision was challenged by parents and teachers and various other organisations before the High Court and interim orders were passed. It was at that stage that the Bill was introduced in the House on 7.6.2011 and the Amendment Act was passed and enforced with retrospective effect i.e. from 22.5.2011, the date of the decision of the Cabinet in this regard.

(x) The interim orders passed by the High Court were challenged before this Court and the appeals were disposed of by this court vide judgment and order dated 14.6.2011, issuing large number of directions including constitution of the Expert Committee which would find out ways and means to enforce the common education system.

(xi) The Secretary of School Education Department had filed affidavits before the High Court as well as before this Court pointing out that the Amendment Act 2011 was necessary in view of the fact that the Act 2010 was illegal and unconstitutional. However, the Secretary of School Education Department was inadvertently made a member of the Expert Committee by this Court. Though her inclusion in the Committee was totally unwarranted particularly in view of her stand taken before the High Court that the Act 2010 was unconstitutional and illegal.

(xii) The Secretary, to the Govt. of Tamil Nadu School Education Department, who had been entrusted the responsibility to plead on behalf of the State, herself had approved the textbooks and fixed the prices for those books of Standards VIIIth, IXth and Xth vide G.O. dated 9.5.2011.

(xiii) The members of the Expert Committee did not

reject the text books and syllabus in toto, however, pointed out certain discrepancies therein and asked for rectification/improvements of the same.

(xiv) The High Court as well as this Court upheld the validity of the Act 2010. Thus, it was not permissible for the legislature to annul the effect of the said judgments by the Amendment Act 2011, particularly so far as the Ist and VIth Standards are concerned. The list of approved textbooks had been published and made known to all concerned. Thus, the Act 2010 stood completely implemented so far these Standards were concerned.

(xv) The Statement of Objects and Reasons of the Act 2011 clearly stipulated that legislature intended to find out a better system of school education. Thus, the object has been to repeal the Act 2010.

(xvi) The legislature is competent to enact the revalidation Act under certain circumstances, where the statutory provisions are struck down by the court, fundamentally altering the conditions on which such a decision is based, but the legislature cannot enact, as has been enacted herein, an invalidation Act, rendering a statute nugatory.

(xvii) The School Education Department of Tamil Nadu on 24.2.2011 called for private publishers to come out with the textbooks based on common education system, and submit for clearance by the Department by 5.4.2011, as taken note of by the High Court in its order dated 10.6.2011. Thus, in such a fact-situation, it was not permissible for the State to revert back to the old system at this advanced stage.

(xviii) Most of the other directions given by the High

Court on 30.4.2010, stood complied with. The DTERT had been appointed as Academic Authority as required under Section 29 of the Act 2009, vide G.O. dated 27.7.2010.

(xix) The material produced by the respondents before this Court reveal that norms had been made known and the NCF 2005 was also implemented by issuing Tamil Nadu Curriculum 2009.

(xx) The issue of repugnancy of the Act 2010 with the Act 2009 merely remains an academic issue as most of the discrepancies stood removed. Even if something remains to be done, it can be cured even now, however, such a minor issue could not be a good ground for putting the Act 2010 under suspended animation for an indefinite period on uncertain terms.

(xxi) Undoubtedly, there had been a few instances of portraying the personality by the leader of political party earlier in power, i.e. personal glorification, self publicity and promotion of his own cult and philosophy, which could build his political image and influence the young students, particularly, in the books of primary classes. Such objectionable material, if any, could be deleted, rather than putting the operation of the Act 2010 in abeyance for indefinite period.

(xxii) As early as in April 2011, textbooks for Xth Standard were posted in the official website of School Education Department and many students downloaded the same and started study of the same as the students, parents and teachers had been under the impression that for Standards II to V and VII to X, common education system would definitely

be implemented from academic year 2011-12. Such pious hope of so many stakeholders could not be betrayed. Rolling back the Act 2010 at this belated stage and withdrawal thereof even for Standard I and VI would be unjust, iniquitous and unfair to all concerned.

(xxiii) The Amendment Act 2011, in fact, has the effect of bringing back the effect of Section 14 of the Act 2010 which had been declared ultra vires by the High Court for the reason that the Board could not be given binding directions by the State Government.

(xxiv) Even if a very few schools could not exercise their choice of multiple text books, it could not be a ground of scrapping the Act 2010. Steps should have been taken to remove the discrepancy.

(xxv) Passing the Act 2011, amounts to nullify the effect of the High Court and this Court's judgments and such an act simply tantamounts to subversive of law. [Para 70] [1170-D-H; 1171-A-H; 1172-A-H; 1173-A-H; 1174-A-H; 1175-E]

Case Law Reference:

1992 (3) SCR 658	**relied on**	**Para 7**
1993 (1) SCR 594	**relied on**	**Para 7**
2002 (3) Suppl. SCR 587	**relied on**	**Para 7**
347 U.S. 483 (1954)	**referred to**	**Para 7**
163 U.S. 537 (1896)	**referred to**	**Para 7**
2002 (5) Suppl. SCR 515	**relied on**	**Para 7**
(2011) 3 SCC 436	**relied on**	**Para 8**
AIR 1987 SC 2034	**relied on**	**Para 8**

AIR 2003 SC 2562	**relied on**	**Para16**
AIR 2006 SC 1846	**relied on**	**Para 17**
AIR 2004 SC 3800	**relied on**	**Para 18**
AIR 2002 SC 685	**relied on**	**Para 18**
AIR 1999 SC 2468	**relied on**	**Para 19**
AIR 1980 SC 319	**relied on**	**Para 21**
1954 SCR 1	**relied on**	**Para 22**
1978 (1) SCR 338	**relied on**	**Para 22**
1985 (2) SCR 579	**relied on**	**Para 22**
2003 (2) SCR 139	**relied on**	**Para 22**
2009 (11) SCR 142	**relied on**	**Para 22**
1959 Suppl. SCR 8	**relied on**	**Para 23**
1978 (1) SCR 338	**relied on**	**Para 24**
1955 SCR 613	**relied on**	**Para 25,43**
1963 Suppl. SCR 912	**relied on**	**Paras 25, 43**
1954 SCR 674	**relied on**	**Para 26**
1959 Suppl. SCR 503	**relied on**	**Para 26**
1960 SCR 671	**relied on**	**Para 26**
1964 SCR 576	**relied on**	**Para 27**
1990 (2) SCR 84	**relied on**	**Para 27**
2010 (3) SCR 190	**relied on**	**Para 27**
2010 (9) SCR 227	**relied on**	**Para 27**
(2011) 6 SCC 597	**relied on**	**Para 27**
1979 (2) SCR 282	**relied on**	**Para 28**

2000 (1) Suppl. SCR 389	**relied on**	**Para 28**
JT 2010 (11) SC 273	**relied on**	**Para 28**
1951 SCR 747	**relied on**	**Paras 29,30,31**
1968 SCR 251	**relied on**	**Para 30**
1955 SCR 290	**relied on**	**Para 32**
1961 SCR 698	**relied on**	**Para 32**
1960 SCR 671	**relied on**	**Para 32**
1964 SCR 913	**relied on**	**Para 33**
1981 (2) SCR 79	**relied on**	**Para 35**
1974 (2) SCR 348	**relied on**	**Para 35**
1978 (2) SCR 621	**relied on**	**Para35**
2001 (5) Suppl. SCR 390	**relied on**	**Para 36**
2006 (2) SCR 920	**relied on**	**Para 37**
2007 (7) SCR 430	**relied on**	**Para 38**
2009 (3) SCR 668	**relied on**	**Para 38**
1988 SCR 1034	**relied on**	**Para 39**
1996 (3) Suppl. SCR 98	**relied on**	**Para 40**
1969 (3) SCR 40	**relied on**	**Para 40**
1963 Suppl. SCR 435	**relied on**	**Paras 41,42**
2010 (15) SCR 854	**relied on**	**Para 42**
AIR 1955 SC 352	**relied on**	**Para 42**
1965 SCR 421	**relied on**	**Para 42**
1975 (2) SCR 612	**relied on**	**Para 42**
1985 (2) SCR 287	**relied on**	**Para 42**

2002 (1) SCR 897	**relied on**	**Para 42**
2003 (4) Suppl. SCR 1104	**relied on**	**Para 42**
2008 (12) SCR 1141	**relied on**	**Para 42**
1995 (6) Suppl. SCR 178	**relied on**	**Para 44**
1970 (1) SCR 388	**Followed**	**Para 46**
1995 (3) Suppl. SCR 545	**relied on**	**Para 47**
1991 (2) Suppl. SCR 497	**relied on**	**Para 48**
1995 (1) Suppl. SCR 510	**relied on**	**Para 48**
1978 (3) SCR 334	**relied on**	**Para 49**
1995 (4) Suppl. SCR 493	**relied on**	**Para 49**
2009 (10) SCR 634	**relied on**	**Paras 50, 53**
AIR 1960 SC 1080	**relied on**	**Para 52**
2009 (9) SCR 625	**relied on**	**Para 52**
1982 (2) SCR 272	**Distinguished**	**Para 68**
1988 (2) Suppl. SCR 223	**Distinguished**	**Para 68**
2002 (3) SCR 600	**Distinguished**	**Para 68**
2003 (4) Suppl. SCR 471	**Distinguished**	**Para 68**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6015-6027 of 2011.

From the Judgment & Order dated 18.7.2011 of the High Court of Judicature at Madras in W.P. No. 12882, 12890, 13019, 13037, 13038, 13227, 13293, 13296, 13345, 13381, 13390, 13547 and 6143 of 2011.

A. Navaneetha Krishnan, AG, TN, Guru Krishna Kumar, A. Sethuraman, AAG, TN. P.P. Rao, C.A. Sundaram and Dr. Rajeev Dhawan, Subramonium Prasad, Anesh Paul, Apeksha Saran, Shweta Mohta, Akshat Hansaria, Utsav Sidhu, V.P. Sengottuvel, S. Ravi Shankar, Rohini Musa, Yogesh Kotemmath, Zafar Inayat, G. Umapathy, Sudha Umapathy, P.V. Yogeswaran, Debmalya Banerjee, Manik Karanjwala (for Karanjawala & Co.) for the Appellants.

T.R. Andhyarujina, M.N, Krishnamani, R. Viduthalai, Dhruv Mehta, Basava Prabhu S. Patil and A.T.M. Ranga Ramanujam, T. Harish Kumar, S. Beno Bencigar, Sameer, Sri Ram Krishna, B. Vinodh Kanna, S. Prabu Rama Subramanian, Sabarish Subramanian, Suresh Sakthi Murugan S.J. Aristole, Ankolekar Gurudatta, S. Ashok Kumar, Gouri Karuna Das Mohanti, Anu Gupta, Sanjeev Kumar Sharma, G. Sivabalamurugan, Anis Mohd., L.K. Pandey, Prakhar Sharma, S. Nanda Kumar, Satish Kumar, Anjali Chauhan, Parivesh Kumar Singh, R. Satish Kumar, V.N. Raghupathy, Prashant Bhushan, P.B. Suresh Babu, S. Gowthaman, S.R. Setia, M. Yogesh Kanna and Himmat Singh Shergill for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the judgment and order dated 18.7.2011 of the High Court of Judicature at Madras in Writ Petition Nos.12882, 12890, 13019, 13037, 13038, 13227, 13293, 13296, 13345, 13381, 13390, 13547 of 2011 and W.P.(M.D.) No.6143/2011 whereby the High Court has struck down Section 3 of The Tamil Nadu Uniform System of School Education (Amendment) Act, 2011 (hereinafter called the Amendment Act 2011) and issued directions to the State Authorities to implement the provisions of The Tamil Nadu Uniform System of School Education Act, 2010 (hereinafter called the Act 2010), i.e. to implement the common syllabus, distribute the textbooks printed under the uniform system of education and commence the classes on or before 22.7.2011.

The Contempt Petitions have been filed for non-implementing the directions given by this Court vide order dated 14.6.2011.

2. **FACTS:**

A. In the State of Tamil Nadu, there had been different Boards imparting basic education to students upto 10th standard, namely, State Board, Matriculation Board, Oriental Board and Anglo-Indian Board. Each Board had its own syllabus and prescribed different types of textbooks. In order to remove disparity in standard of education under different Boards, the State Government appointed a Committee for suggesting a uniform system of school education. The said Committee submitted its report on 4.7.2007. Then another Committee was appointed to implement suggestions/ recommendations made by the said Committee.

B. During the intervening period, The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter called the Act 2009), enacted by the Parliament, came into force with effect from 1.4.2010 providing for free and compulsory education to every child of the age of 6 to 14 years in a neighbourhood school till completion of elementary education i.e. upto 8th standard. The Act 2009 provided that curriculum and the evaluation procedure would be laid down by an Academic Authority to be specified by the appropriate State Government, by issuing a notification. The said Academic Authority would lay down curriculum and the evaluation procedure taking into consideration various factors mentioned under Section 29 of the Act 2009. Section 34 of the Act 2009 also provided for the constitution of a State Advisory Council consisting of maximum 15 members. The members would be appointed from amongst persons having knowledge and practical experience in the field of elementary education and child development. The State Advisory Council would advise the State Government on implementation of the provisions of the Act 2009 in an effective manner.

C. The Cabinet of the State of Tamil Nadu took a decision on 29.8.2009 that it will implement the uniform system of school education in all schools in the State, form a Common Board by integrating the existing four Boards, and will introduce textbooks providing for the uniform syllabus in Standards I and VI in the academic year 2010-11 and in Standards II to V and VII to X in the academic year 2011-12. In order to give effect to the said Cabinet decision, steps were taken on administrative level and thus, the Tamil Nadu Uniform System of School Education Ordinance, 2009 was issued on 27.11.2009 which was published in the official Gazette on 30.11.2009. The Ordinance was subsequently converted into the Act 2010 on 1.2.2010. The Act 2010 provided for the State Common Board of School Education (hereinafter called the Board); imposition of penalties for wilful contravention of the provisions of the Act or the Rules made thereunder (Section 11); offences by companies in the same regard (Section 12); and it also enabled the State Government to issue directions on policy matters to the Board from time to time which would be binding on the Board (Section 14).

D. Section 3 of the Act 2010 provided that the Act would commence:

(a) in Standards I & VI from the academic year 2010-11; and

(b) in Standards II to V and VII to X from the academic year 2011-12.

Sub-section(2) thereof required every school in the State to follow the norms fixed by the Board for giving instruction in each subject and follow the norms for conducting examination as may be specified by the Board. The Board approved the curriculum and textbooks for Standards I and VI on 22.3.2010 and the books were printed in view of the consequential order dated 31.3.2010 by the Tamil Nadu Textbook Corporation.

E. As many as 14 writ petitions were filed in the High Court of Madras challenging the validity of various provisions of the Act 2010. A Division Bench of the High Court vide judgment and order dated 30.4.2010 held that the provisions of Sections 11, 12 and 14 were unconstitutional and struck down the same while the Court issued elaborate directions for implementation of the common syllabus and the textbooks for Standards I and VI by the academic year 2010-11; and for all other Standards by the academic year 2011-12 or until the State makes the norms and the syllabus and prepares the textbooks in advance for the same. Further directions were issued by the Court to the State Government to bring the provisions of the Act 2010 in consonance with the Act 2009 and notify the Academic Authority and the State Advisory Council under the Act 2009. The State was also directed to indicate approved textbooks from which private unaided schools could choose suitable for their schools. The Court further directed the Government to amend the Act to say that the common/uniform syllabus was restricted to five curricular subjects, namely, English, Tamil, Mathematics, Science and Social Science which the schools were bound to follow, but not in respect of the co-curricular subjects. The aforesaid judgment was duly approved by this Court vide order dated 10.9.2010 while dismissing large number of SLPs filed against the same by a speaking order.

F. In order to implement the Act 2010 and the judgment of the High Court duly approved by this Court, the State Authorities referred the enumerated components of the curriculum in respect of Classes II to V and VII to X to an Expert Committee for its opinion. The curriculum and syllabus prepared for uniform system of school education as well as the textbooks for Classes II to V and VII to X for uniform system of school education in Government schools and Government aided schools were approved by the Board.

G. However, there was a change of State Government following the general elections of the State Assembly, on

16.5.2011. After completing the formalities, the Government amended the Act 2010 by the Amendment Act 2011, by which it substituted Section 3 by a new Section providing that the schools would follow the common syllabus as may be specified by the Board for each subject in Standards I to X from such academic year as may be notified by the Government in the official Gazette. The Government may specify different academic years for different Standards. The amendment also omitted Sections 11, 12 and 14 from the Act 2010 since those Sections had been struck down by the High Court as unconstitutional.

H. New academic session was to commence on 1.6.2011 and the Amendment Act 2011 came into force on 7.6.2011. A large number of writ petitions were filed challenging the said amendment. A Division Bench of the High Court vide order dated 10.6.2011 stayed the operation of the Amendment Act 2011, but gave liberty to the State Government to conduct a detailed study of the common syllabus and common textbooks and further clarified that the State Government would be entitled to add, modify, substitute or alter any chapter, paragraph or portion of the textbooks etc. and further permitting the managements of private schools to submit their list of books for approval to the Government.

I. The aforesaid interim order passed by the High Court on 10.6.2011 was challenged before this Court and all those matters stood disposed of vide judgment and order dated 14.6.2011 by which this Court modified the said interim order *inter-alia*, directing constitution of a committee of experts, which the State Government had already undertaken to appoint, to examine ways and means for implementing the uniform education system, common syllabus, and the textbooks which were to be provided for Standards II to V and VII to X under the Act 2010. It requested the High Court to determine if such textbooks and the amended syllabus would be applicable to Standards II to V and VII to X keeping in view the provisions of

the amended Act.

J. In pursuance of the said order, an Expert Committee was constituted and after having several meetings, a joint report was submitted to the High Court. The High Court after considering the said report, vide judgment and order dated 18.7.2011, found fault with the report of the Expert Committee and struck down Section 3 of Amendment Act 2011 with a direction that the State shall distribute the textbooks printed under the uniform system of education to enable the teachers to commence classes, and complete distribution of textbooks on or before 22.7.2011.

Hence, these appeals.

RIVAL SUBMISSSIONS:

3. Shri P.P. Rao, Shri C.A. Sundaram, Dr. Rajeev Dhavan, Dr. Abhishek M. Singhvi, Sr. Advocates, Shri A. Navaneetha Krishnan, learned Advocate General and Shri Guru Krishna Kumar, learned Additional Advocate General for the State of Tamil Nadu, appearing for the appellants, have submitted that the High Court vide its earlier judgment dated 30.4.2010 had issued directions to the State Government to amend the Act 2010 as certain provisions thereof had to be brought in conformity with the Act 2009 and the State had to constitute the Board and designate the Academic Authority and the State Advisory Council. In view thereof, it was necessary to bring the Amendment Act 2011. Thus, basically it was in consonance and in conformity with the judgment dated 30.4.2010 which has duly been approved by this Court. The High Court in its earlier judgment itself gave liberty to the State to implement the common syllabus and distribute text books under the Act 2010 from academic year 2011-12 or with any future date after the norms were made known by the State Authorities so far as the students of Standards II to V and VII to X are concerned. Therefore, in view of the same, the High Court committed an error holding that the Amendment Act 2011

tantamounts to repealing the Act 2010. The High Court itself has accepted the settled legal proposition that the question of malafide or colourable exercise of power cannot be alleged against the legislature, but still it recorded the finding that the Amendment Act 2011 was a product of arbitrary exercise of power. The authorities had to ensure compliance with the National Curriculum Framework 2005 (hereinafter called NCF 2005) prepared by the National Council of Educational Research and Training (hereinafter called NCERT), which had laid down a large number of guidelines for preparing the syllabus and curriculum for the children. The Government of India issued Notification dated 31.3.2010, published in the Official Gazette of India on 5.4.2010, recognizing the NCERT as the Academic Authority to lay down the curriculum and evaluation procedure for elementary education and to develop a framework on national curriculum. In consequence thereof, a Government Order dated 31.5.2010 was also issued by the Ministry of Human Resources Development to the effect that in view of the statutory provisions of the Act 2009, which provided that the Central Government shall develop a framework on national curriculum with the help of Academic Authority specified under Section 29 thereof, the NCF 2005 would be the NCF till such time as the Central Government requires to develop a new framework. After the order of this Court dated 14.6.2011, the Expert Committee appointed by the State had gone through the syllabus and the text books already printed and after having various meetings, came to the conclusion that the same required thorough revision and therefore, submitted a report that it was not possible to implement the Act 2010 in the academic year 2011-12.

The Advocate General of Tamil Nadu had given assurance to the High Court that under all circumstances the Act 2010 will be implemented in the next academic year, i.e. 2012-13. However, the Court did not consider the same at all. It falls within the exclusive domain of the legislature/ Government as to from which date it would enforce a Statute. The court cannot

even issue a mandamus to the legislature to bring a particular Act into force. Therefore, the question of striking down the Amendment Act 2011 on the ground that implementation of the Act 2010 to be deferred indefinitely is not in accordance with the settled legal propositions. The State had to appoint various authorities and notify the same as required under various statutes. Once the provision stands amended and the amending provisions are struck down by the Court, the obliterated statutory provisions would not revive automatically unless the provisions of the amending statutes is held to be invalid for want of legislative competence. The appeals deserve to be allowed and the judgment and order of the High Court impugned are liable to be set aside.

4. Per contra, Shri T.R. Andhyarujina, Shri Basava Prabhu S. Patil, Shri R. Viduthalai, Shri Dhruv Mehta, Shri M.N. Krishnamani and Shri Ravi Verma Kumar, Sr. Advocates and Shri Prashant Bhushan and Shri N.G.R. Prasad, Advocates appearing for the respondents have submitted that the Amendment Act is a political fall out due to change of Government. The new Government was sworn in on 16.5.2011. The Cabinet on 22.5.2011 decided not to implement the uniform education system which was purely a political decision as there was no material before the Cabinet on the basis of which it could be decided that implementation of the Act 2010 was not possible. The academic session which had to start on 1.6.2011 was postponed extending the summer vacation upto 15.6.2011 vide order dated 25.5.2011. The decision of the Cabinet was challenged before the High Court by filing writ petitions on 1.6.2011 and during the pendency of the said cases, the Amendment Act 2011 was passed hurriedly, that was a totally arbitrary and unwarranted exercise underlined by sheer political motives. The Amendment Act 2011 was promulgated on 7.6.2011 itself with retrospective effect i.e. with effect from 22.5.2011, the date of decision of the Cabinet, not to implement the Act 2010. The Amendment Act 2011 has taken away the effect of the judgments of the High Court dated

30.4.2010 and of this Court dated 10.9.2010, wherein it had been held that for Standards I & VI, the Act 2010 will be implemented from academic year 2010-11 and for others from the academic year 2011-12. Under the said judgment, the implementation of Act 2010 for Standards I & VI as directed by Court had also been taken away by the Amendment Act 2011. The mandate of the statute that for Standards II to V and VII to X, the Act 2010 will be implemented from academic year 2011-12, stood completely wiped out. Not fixing any future date for implementation of the Act 2010 while bringing the Amendment Act 2011, the legislature has substantially repealed the Act 2010. The Statement of Objects and Reasons are a preface to the intention of the legislature and provide guidelines for interpreting the statutory provisions. The same provides that the authorities have taken a decision to scrap the uniform education system adopted under the Act 2010 and the State will search for a better alternative. The legislature is not competent to overrule a judicial decision of a competent court or take away its effect completely as it amounts to trenching upon the judicial powers of the Court. The Amendment Act 2011 is liable to be struck down solely on this ground.

The law does not permit change of policies merely because of another political party with a different political philosophy coming in power, as it is the decision of the Government, the State, an Authority under Article 12 of the Constitution, and not of a particular person or a party, which is responsible for an enactment and implementation of all laws. The High Court rightly came to the conclusion that the Expert Committee was not unanimous on every issue regarding the curriculum, syllabus and quality of text books. Even if some corrections were required, it could have been done easily by issuing administrative orders. The authorities defined under the Act 2009 had already been appointed, and even for giving effect to the judgment of the High Court dated 30.4.2010, it was not necessary to bring about any fresh legislation. In case the amending statute is held to be invalid being violative of any of

the fundamental rights or arbitrary, the repealed provisions would automatically revive. Conferring unfettered powers on the executive, without laying down any criterion or guidelines to enforce the Act 2010, tantamounts to abdication of its legislative powers. Non-availability of choice of multiple text books for a very few schools could not be a ground for scrapping the Act 2010. The appeals lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. In post-Constitutional era, an attempt has been made to create an egalitarian society removing disparity amongst individuals, and in order to achieve that purpose, education is one of the most important and effective means. After independence, there has been an earnest effort to bring education out of commercialism/mercantilism. In the year 1951, the Secondary School Commission was constituted as per the recommendation of Central Advisory Board of Education and an idea was mooted by the Government to prepare textbooks and a common syllabus in education for all students. In 1964-1966, the report on National Education Policy was submitted by the Kothari Commission providing for common schools suggesting that public funded schools be opened for all children irrespective of caste, creed, community, religion, economic conditions or social status. Quality of education imparted to a child should not depend on wealth or class. Tuition fee should not be charged from any child, as it would meet the expectations of parents with average income and they would be able to send their children to such schools. The recommendations by the Kothari Commission were accepted and reiterated by the Yashpal Committee in the year 1991. It was in this backdrop that in Tamil Nadu, there has been a demand from the public at large to bring about a common education system for all children.

In the year 2006, in view of the struggle and campaign and constant public pressure, the Committee under the Chairmanship of Dr. S. Muthukumaran, former Vice-Chancellor of Bharathidasan University was appointed which recommended to introduce a common education system after abolishing the four different Boards then in existence in the State. Subsequent thereto, the Committee constituted of Shri M.P. Vijayakumar, IAS was appointed to look into the recommendations of Dr. S. Muthukumaran Committee which also submitted its recommendations to the Government to implement a common education system upto Xth standard.

7. The right to education is a Fundamental Right under Article 21-A inserted by the 86th amendment of the Constitution. Even before the said amendment, this Court has treated the right to education as a fundamental right. (Vide: *Miss Mohini Jain v. State of Karnataka & Ors.,* AIR 1992 SC 1858; *Unni Krishnan, J.P. & Ors. etc. etc. v. State of A.P & Ors. etc. etc. ,* AIR 1993 SC 2178; and *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.,* (2002) 8 SCC 481).

There has been a campaign that right to education under Article 21-A of our Constitution be read in conformity with Articles 14 and 15 of the Constitution and there must be no discrimination in quality of education. Thus, a common syllabus and a common curriculum is required. The right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background.

Arguments of the propagators of this movement draw support from the judgment of U.S. Supreme Court in the case of *Brown v. Board of Education,* 347 U.S. 483 (1954) over-ruling its earlier judgment in *Plessy v. Ferguson,* 163 U.S. 537 (1896), where it has been held that "separate education facilities are inherently unequal" and thus, violate the doctrine

of equality.

The propagators of this campaign canvassed that uniform education system would achieve the code of common culture, removal of disparity, depletion of discriminatory values in human relations. It would enhance the virtues and improve the quality of human life, elevate the thoughts which advance our constitutional philosophy of equal society. In future, it may prove to be a basic preparation for uniform civil code as it may help in diminishing opportunities to those who foment fanatic and fissiparous tendencies.

In *Rohit Singhal & Ors. v. Principal, Jawahar N. Vidyalaya & Ors.,* AIR 2003 SC 2088, this Court expressed its great concern regarding education for children observing as under:-

> *"Children are not only the future citizens but also the future of the earth. Elders in general, and parents and teachers in particular, owe a responsibility for taking care of the well-being and welfare of the children. The world shall be a better or worse place to live according to how we treat the children today.* ***Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well functioning Society.*** *However, children are vulnerable. They need to be valued, nurtured, caressed and protected."* (Emphasis added)

8. In *State of Orissa v. Mamta Mohanty,* (2011) 3 SCC 436, this Court emphasised on the importance of education observing that education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The Court further relied upon the earlier judgment in *Osmania University Teachers' Assn. v. State of A.P. & Anr.,* AIR 1987 SC 2034, wherein it has been held as under:

"….Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs."

The case at hand is to be proceeded with keeping this ethical backdrop in mind.

9. While deciding the case earlier, the Division Bench of the Madras High Court on 30.4.2010 held that:

(i) The provisions of Sections 11, 12 and 14 of the Act were ultra vires and unconstitutional, and thus struck them down. However, considering the problems of the State authorities, the Division Bench concluded that the State was competent to bring in an education system common to all in the interest of social justice and quality education. The order further read as under:

"Implementation of the syllabus and text books is postponed till the academic year 2011-12 **or until** the State makes known the norms and the syllabus and prepares the text books in advance."

(Emphasis added)

(ii) In the meantime the State would bring the provision of the Act 2010 in line with the Central Act, e.g. the State shall specify by Notification the Academic Authority and the State Advisory Council. The Board shall also indicate what the approved books are. *The State shall by amending the section or by introducing a schedule to the Act,* indicate that the syllabus is restricted to curricular subjects and all schools are bound to follow the common syllabus only for the curricular subjects and not for the co-curricular subjects. *The schools may choose from multiple text books* vis. Government produced text books which are prescribed text books and the Government approved text books in all subjects both curricular and co-curricular.

(iii) The schools shall follow the norms as far as they are practicable. There can be no Board examination upto the level of elementary education but the assessment norms may be specified. Norms shall be fixed by the Board. The State may make it clear whether this Board will also be the Academic Authority under the Central Act. However, considering the request of the learned Additional Advocate General just after pronouncing the judgment the Court accepted that Section 3 as modified by the Court would be implemented for Standards I and VI from academic year 2010-11, provided the Board fixed the norms before 15.5.2010.

The said judgment has duly been approved by this Court by a speaking order dated 10.9.2010.

10. Decision of the Cabinet dated 22.5.2011, to postpone the enforcement of the Act 2010 was challenged through various writ petitions. Meanwhile, the government issued an Ordinance which was converted to Act 2011 passed on 7.6.2011 with retrospective effect i.e. 22.5.2011, the date on which the decision was taken by the Cabinet of the State in this regard. Accordingly, writ petitions were amended challenging the validity of the Amendment Act 2011. Interim orders passed by the High Court therein were challenged before this Court.

11. This Court in its judgment and order dated 14.6.2011 *inter-alia*, directed as under:

(i) The academic Scheme in force for the Academic year 2010-11 for Standards I and VI shall continue to be in force in all respects for the Academic year 2011-12 as well;

(ii) Each text book and to what extent the amended syllabus will be applicable to every course shall be finally determined by the High Court keeping in view the amended provisions of the Act and its impact; and

(iii) We hereby direct the State to appoint a Committee,

which it had already undertaken to appoint primarily to examine ways and means of implementing the uniform education system to the classes (II to V and VII to X) in question; common syllabus and the text books which are to be provided for the purpose.

12. The aforesaid directions make it clear that the issues with regard to syllabus and text books were to be determined after considering the report of the Expert Committee appointed by the State *to examine ways and means of implementing the uniform education system* in Standards (II to V and VII to X) in question, common syllabus and the text books which are to be provided for the purpose. Thus, it was the Expert Committee which had been assigned the role to find out ways and means to implement the common education policy etc.

13. The High Court in the impugned judgment while examining the validity of the amended provisions took note of settled legal propositions as under:

"As there is no challenge to the Amending Act on the ground of legislative incompetence, we are not required to examine the effect of the Amending Act, on such grounds or to examine whether the Amending Act is a colourable legislation on such aspects. Therefore, we have to examine the matters solely based on the directions issued by the Hon'ble Supreme Court in its order dated 14.6.2011. The Amending Act which has the effect of repeal of the Parent Act under the guise of postponement of its implementation, when in fact Parent Act has already been implemented, though partially, the Amending Act has to be held to be arbitrary piece of legislation which does not satisfy the touchstone of Article 14 of the Constitution of India." (Emphasis added)

14. The High Court after examining the validity of the Amended Act held:

(I) The Committee so constituted may not be justified in submitting the report stating that the entire uniform system of education be scrapped and the text books already provided for be discarded.

(II) The Expert Committee has mis-directed itself as it ought to have proceeded primarily to examine the ways and means of implementing the uniform system of education, curiously the Committee, in its final report concluded that no text book can be used for the academic year 2011-12.

(III) The Committee members were not of the unanimous opinion that the uniform syllabus and common text books have to be discarded from the current year. Each member has pointed out certain defects and recommended for certain changes and additions.

(IV) In the order dated 10.6.2011, the High Court directed the Government to notify the approved text books after conducting the study with a view to comply with the direction issued earlier on 30.4.2010. This direction was issued to enable the schools to choose from the multiple text books. However, these orders and directions have been discarded by the State.

(V) The State has exceeded its power in bringing the Amending Act to postpone an enactment which has already come into force. As there is a sudden change in the policy of the Government from its predecessor immediately after coming into power that the Court had to see the impact of the amendment, notwithstanding the competence of the legislature to pass an Amendment Act.

(VI) If the law was passed only ostensibly but was in truth and substance, one for accomplishing an unauthorized object, the court would be entitled to lift the veil and judicially review the case.

(VII) The State has sought to achieve indirectly what could not be achieved directly as it was prevented from doing so in view of the judgment of the Division Bench which upheld the validity of the Parent Act 2010.

(VIII) The Amendment Act 2011 is an arbitrary piece of legislation and violative of Article 14 of the Constitution and the Amendment Act 2011 was merely a pretence to do away with the uniform system of education under the guise of putting on hold the implementation of the Parent Act, which the State was not empowered to do so.

(IX) If the impugned Amending Act has to be given effect to, it would result in *unsettling* various issues and the larger interest of children would be jeopardized.

15. There are claims and counter claims on each factual aspect and the High Court has dealt with each issue elaborately, in our opinion, to an unwarranted extent. However, before we proceed further, it may be necessary to examine the legal issues:-

I. CHANGE OF POLICY WITH THE CHANGE OF GOVERNMENT:

16. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. "The principles of governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate". (Vide: *Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc.,* AIR 2003 SC 2562).

17. In *State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors.,* AIR 2006 SC 1846, this Court examined under what circumstances the government should revoke a

decision taken by an earlier Government. The Court held that an instrumentality of the State cannot have a case to plead contrary from that of the State and the policy in respect of a particular project adopted by the State Government should not be changed with the change of the government. The Court further held as under:-

> "It is trite law that when one of the contracting parties is State within the meaning of Article 12 of the Constitution, it does not cease to enjoy the character of "State" and, therefore, it is subjected to all the obligations that "State" has under the Constitution. *When the State's acts of omission or commission are tainted with extreme arbitrariness and with mala fides, it is certainly subject to interference by the Constitutional Courts."* (Emphasis added)

18. While deciding the said case, reliance had been placed by the Court on its earlier judgments in *State of U.P. & Anr. v. Johri Mal,* AIR 2004 SC 3800; and *State of Haryana v. State of Punjab & Anr.,* AIR 2002 SC 685. In the former, this Court held that the panel of District Government Counsel should not be changed only on the ground that the panel had been prepared by the earlier Government. In the latter case, while dealing with the river water-sharing dispute between two States, the Court observed thus:

> " ……in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same."

19. In *M.I. Builders Pvt. Ltd. v. V. Radhey Shyam Sahu & Ors.,* AIR 1999 SC 2468, while dealing with a similar issue, this Court held that Mahapalika being a continuing body can

be estopped from changing its stand in a given case, but where, after holding enquiry, it came to the conclusion that action was not in conformity with law, there cannot be estoppel against the Mahapalika.

20. Thus, it is clear from the above, that unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law.

II. COLOURABLE LEGISLATIONS:

21. In *The State of Punjab & Anr. v. Gurdial Singh & Ors.,* AIR 1980 SC 319, this Court held that when power is exercised in bad faith to attain ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal, it is called colourable exercise of power. The action becomes bad where the true object is to reach an end different from the one for which the power is entrusted, guided by an extraneous consideration, whether good or bad but irrelevant to the entrustment. When the custodian of power is influenced in exercise of its power by considerations outside those for promotion of which the power is vested, the action becomes bad for the reason that power has not been exercised bonafide for the end design.

22. It has consistently been held by this Court that the doctrine of malafide does not involve any question of bonafide or malafide on the part of legislature as in such a case, the Court is concerned to a limited issue of competence of the particular legislature to enact a particular law. If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant. On the other hand, if the legislature lacks competence, the question of motive does not arrive at all. Therefore, whether a statute is constitutional

or not is, thus, always a question of power of the legislature to enact that Statute.

Motive of the legislature while enacting a Statute is inconsequential: "*Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides.*"

The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. This kind of "transferred malice" is unknown in the field of legislation.

[See: *K.C. Gajapati Narayan Deo & Ors. v. State of Orissa,* AIR 1953 SC 375; *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited & Anr.,* AIR 1977 SC 2279; *K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr.,* AIR 1985 SC 551; *Welfare Assocn. A.R.P., Maharashtra & Anr. v. Ranjit P. Gohil & Ors.,* AIR 2003 SC 1266; and *State of Kerala & Anr. v. Peoples Union for Civil Liberties, Kerala State Unit & Ors.,* (2009) 8 SCC 46].

III. LAWS CONTRAVENING ARTICLE 13(2):

23. The legislative competence can be adjudged with reference to Articles 245 and 246 of the Constitution read with the three lists given in the Seventh Schedule as well as with reference to Article 13(2) of the Constitution which prohibits the State from making any law which takes away or abridges the rights conferred by Part-III of the Constitution and provides that any law made in contravention of this Clause shall, to the extent of contravention be void.

24. In *Deep Chand & Ors. v. State of U.P. & Ors.,* AIR 1959 SC 648, this Court held:

"There is a clear distinction between the two clauses of Article 13. Under cl. (1) of Article 13, a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas, no post-Constitution law can

be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception of this clear distinction is borne in mind much of the cloud raised is dispelled.

When cl. (2) of Art. 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition. A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions; nor can we appreciate the argument that the words "any law" in the second line of Art. 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and therefore any law made in contravention of that clause presupposes that the law made is not a nullity. This argument may be subtle but is not sound. The words 'any law" in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law ; the law made in spite of the prohibition is a still born law."

(Emphasis added)

(See also: *Mohd. Shaukat Hussain Khan v. State of A.P.* AIR 1974 SC 1480).

25. In *Behram Khurshid Pesikaka v. State of Bombay* AIR 1955 SC 123; and *Mahendra Lal Jaini v. State of Uttar*

Pradesh & Ors. AIR 1963 SC 1019, this Court held that in case a statute violates any of the fundamental rights enshrined in Part III of the Constitution of India, such statute remains still-born; void; ineffectual and nugatory, without having legal force and effect in view of the provisions of Article 13(2) of the Constitution. The effect of the declaration of a statute as unconstitutional amounts to as if it has never been in existence. Rights cannot be built up under it; contracts which depend upon it for their consideration are void. The unconstitutional act is not the law. It confers no right and imposes no duties. More so, it does not uphold any protection nor create any office. In legal contemplation it remains not operative as it has never been passed. In case the statute had been declared unconstitutional, the effect being just to ignore or disregard.

IV. DOCTRINE OF LIFTING THE VEIL:

26. However, in order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act. Thus, courts may examine with some strictness the substance of the legislation and for that purpose, the court has to look behind the form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent have to be determined. In order to do so it is permissible in law to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy. (Vide: *Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. & Ors.,* AIR 1954 SC 119; *Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust & Ors.,* AIR 1959 SC 942; and *Hamdard Dawakhana & Anr. v. Union of India & Ors.,* AIR 1960 SC 554).

V. INTERFERENCE BY COURT WITH EXPERT BODY'S

OPINION:

27. Undoubtedly, the Court lacks expertise especially in disputes relating to policies of pure academic educational matters. Therefore, generally it should abide by the opinion of the Expert Body. The Constitution Bench of this Court in *The University of Mysore & Anr. v. C.D. Govinda Rao & Anr.,* AIR 1965 SC 491 held that "normally the courts should be slow to interfere with the opinions expressed by the experts". It would normally be wise and safe for the courts to leave such decisions to experts who are more familiar with the problems they face than the courts generally can be. This view has consistently been reiterated by this Court in *Km. Neelima Misra v. Dr. Harinder Kaur Paintal & Ors.,* AIR 1990 SC 1402; *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.,* AIR 2010 SC 1285; *Dr. Basavaiah v. Dr. H.L. Ramesh & Ors.,* (2010) 8 SCC 372; and *State of H.P. & Ors. v. H.P. Nizi Vyavsayik Prishikshan Kendra Sangh,* (2011) 6 SCC 597.

VI. WHAT CANNOT BE DONE DIRECTLY-CANNOT BE DONE INDIRECTLY:

28. It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "*quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud.*" An authority cannot be permitted to evade a law by "shift or contrivance". (See: *Jagir Singh v. Ranbir Singh,* AIR 1979 SC 381; *M.C. Mehta v. Kamal Nath & Ors.,* AIR 2000 SC 1997; and *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.,* JT 2010 (11) SC 273).

VII. CONDITIONAL LEGISLATION:

29. As the legislature cannot carry out each and every function by itself, it may be necessary to delegate its power for

certain limited purposes in favour of the executive. Delegating such powers itself is a legislative function. *Such delegation of power, however, cannot be wide, uncanalised or unguided.* The legislature while delegating such *power is required to lay down the criteria or standard so as to enable the delegatee to act within the framework of the statute.* The principle on which the power of the legislature is to be exercised is required to be disclosed. It is also trite that essential legislative functions cannot be delegated.

Delegation cannot be extended to "repealing or altering in essential particulars of laws which are already in force in the area in question". (Vide: *re: Article 143, Constitution of India and Delhi Laws Act* (1912) etc., AIR 1951 SC 332).

30. The legislature while delegating such powers has to specify that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation. While doing so, the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purpose and object of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on consideration of the provisions of the particular Act with which the Court has to deal including its preamble. (See: In *re: Delhi Laws Act* (supra); *The Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.,* AIR 1968 SC 1232).

31. In *Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr.,* AIR 1954 SC 569, a Constitution Bench of this Court explained the ratio of the judgment in *re: Delhi Laws Act* (supra) observing as under:

"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not any essential feature. Exactly, what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy." (Emphasis added)

32. In *Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore v. Corporation of the City of Bangalore by its Commissioner, Bangalore City,* AIR 1962 SC 1263, this Court dealt with a similar issue in a case where the legislature had conferred power upon the Municipal Corporation to determine on what other goods and under what conditions the tax should be levied. In that case the legislature had prepared a list of goods which could be subjected to tax and the rate had also been fixed in addition thereto. The powers had been conferred on the Municipal Corporation. This Court therefore came to the conclusion that it was not a case of excessive delegation which may be held to be bad in view of the judgment in *Hamdard Dawakhana v. Union of India,* AIR 1960 SC 554, rather it was a case of conditional legislation.

33. In *Basant Kumar Sarkar & Ors. v. The Eagle Rolling Mills Ltd. & Ors.,* AIR 1964 SC 1260, this Court examined the issue of extension of Employees State Insurance Act, i.e. temporal application of employees insurance legislation and held that it was a case of conditional legislation and not of excessive delegation because there was no element of delegation therein at all. The Court held as under:

"Thus, it is clear that when extending the Act to different establishments, the relevant Government is given the power to constitute a Corporation for the administration of the scheme of Employees State Insurance. The course adopted by modern legislatures in dealing with welfare

scheme has uniformly conformed to the same pattern. The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the Government concerned to decide when, how and in what manner the scheme should be introduced. That, in our opinion, cannot amount to excessive delegation."

34. In view of the above, the law stands crystallised to the effect that in case the legislature wants to delegate its power in respect of the implementation of the law enacted by it, it must provide sufficient guidelines, conditions, on fulfillment of which, the Act would be enforced by the delegatee. Conferring unfettered, uncanalised powers without laying down certain norms for enforcement of the Act tantamounts to abdication of legislative power by the legislature which is not permissible in law. More so, where the Act has already come into force, such a power cannot be exercised just to nullify its commencement thereof.

VIII. LEGISLATIVE ARBITRARINESS:

35. In *Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors.,* AIR 1981 SC 487, this Court held that Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. Whenever therefore, there is arbitrariness in State action, whether it be of the **legislature** or of the executive, Article 14 immediately springs into action and strikes down such State action. (See also : *E.P. Royappa v. State of Tamil Nadu & Anr.,* AIR 1974 SC 555; and *Smt. Meneka Gandhi v. Union of India & Anr.* AIR 1978 SC 597).

36. In *M/s. Sharma Transport rep. by D.P. Sharma v. Government of A.P. & Ors.* AIR 2002 SC 322, this Court defined arbitrariness observing that party has to satisfy that the action was not reasonable and was manifestly arbitrary. The expression 'arbitrarily' means; act done in an unreasonable manner, as fixed or done capriciously or at pleasure without

adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

37. In *Bombay Dyeing & Manufacturing Co. Ltd. (3) v. Bombay Environmental Action Group & Ors.* AIR 2006 SC 1489, this Court held that arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness.

38. In cases of *Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board & Ors.* AIR 2007 SC 2276; and *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited & Ors.* AIR 2009 SC 2337, this Court held that a law cannot be declared ultra vires on the ground of hardship but can be done so on the ground of total unreasonableness. The legislation can be questioned as arbitrary and ultra vires under Article 14. However, to declare an Act ultra vires under Article14, the Court must be satisfied in respect of substantive unreasonableness in the statute itself.

IX. AMENDING ACT-IF STRUCK DOWN-WHETHER OLD LAW WILL REVIVE:

39. This Court in *Bhagat Ram Sharma v. Union of India & Ors.,* AIR 1988 SC 740 explained the distinction between repeal and amendment observing that amendment includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act prefaces to amend; if it is extensive, it repeals and re-enacts it.

40. In *State of Rajasthan v. Mangilal Pindwal* AIR 1996 SC 2181, this Court held that when the statute is amended, the process of substitution of statutory provisions consists of two parts:-

(i) the old rule is made to cease to exist;

(ii) the new rule is brought into existence in its place.

In other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. (See also: *Koteswar Vittal Kamath v. K.Rangappa Baliga & Co.* AIR 1969 SC 504).

41. In *Firm A.T.B. Mehtab Majid and Co. v. State of Madras & Anr.,* AIR 1963 SC 928, this Court held:

> **"22.** It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal"

42. Thus, undoubtedly, submission made by learned senior counsel on behalf of the respondents that once the Act stands repealed and the amending Act is struck down by the Court being invalid and ultra vires/unconstitutional on the ground of legislative incompetence, the repealed Act will automatically revive is preponderous and needs no further consideration.

This very Bench in *State of Uttar Pradesh & Ors. v. Hirendra Pal Singh & Ors.,* (2011) 5 SCC 305, after placing reliance upon a large number of earlier judgments particularly in *Ameer-un-Nissa Begum v. Mahboob Begum & Ors.,* AIR 1955 SC 352; *B.N. Tewari v. Union of India & Ors.,* AIR 1965 SC 1430; *India Tobacco Co. Ltd. v. CTO, Bhavanipore & Ors.,* AIR 1975 SC 155; *Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors.,* AIR 1986 SC 515; *West U.P. Sugar Mills Assn. v. State of U.P.,* AIR 2002 SC 948; *Zile Singh v. State of Haryana & Ors.,* (2004) 8 SCC 1; *State of Kerala v. Peoples Union for Civil Liberties, Kerala*

State Unit & Ors., (2009) 8 SCC 46; and *Firm A.T.B. Mehtab Majid and Co.* (supra) reached the same conclusion.

43. There is another limb of this legal proposition, that is, where the Act is struck down by the Court being invalid, on the ground of arbitrariness in view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part-III of the Constitution, such Act can be described as *void ab-initio* meaning thereby unconstitutional, still born or having no existence at all. In such a situation, the Act which stood repealed, stands revived automatically. (See: *Behram Khurshid Pesikaka* (Supra); and *Mahendra Lal Jaini* (Supra)

44. In *Harbilas Rai Bansal v. State of Punjab & Anr.* AIR 1996 SC 857, while dealing with the similar situation, this Court struck down the Amending Act being violative of Article 14 of the Constitution. The Court further directed as under:

> *"We declare the abovesaid provision of the amendment as constitutionally invalid and as a consequence* ***restore the original provisions of the Act*** *which were operating before coming into force of the Amendment Act."* (Emphasis added)

45. Thus, the law on the issues stands crystallised that in case the Amending Act is struck down by the court for want of legislative competence or is violative of any of the fundamental rights enshrined in Part III of the Constitution, it would be unenforceable in view of the provision under Article 13(2) of the Constitution and in such circumstances the old Act would revive, but not otherwise. This proposition of law is, however, not applicable so far as subordinate legislation is concerned.

X. WHETHER LEGISLATURE CAN OVERRULE THE JUDGMENT OF THE COURT:

46. A Constitution Bench of this Court in *Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality &*

Ors., AIR 1970 SC 192, examined the issue and held as under:

> "…..When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that it tantamounts to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances….."

47. In *S.R. Bhagwat & Ors. v. State of Mysore,* AIR 1996 SC 188, a similar issue was considered by this Court while considering the provisions of Karnataka State Civil Services (Regulation of Promotion, Pay & Pension) Act, 1973. In that case, the provisions of that Act disentitled deemed promotees to arrears for the period prior to actual promotion. These provisions were held to be not applicable where directions of the competent court against the State had become final. The Court observed that any action to take away the power of judicial decision shall be ultra vires the powers of the State legislature as it encroached upon judicial review and tried to overrule the judicial decision binding between the parties. The binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance overrules such a judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such an enactment having retrospective effect.

48. While deciding the said case, this Court placed reliance on its earlier judgments in Re, *Cauvery Water Disputes Tribunal,* AIR 1992 SC 522; and *G.C. Kanungo v. State of Orissa,* AIR 1995 SC 1655. In the former case, the Constitution Bench of this Court held that the legislature could change the basis on which a decision was given by the Court and, thus, change the law in general, which would affect a class of persons and events at large. However, it cannot set aside an individual decision inter-parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and functioning as an appellate court or tribunal. In the latter case, a similar view had been reiterated observing that the award of the tribunal could not be nullified by an Amendment Act having recourse to the legislative power as it tantamounts to nothing else, but "the abuse of this power of legislature."

49. In *Madan Mohan Pathak & Anr. v. Union of India & Ors.,* AIR 1978 SC 803, a seven-Judge Bench of this Court considered a similar issue and held that the act of legislature cannot annul a final judgment giving effect to rights of any party. A declarative judgment holding an imposition of tax invalid can be superseded by a re-validation statute. But where the factual or legal situation is retrospectively altered by an act of legislature, the judgment stands, unless reversed by an appeal or review. Bringing a legislation in order to nullify the judgment of a competent court would amount to trenching upon the judicial power and no legislation is permissible which is meant to set aside the result of the mandamus issued by a court even though, the amending statute may not mention such an objection. The rights embodied in a judgment could not be taken away by the legislature indirectly.

A similar view has been reiterated in *K. Sankaran Nair (Dead) through LRs. v. Devaki Amma Malathy Amma & Ors.,* (1996) 11 SCC 428.

50. The legislature cannot by bare declaration, without

anything more, directly overrule, reverse or override a judicial decision. However it can, in exercise of the plenary powers conferred upon it by Articles 245 and 246 of the Constitution, render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision is based.

(Vide: *A. Manjula Bhashini & Ors. v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & Anr.,* (2009) 8 SCC 431).

51. In view of the above, the law on the issue can be summarised to the effect that a judicial pronouncement of a competent court cannot be annulled by the legislature in exercise of its legislative powers for any reason whatsoever. The legislature, in order to revalidate the law, can re-frame the conditions existing prior to the judgment on the basis of which certain statutory provisions had been declared ultra vires and unconstitutional.

XI. READING OF THE STATEMENT OF OBJECTS AND REASONS: WHILE INTERPRETING THE STATUTORY PROVISIONS:

52. The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons may be relevant to find out what is the *objective* of any given statute passed by the legislature. It may provide for the reasons which induced the legislature to enact the statute. "For the purpose of *deciphering the objects and purport* of the Act, the court can look to the Statement of Objects and Reasons thereof". (Vide: *Kavalappara Kottarathil Kochuni @ Moopil Nayar v. The States of Madras and Kerala & Ors.,* AIR 1960

SC 1080; and *Tata Power Company Ltd. v. Reliance Energy Ltd. & Ors.,* (2009) 16 SCC 659).

53. In *A. Manjula Bhashini & Ors.* (Supra), this Court held as under:

> "The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act." (Emphasis added)

54. Thus, in view of the above, the Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of the particular Act or even for judging the reasonableness of the classifications made by such Act.

CASE ON MERITS:

55. The instant case requires to be examined in the light of the aforesaid settled legal propositions, though it may not be necessary to deal with all these issues in great detail as the High Court has already dealt with the same elaborately.

56. In the instant case, as the Expert Committee had submitted a report and most of the members had given their opinion on different issues and as we have also examined the reports, it is evident from the same that each member had

pointed out certain defects in the curriculum as well as in the text books etc. There was no unanimity on any particular issue, as each member has expressed a different opinion on different issues/subjects.

57. The counter affidavit dated 7.6.2011 was filed before the High Court by Ms. D. Sabitha, the Secretary to the Government Education Department on behalf of all the respondents therein. In reply to the Writ Petition she stated as under:

> "I. Further the prayer for an issuance of writ of declaration *declaring that the decision of the Cabinet dated 22.5.2011 by the Government of Tamil Nadu to withhold the implementation of the Tamil Nadu Uniform System of School Education Act, 2010* for the academic year 2011-12 as published vide News Release No. 289 dt. 22.5.2011 as *null and void is not* sustainable in law for the sole reason that the policy decision taken by the Cabinet would not be generally subject to judicial review. It is further submitted that the decision taken by the Cabinet to review the implementation of the Uniform System of School Education for Standards I to X is purely in the interest of students, parents and public which is within the domain of the popular Government..
>
> II. Further the averment that text books printed would be wasted and there would be a loss caused to the tune of 200 crore rupees seems to have been made without understanding the implications that could be created due to the implementation of the *illegal policy formulated by the erstwhile Government.* The Government has a mandate to ensure the quality of education and welfare of the students. It is with this intent the present policy is being formulated……
>
> `III. The State, therefore, proposes to appoint a high powered committee consisting of experts in the field to

undertake a detailed study *of the more appropriate system to be adopted for ensuring the improvement of quality of education* and social justice by providing a level playing field to all sections of society.

IV. At this juncture, it is pointed out that the books that have been printed already are *substandard and wanting in quality* and if followed, would lead to deterioration of academic *Standards of school students and therefore the* Cabinet has rightly taken a policy decision after thorough deliberation *to stall the implementation of the Uniform System of School Education Act, 2010 as it suffers from illegality, irrationality and unconstitutionality...."* (Emphasis added)

On amendment of the writ petitions, another counter affidavit was filed by Ms. D. Sabitha, the same officer, wherein she stated on oath, *inter-alia*, as under:

"I. This being so, the Government has taken a *decision to stall the implementation of the policy of the previous government that is devoid of any legal sanction* and has constituted a committee to formulate an appropriate solution in order to redress the complications created due to the *implementation of the illegal policy.*

II.....In the Cabinet meeting held on 22.5.2011, it was initially decided to do away *with the uniform Education system.* Since the schools were reopening on 1st June, 2011, orders had to be issued for printing of textbooks. It is submitted that the advertisement for inviting tenders for printing textbooks was issued on 23.5.2011."

(Emphasis added)

58. The High Court, after taking note of the counter affidavit filed by the present appellants labeling the Act 2010 as *illegal, irrational* and *unconstitutional,* after it had already undergone an intense judicial scrutiny and held to be

Constitutionally valid by the High Court vide judgment and order dated 30.4.2010 and by this Court vide judgment and order dated 10.9.2010, the question that arises for consideration is as to whether it was permissible for the Secretary of the Education Department to label the Act as illegal and unconstitutional. Does such a conduct amount to sitting in appeal against the judgments of the High Court as well as of this Court or does it not amount to an attempt to take away the effect of the judgments of the High Court as well of this Court ?

59. The High Court has taken note of these pleadings taken by the State authorities :

"From a perusal of the counter affidavit filed by the Secretary, School Education Department, it is manifestly clear that the Government has taken the consistent stand that the policy formulated by the previous Government by implementing the Uniform Syllabus System ***was illegal*** *and that the amount of Rs. 200 crores spent for printing the textbooks under the new syllabus was because of the* ***wrong policy****....."* (Emphasis added)

The report submitted by the Expert Committee, in fact, did not contain any collective opinion. All the members have expressed their different views and most of the members had approved the contents of the text books, in general, pointing out certain defects which could be cured by issuing corrigendums or replacements etc.

60. Section 18 of the Act 2010 enables the State Government to remove difficulties, if any, in implementation of the said Act. The provisions thereof read as under:

"If any difficulty arises in giving effect to the provisions of this Act, the Government may, by order published in the Tamil Nadu Government Gazette, make such provisions, not inconsistent with the provisions of this Act as appears

to them to be necessary or expedient for removing the difficulty;…"

Therefore, the amendment itself is totally unwarranted. If the State Government was facing any difficulty, the same could have been removed by issuing a Government order under Section 18 of the Act which conferred all residuary powers on it.

The nature of the defect as canvassed by the State counsel is reflected in the pleadings that indicates an undesirable inclusion of certain chapters that do not subserve the purpose of a uniform standard and multicultural educational pattern. The contention appears to be that such material may damagingly divert the mind of the young students towards a motivated attempt of individualistic glorification. In the opinion of the court, if such material does create any adverse impact or is otherwise targeted towards unwanted propaganda without any contribution towards the educational standard sought to be achieved, then such material upon a thorough investigation and deliberation by the Expert Committee could be deleted with the aid of Section 18 of the Act 2010. It appears that the State Government while introducing the Amendment Act 2011 did not appropriately focus attention on the provision of Section 18 quoted hereinabove that are inclusive of all powers that may be required to remove such difficulties. Had the said provision been carefully noted, there would have been no occasion to suspend the implementation of the Act 2010. What could have been done with the help of a needle was unnecessarily attempted by wielding a sword from the blunt side. Not only this the said provision was not even pointed out by the State machinery before the High Court nor did its legal infantry choose to examine the same. Even before us the learned counsel were unable to successfully counter the availability of such powers with the State Government.

In addition to that, needless to re-emphasize, the High Court while dealing with the validity of the provisions of the Act

2010, had already conceded liberty to the State Government to remove defects and had on the other hand struck down the offending provisions in Section 14 thereof empowering the State Government to compel the Education Board to be bound on questions of policy. Thus, the State Government was left with sufficient powers to deal with the nature of defects appropriately under the said judgment with a statutory power available for that purpose under Section 18 of the Act 2010.

61. It may be relevant to point out here that Statement of Objects and Reasons given to the Amendment Act 2011 reveal a very sorry state of affairs and point out towards the intention of the legislature not to enforce the Act 2010 at all. Relevant part of clause 9 of the Statement of Objects and Reasons of the Amendment Act 2011 reads as under:

> "…the State proposes to appoint a high powered committee consisting of experts in the field to undertake a detailed study of the more appropriate system to be adopted for ensuring the improvement of quality and education and social justice by providing a level playing field to all sections of society. .." (Emphasis added)

The aforesaid quoted part of the same makes it clear that the Government intended to introduce a more appropriate system to ensure the improvement of quality education, meaning thereby, that the State has no intention to enforce the uniform education system as provided under the Act 2010.

62. The relevant part of Section 3 of the Act 2010 reads as under:

> 3(1) Every school in the State shall follow the common syllabus and text books as may be specified by the Board for each subject –
>
> (a) in Standards I and VI, commencing from the academic year 2010-2011;

(b) in Standards II to V and Standards VII to X from the academic year 2011-2012.

(2) Subject to the provisions of sub-section (1), every school in the State shall –

(a) follow the norms fixed by the Board for giving instruction in each subject;

(b) follow the norms for conducting examination as may be specified by the Board.

63. After the Amendment Act 2011, Section 3 reads as under:

"3. Schools to follow common syllabus –

(1) Every school in the State shall follow the common syllabus as may be specified by the Board for each subject in *Standards 1 to X from such academic year as may be notified by the Government* in the Tamil Nadu Government Gazette. The Government may specify different academic years for different Standards.

(2) Until notification under sub-section (1) is issued, the syllabus and text books for every school in the State shall be as follows:

(a) in Standards I and VI, the system as *prevailing prior to academic year 2010-11 shall continue;* and

(b) in Standards II to V and VII to X, the existing system shall continue," (Emphasis added)

64. The legislature in its wisdom had enforced the Act 2010 providing for common syllabus and text books for Standards I and VI from the academic year 2010-2011 and for Standards II to V and VII to X from the academic year 2011-2012, the validity of this law has been upheld by the High Court vide judgment and order dated 30.4.2010 and by this Court vide

order dated 10.9.2010. Certain directions had been issued by the High Court which could be carried out easily by the State exercising its administrative powers without resorting to any legislative function. By the Amendment Act, even the application of Act 2010, so far as Standards I and VI are concerned, has also been withdrawn without realising that students who have studied in academic year 2010-11 would have difficulty in the next higher class if they are given a different syllabus and different kind of text books. The Amendment Act 2011 provided that the students in Standards I and VI would also revert back to the old system which had already elapsed.

65. The Amendment Act 2011, in fact, nullified the earlier judgment of the High Court dated 30.4.2010, duly approved by the order of this Court dated 10.9.2010, and tantamounts to repealing of the Act 2010 as unfettered and uncanalised power has been bestowed upon the Government to notify the commencement of the uniform education system. State Government may submit only to the extent that the High Court itself had given option to the State to implement the Common Education System after ensuring compliance of directions issued by the High Court itself. However, no such liberty was available to the State so far as Standards I and VI are concerned.

66. It is also evident from the record that after the new Government was sworn in on 16.5.2011, tenders were invited to publish books being taught under the old system on 21.5.2011 and subsequent thereto, it was decided in the Cabinet meeting on 22.5.2011 not to implement the uniform education system. Whole exercise of amending the Act 2010 was carried out most hurriedly. However, proceeding in haste itself cannot be a ground of challenge to the validity of a Statute though proceeding in haste amounts to arbitrariness and in such a fact-situation the administrative order becomes liable to be quashed. The facts mentioned hereinabove reveal that tenders had been invited on 21.5.2011 for publishing the text

books, taught under the old system even prior to Cabinet meeting dated 22.5.2011. Thus, a decision had already been taken not to implement the Common Education System.

67. If one crore twenty lacs students are now to revert back to the multiple syllabus with the syllabus and textbooks applicable prior to 2010 after the academic term of 2011-12 has begun, they would be utterly confused and would be put to enormous stress. Students can not be put to so much strain and stress unnecessarily. The entire exercise by the Government is therefore arbitrary, discriminatory and oppressive to students, teachers and parents.

The State Government should have acted bearing in mind that "destiny of a nation rests with its youths". Personality of a child is developed at the time of basic education during his formative years of life. Their career should not be left in dolorific conditions with uncertainty to such a great extent. The younger generation has to compete in global market. Education is not a consumer service nor the educational institution can be equated with shops, therefore, "there are statutory prohibitions for establishing and administering educational institution without prior permission or approval by the authority concerned."

Thus, the State Government could by no means be justified in amending the provisions of Section 3 of the Act 2010, particularly in such uncertain terms. Undertaking given by the learned Advocate General to the High Court that the Act 2010 would be implemented in the academic year 2012-13, cannot be a good reason to hold the Act 2011 valid.

68. Submissions advanced on behalf of the appellants that it is within the exclusive domain of the legislature to fix the date of commencement of an Act, and court has no competence to interfere in such a matter, is totally misconceived for the reason that the legislature in its wisdom had fixed the dates of commencement of the Act though in a phased manner. The Act commenced into force accordingly. The courts intervened in the

matter in peculiar circumstances and passed certain orders in this regard also. The legislature could not wash off the effect of those judgments at all. The judgments cited to buttress the arguments, particularly in *A.K. Roy v. Union of India & Anr.,* AIR 1982 SC 710; *Aeltemesh Rein v. Union of India & Ors.,* AIR 1988 SC 1768; *Union of India v. Shree Gajanan Maharaj Sansthan,* (2002) 5 SCC 44; and *Common Cause v. Union of India & Ors.,* AIR 2003 SC 4493, wherein it has been held that a writ in the nature of mandamus directing the Central Government to bring a statute or a provision in a statute into force in exercise of powers conferred by Parliament in that statute cannot be issued, stand distinguished.

69. As explained hereinabove, the Amendment Act 2011, to the extent it applies to enforcement of Act 2010, nullified the judgment of the High Court dated 30.4.2010 duly approved by this Court vide order dated 10.9.2010. Thus, we concur with the conclusion reached by the High Court in this regard.

70. To summarise our **conclusions:**

(i) The Act 2010 was enacted to enforce the uniform education system in the State of Tamil Nadu in order to impart quality education to all children, without any discrimination on the ground of their economic, social or cultural background.

(ii) The Act itself provided for its commencement giving the academic years though, in phased programme i.e. for Standards I to VI from the academic year 2010-2011; and for other Standards from academic year 2011-2012, thus, enforcement was not dependent on any further notification.

(iii) The validity of the Act was challenged by various persons/ institutions and societies, parents of the students, but mainly by private schools organisations, opposing the common education system in the entire State. The writ petitions were dismissed upholding the validity of the Act.

However, few provisions, particularly, the provisions of Sections 11, 12 and 14 were struck down by the High Court vide judgment and order dated 30.4.2010. The said judgment of the High Court was duly approved by a speaking order of this Court dated 10.9.2010. Certain directions had been given in the said judgment by the High Court which could have been complied with by issuing executive directions. Moreover, directions issued by the High Court could be complied with even by changing the Schedule as provided in the judgment dated 30.4.2010 itself.

(iv) Section 18 of the Act 2010 itself enabled the Government to issue any executive direction to remove any difficulty to enforce the statutory provisions of the Act 2010. The Act 2010 itself provided for an adequate residuary power with the government to remove any difficulty in enforcement of the Act 2010, by issuing an administrative order.

(v) Justification pleaded by the State that Amendment Act 2011 was brought to avoid contempt proceedings as the directions issued by the High Court could not be complied with, is totally a misconceived idea and not worth acceptance.

(vi) The new government took over on 16.5.2011 and immediately thereafter, the Government received representations from various private schools/organizations on 17th/18th May, 2011 to scrap the uniform education system. As most of these representations were made by the societies/organisations who had earlier challenged the validity of the Act 2010 and met their waterloo in the hierarchy of the courts, such representations were, in fact, not even maintainable and, thus could not have been entertained by the Government.

(vii) Before the first Cabinet meeting of the new

Government on 22.5.2011, i.e. on 21.5.2011, tenders were invited to publish the books under the old education system. It shows that there had been a pre-determined political decision to scrap the Act 2010. The Cabinet on 22.5.2011 had taken a decision to do away with the Act 2010 and brought the Ordinance for that purpose.

(viii) There was no material before the Government on the basis of which, the decision not to implement the Act 2010 could be taken as admittedly the Expert Committee had not done any exercise of reviewing the syllabus and textbooks till then.

(ix) The validity of the said decision was challenged by parents and teachers and various other organisations before the High Court and interim orders were passed. It was at that stage that the Bill was introduced in the House on 7.6.2011 and the Amendment Act was passed and enforced with retrospective effect i.e. from 22.5.2011, the date of the decision of the Cabinet in this regard.

(x) The interim orders passed by the High Court were challenged before this Court and the appeals were disposed of by this court vide judgment and order dated 14.6.2011, issuing large number of directions including constitution of the Expert Committee which would find out ways and means to enforce the common education system.

(xi) The Secretary of School Education Department had filed affidavits before the High Court as well as before this Court pointing out that the Amendment Act 2011 was necessary in view of the fact that the Act 2010 was illegal and unconstitutional. However, the Secretary of School Education Department was inadvertently made a member of the Expert Committee by this Court. Though her inclusion in the Committee was totally unwarranted particularly in view of her stand taken before the High Court that the Act

2010 was unconstitutional and illegal.

(xii) The Secretary, to the Govt. of Tamil Nadu School Education Department, who had been entrusted the responsibility to plead on behalf of the State, herself had approved the textbooks and fixed the prices for those books of Standards VIIIth, IXth and Xth vide G.O. dated 9.5.2011.

(xiii) The members of the Expert Committee did not reject the text books and syllabus in toto, however, pointed out certain discrepancies therein and asked for rectification/ improvements of the same.

(xiv) The High Court as well as this Court upheld the validity of the Act 2010. Thus, it was not permissible for the legislature to annul the effect of the said judgments by the Amendment Act 2011, particularly so far as the Ist and VIth Standards are concerned. The list of approved textbooks had been published and made known to all concerned. Thus, the Act 2010 stood completely implemented so far these Standards were concerned.

(xv) The Statement of Objects and Reasons of the Act 2011 clearly stipulated that legislature intended to find out a better system of school education. Thus, the object has been to repeal the Act 2010.

(xvi) The legislature is competent to enact the revalidation Act under certain circumstances, where the statutory provisions are struck down by the court, fundamentally altering the conditions on which such a decision is based, but the legislature cannot enact, as has been enacted herein, an invalidation Act, rendering a statute nugatory.

(xvii) The School Education Department of Tamil Nadu on 24.2.2011 called for private publishers to come out with the textbooks based on common education system, and submit for clearance by the Department by 5.4.2011, as

taken note of by the High Court in its order dated 10.6.2011. Thus, in such a fact-situation, it was not permissible for the State to revert back to the old system at this advanced stage.

(xviii) Most of the other directions given by the High Court on 30.4.2010, stood complied with. The DTERT had been appointed as Academic Authority as required under Section 29 of the Act 2009, vide G.O. dated 27.7.2010.

(xix) The material produced by the respondents before this Court reveal that norms had been made known and the NCF 2005 was also implemented by issuing Tamil Nadu Curriculum 2009.

(xx) The issue of repugnancy of the Act 2010 with the Act 2009 merely remains an academic issue as most of the discrepancies stood removed. Even if something remains to be done, it can be cured even now, however, such a minor issue could not be a good ground for putting the Act 2010 under suspended animation for an indefinite period on uncertain terms.

(xxi) Undoubtedly, there had been a few instances of portraying the personality by the leader of political party earlier in power, i.e. personal glorification, self publicity and promotion of his own cult and philosophy, which could build his political image and influence the young students, particularly, in the books of primary classes. Such objectionable material, if any, could be deleted, rather than putting the operation of the Act 2010 in abeyance for indefinite period.

(xxii) As early as in April 2011, textbooks for Xth Standard were posted in the official website of School Education Department and many students downloaded the same and started study of the same as the students, parents and teachers had been under the impression that for Standards

II to V and VII to X, common education system would definitely be implemented from academic year 2011-12. Such pious hope of so many stakeholders could not be betrayed. Rolling back the Act 2010 at this belated stage and withdrawal thereof even for Standard I and VI would be unjust, iniquitous and unfair to all concerned.

(xxiii) The Amendment Act 2011, in fact, has the effect of bringing back the effect of Section 14 of the Act 2010 which had been declared ultra vires by the High Court for the reason that the Board could not be given binding directions by the State Government.

(xxiv) Even if a very few schools could not exercise their choice of multiple text books, it could not be a ground of scrapping the Act 2010. Steps should have been taken to remove the discrepancy.

(xxv) Passing the Act 2011, amounts to nullify the effect of the High Court and this Court's judgments and such an act simply tantamounts to subversive of law.

71. In view of the above, the appeals are devoid of any merit. Facts and circumstances of the case do not present special features warranting any interference by this Court.

The appeals are accordingly dismissed. The appellants are directed to enforce the High Court judgment impugned herein within a period of 10 days from today.

D.G. Appeals dismissed.

KRISHI UTPADAN MANDI SAMITI, ALLAHABAD

v.

M/S. BAIDYANATH AYURVED BHAWAN (P) LTD. AND ANR.

(Civil Appeal No. 8963 of 2003)

AUGUST 11, 2011

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

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act 1964) – s.9 – Respondent-company purchased specified agriculture produce in bulk within the market area and used it in manufacturing commercial product – Whether respondent-company was exempt from obtaining licence u/s.9(2) of the Act 1964 – Held: Sale of specified agricultural produce from any place in the market area is prohibited unless the person concerned has a licence – The statute provides for an exception of having a licence or from paying the market fee if sale of agricultural produce is made to a person for his "domestic consumption" in "retail sale" – "Domestic consumption" under the Act 1964 has to be given a very restricted and limited meaning i.e. for personal use of the purchaser, for consumption by the family and not for commercial and industrial activities – Purchase of agricultural produce in bulk cannot be termed to have been made for "domestic consumption"– As respondent-company buys specified agricultural produce from the market area which is not meant for domestic consumption, the company is required to take license u/s.9(2) of the Act 1964 – U.P. Krishi Utpadan Mandi Niyamavali, 1965 (the Rules 1965) – Rule 70.

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act 1964) – Object of – Stated.

Respondent no.1-company manufactures Ayurvedic medicines including Chawanprash. For manufacturing

Chawanprash the said respondent purchases certain agricultural produce e.g. Gur, Amala and Ghee etc. and uses the same as raw material.

The appellant served a notice calling upon respondent no.1 for taking a licence under Section 9 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act 1964) as it was purchasing and processing the aforesaid agricultural produce in its ordinary course of business. Respondent no. 1 replied that it was not required to take licence as it was not doing any business in the sale or purchase of agricultural produce. The appellant issued notice to respondent no.1 for personal appearance. Respondent no.1 did not comply with the said notice, whereafter the appellant filed complaint Case in the court of Special Judicial Magistrate against respondent no.1, alleging violation of the statutory provisions of the Act 1964. Respondent no.1 filed writ petition before High Court for quashing of the complaint Case. The High Court allowed the writ petition holding that respondent no.1 had been using the agricultural produces after buying for internal purpose i.e. for consumption in its factory for manufacturing the end product and not for further transferring the agricultural produces to someone else and thus, respondent no. 1 was not required to take licence under Section 9 of the Act 1964.

In the instant appeal the question which arose for consideration was: Whether the specified agriculture produce purchased by Respondent No. 1 within the market area and used in manufacturing a commercial product could be held to be for domestic consumption and thereby would exempt it from obtaining licence under Section 9(2) as also from levy and payment of market fee under Section 17(iii)(b) of the Act 1964.

Allowing the appeal, the Court

HELD: 1. The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act 1964) was enacted with the object to regulate the sale and purchase of the specified agricultural produce in market area and to curb down the unfair trade practices prevalent in the old market system within the State of Uttar Pradesh. The object of the Act was to reduce the multiple trade charges, levies and exactions charged from the producer-seller; to provide for the verification of accurate weights and scales and to ensure that the producer-seller is not denied his legitimate dues. Further to provide amenities to the producer-seller in the market and for providing better storage facilities, to stop inequalities and unauthorised charges and levies from the producer-seller and to make adequate arrangements for market intelligence with a view to posting the agricultural producer with the latest position in respect of the markets dealing with a particular agricultural produce. [Para 8] [1184-H; 1185-A-C]

2. Section 2(a) of the Act, 1964 defines "agricultural produce". "Trader" is defined under Clause (y) of the Section 2. Section 9 of the Act 1964 excludes the application of the Act on purchase of agricultural produce for "domestic consumption". Section 17 of the Act 1964 empowers the Committee to issue, renew, suspend or cancel a licence, and to levy and collect market fee. However, the proviso thereto reads as under: *"Provided that no market fee or development cess shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer for his domestic consumption only."* Section 37 of the Act, 1964 further empowers the Committee to impose penalty on a person who contravenes any of the provision contained in Section 9 of the Act 1964 or the Rules 1965. The cumulative effect of combined reading of the aforesaid

statutory provisions comes to the effect that sale of the specified agricultural produce from any place in the market area is prohibited unless the person concerned has a licence. The statute provides for an exception of having a licence or from paying the market fee if the sale of an agricultural produce is made to a person for his "domestic consumption" in "retail sale". [Paras 9 and 10] [1185-C-D-F-H; 1186-F-H; 1187-A-F-H]

3.1. Indisputably, in the instant case the produce purchased by respondent company are agricultural produce. In view of the circular dated 18.4.1988, issued by the appellant, a retail trader cannot sell any specified agricultural produce to any person more than the prescribed limit therein. The said circular fixed the maximum quantity of an agricultural produce which the retail dealer can sell to an individual for domestic consumption. The Circular issued under the Rules 1965 prescribes the limit of sale to an individual and storage of the agricultural produces, by the retailer. [Para 11] [1187-H; 1188-A-B]

3.2. As the retail trader cannot sell the agricultural produce in quantity more than prescribed in the circular and also such retailer himself cannot purchase and store more than prescribed in the circular, therefore, the meaning of "domestic consumption" has to be understood in such restricted sense. Thus, meaning thereby for personal use i.e. for the use of family members of the purchaser and not for any production activity, otherwise prescribing the limits of purchase and storage by the retail trader becomes redundant. Purchase of agricultural produce in bulk cannot be termed to have been made for "domestic consumption." The Court cannot travel beyond the pleadings. The meaning of "domestic trade" and "foreign trade", had not been in issue in the instant case. The "domestic consumption" under the Act 1964 has to be given a very

restricted and limited meaning i.e. for personal use of the purchaser, i.e. for the consumption by the family and not for commercial and industrial activities. [Para 17] [1191-C-F]

M/s. Kesarwani Zarda Bhandar v. State of Uttar Pradesh & Ors. **AIR 2008 SC 2733: 2008 (8) SCR 801 – distinguished.**

Virendra Kumar & Ors. v. Krishi Utpadan Mandi Samiti & Ors. **(1987) 4 SCC 454 – relied on.**

Star Paper Mills Ltd. v. State of U.P. & Ors. **(2006) 10 SCC 201: 2006 (6) Suppl. SCR 380;** *G. Giridhar Prabhu & Ors. v. Agricultural Produce Market Committee,* **AIR 2001 SC 1363: 2001 (2) SCR 329;** *H.P. Marketing Board & Ors. v. Shankar Trading Co. Pvt. Ltd. & Ors.* **(1997) 2 SCC 496: 1996 (5) Suppl. SCR 515;** *Vijayalaxmi Cashew Co. & Ors. v. Dy. CTO & Anr.* **(1996) 1 SCC 468: 1995 (6) Suppl. SCR 719;** *The State of A.P. v. M/s. H. Abdul Bakhi and Bros.* **AIR 1965 SC 531;** *Krishi Upaj Mandi Samiti & Ors. v. Orient Paper & Industries Ltd.* **(1995) 1 SCC 655: 1994 (5) Suppl. SCR 392;** *Ram Chandra Kailash Kumar & Co. & Ors. v. State of U.P. & Anr.* **AIR 1980 SC 1124: 1980 SCR 104 – referred to.**

4. As the respondent-company buys specified agricultural produce from the market area and it is not meant for domestic consumption, the company is required to take license under Section 9(2) of the Act 1964. The impugned judgment passed by the High Court is hereby set aside. [Paras 19 & 20] [1192-D-E]

Case Law Reference:

2006 (6) Suppl. SCR 380	**referred to**	**Para 6**
2001 (2) SCR 329	**referred to**	**Para 12**
1996 (5) Suppl. SCR 515	**referred to**	**Para 12**

1995 (6) Suppl. SCR 719	**referred to**	**Para 12**
AIR 1965 SC 531	**referred to**	**Para 13**
1994 (5) Suppl. SCR 392	**referred to**	**Para 14**
1980 SCR 104	**referred to**	**Para 15**
(1987) 4 SCC 454	**relied on**	**Para16**
2008 (8) SCR 801	**distinguished**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8963 of 2003.

From the Judgment & Order dated 14.07.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 12372 of 2003.

Shobha Dikshit, Daleep Dhyani, Suraj Singh, Pradeep Misra for the Appellant.

Subramonium Prasad, Lokesh Bhola for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 14.7.2003 passed by the High Court of Judicature at Allahabad in C.M.W.P. No. 12372 of 2003 by which the High Court allowed the writ petition holding that respondent no.1 was not required to take licence under Section 9 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter called `the Act 1964').

2. Facts and circumstances giving rise to present appeal are as under:

A. Respondent no. 1 is a company registered under the Indian Companies Act, 1956 and manufactures Ayurvedic medicines including Chawanprash at Naini, Allahabad. For that purpose, the respondent no. 1 has obtained a licence under

the Drugs and Cosmetics Act, 1940. For manufacturing Chawanprash the said respondent purchases certain agricultural produce e.g. Gur, Amala and Ghee etc. and use the same as raw material.

B. The appellants served a notice dated 17.3.1999 calling upon the respondent no. 1 for taking a licence under section 9 of the Act 1964 as it was purchasing and processing the aforesaid agricultural produce in its ordinary course of business. Respondent no. 1 submitted reply to the said notice on 31.3.1999 pleading that it was not required to take licence as the said respondent was not doing any business in the sale or purchase of agricultural produce. The appellant found the explanation furnished by respondent no. 1 unsatisfactory and, thus, sent another notice dated 2.12.2000 calling upon respondent no.1 to take a licence failing which legal proceedings could be initiated against it. Similar notices were subsequently sent to respondent no. 1 on 3.12.2000 and 16.12.2000 but respondent no. 1 did not pay any heed to the said notices. The appellant issued notice dated 14.2.2001 to respondent no. 1 for personal appearance and furnishing the explanation as to why the licence under Section 9 of the Act 1964 was not required. The respondent no. 1 did not comply with the said notice, thus the appellant filed complaint Case No. 480 of 2002 in the court of Special Judicial Magistrate, Allahabad against the respondent no. 1, alleging violation of the statutory provisions of the Act 1964.

C. Being aggrieved, the respondent no. 1 approached the High Court by filing Writ Petition No. 12372 of 2003 for quashing of the complaint Case No. 480 of 2002. The High Court vide impugned judgment and order dated 14.7.2003 allowed the writ petition holding that the said respondent had been using the agricultural produces after buying for internal purpose i.e. for consumption in its factory for manufacturing the end product and not for further transferring the agricultural produces to someone else and thus, the respondent no. 1 was

not required to take licence under Section 9 of the Act 1964.

Hence, this appeal.

3. Smt. Shobha Dikshit, learned senior counsel appearing for the appellant, has submitted that respondent no. 1 is manufacturing Ayurvedic medicines and purchases Amla, Gur and Ghee etc. from the market area established under the Act 1964, which are admittedly agricultural produce. Therefore, being a trader, the respondent no. 1 is required to take a licence so far as the purchase of specified agricultural produce from the market area is concerned and also pay requisite market fee and any violation of the provisions of the Act 1964 would attract penal consequences i.e. prosecution under Section 37 of the Act 1964. The use of the aforesaid agricultural produce for manufacturing of the medicines cannot be termed as domestic consumption. The word `domestic' means required for personal use of the family and this term cannot be interpreted in such wide terms as to include manufacturing of a different commodity at commercial level in an industry. The High Court erred in defining the term `domestic' giving a very wide interpretation i.e. meant for supplying the end product in the country and not for export. Even otherwise, in view of the fact that an adequate and efficacious remedy provided under the Act 1964 was available to the respondent, the High Court ought not to have entertained the Writ Petition. Thus, the appeal deserves to be allowed.

4. Per contra, Shri Subramonium Prasad, learned counsel appearing for the respondents, has submitted that as per the statutory provisions of the Act 1964, the respondent no. 1 cannot be held to be the buyer or seller of the agricultural produce nor it is engaged in processing of agricultural produce, therefore, the provisions of the Act 1964 are not applicable. The respondent-company purchases agricultural produce only as raw material for manufacturing of Chawanprash in its factory. Thus, in such a fact-situation, the respondent no. 1 is not required to take a licence under Section 9(2) of the Act 1964

read with Rule 70 of the U.P. Krishi Utpadan Mandi Niyamavali, 1965 (hereinafter called the `Rules 1965'). The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. In *Star Paper Mills Ltd. v. State of U.P. & Ors.,* (2006) 10 SCC 201, this Court while dealing with the same statutory provisions accepted the submissions made on behalf of the State that in view of the fact that adequate and efficacious statutory remedy was available to the person aggrieved, the High Court ought not to have entertained the writ petition without the statutory remedy being exhausted. While deciding the said case, this Court placed reliance upon large number of earlier judgments of this Court under the Act 1964.

Be that as it may, as the matter has been dealt by the High Court on merit and a period of more than 8 years has elapsed, it is not desirable to entertain the issue of availability of alternative remedy or exhaustion of statutory remedy. The matter requires to be considered on merit.

7. The appeal raises the following substantial question of law:

> Whether the specified agriculture produce purchased by the Respondent No. 1 within the market area and used in manufacturing a commercial product could be held to be for domestic consumption and thereby would exempt it from obtaining licence under Section 9(2) as also from levy and payment of market fee under Section 17(iii)(b) of the Act 1964?

8. The Act 1964 has been enacted with the object to regulate the sale and purchase of the specified agricultural produce in market area and to curb down the unfair trade practices prevalent in the old market system within the State

of Uttar Pradesh. The object of the Act has been to reduce the multiple trade charges, levies and exactions charged from the producer-seller; to provide for the verification of accurate weights and scales and to ensure that the producer-seller is not denied his legitimate dues. Further to provide amenities to the producer-seller in the market and for providing better storage facilities, to stop inequalities and unauthorised charges and levies from the producer-seller and to make adequate arrangements for market intelligence with a view to posting the agricultural producer with the latest position in respect of the markets dealing with a particular agricultural produce.

9. For adjudication of the aforesaid issue, it may be necessary to refer to some of the statutory provisions of the Act 1964.

(a) Section 2(a) of the Act, 1964 defines "agricultural produce" as under:

> "Agricultural produce" means such items of produce of agriculture, horticulture, viticulture, apiculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, and includes admixture of two or more of such items, and also includes any such item in processed form, and further includes gur, rab, shakkar, khandsari and jaggery."

(b) "Trader" is defined under Clause (y) of the Section 2 as under:

> "Trader" means a person who in the ordinary course of business is engaged in buying or selling agricultural produce as a principal or as a duly authorised agent of one or more principals and includes a person, engaged in processing of agricultural produce."

(c) Section 9 of the Act 1964 excludes the application of the Act on purchase of agricultural produce for "domestic consumption":

> "(1) As from the date of declaration of an area as Market Area no local body or other person shall, within the Market Area, set up, establish or continue, or allow to be set up, established or continued, any place for the sale purchase, storage, weighment or processing of the specified agricultural produce, except under and in accordance with the conditions of a licence granted by the Committee concerned, anything to the contrary contained in any other law, custom usage or agreement notwithstanding:
>
> Provided that the provisions of this sub-section shall not apply to a producer in respect of agricultural produce produced, reared, caught or processed by him or to any person who purchases or stores any agricultural produce for his *domestic consumption*.
>
> (2) No person shall, in a Principal market Yard or any Sub-Market Yard, carry on business or work as a trader, broker, commission agent, warehouseman, weighman, palledar or in such other capacity as may be prescribed, in respect of any specified agricultural produce except under and in accordance with the conditions of a licence obtained therefore from the Committee concerned."

(d) Section 17 of the Act 1964 empowers the Committee to issue, renew, suspend or cancel a licence, and to levy and collect market fee. However, the proviso thereto reads as under:

> "Provided that no market fee or development cess shall be levied or collected on the *retail sale of any specified agricultural produce* where such sale is made to the *consumer for his domestic consumption only."*
>
> (Emphasis added)

(e) Section 37 of the Act, 1964 further empowers the Committee to impose penalty on a person who contravenes

any of the provision contained in Section 9 of the Act 1964 or the Rules 1965.

(f) Rule 70 of the Rules 1965 reads as under:

"Licensing by the Market Committee (Section 17(i) – (1) The Market Committee shall ……call upon all Local Bodies and other persons wishing to set up, establish or continue any place for the sale, purchase, storage, weighment or processing of the specified agricultural produce, in the Market Area, and shall likewise call upon all Traders, Commission Agents, Brokers, Warehouseman, Weighmen, Measures, Palledars and other persons handling or dealing in specified agricultural produce, in the Market Yards, to apply for a licence under sub Section (1) of Section 9 or Sub Section (2) of Section 9 of the Act, as the case may be, in such form as may be specified by the Market Committee in its bye-laws, within a period of fifteen days from the date of publication of the said notice.

Provided that the provisions of this sub-rule shall not apply to a producer in respect of agricultural produce produced, reared, caught or processed by him and to any person who purchases or stores any agricultural produce for his domestic consumption."

10. The cumulative effect of combined reading of the aforesaid statutory provisions comes to the effect that sale of the specified agricultural produce from any place in the market area is prohibited unless the person concerned has a licence. The statute provides for an exception of having a licence or from paying the market fee if the sale of an agricultural produce is made to a person for his "domestic consumption" in "retail sale".

11. Indisputably, the aforesaid produce purchased by respondent company are agricultural produce. In view of the circular dated 18.4.1988, issued by the appellant, a retail trader

cannot sell any specified agricultural produce to any person more than the prescribed limit therein. The said circular fixed the maximum quantity of an agricultural produce which the retail dealer can sell to an individual for domestic consumption. The Circular issued under the Rules 1965 prescribes the limit of sale to an individual and storage of the agricultural produces, by the retailer:

Retailer could sell to an individual	**Retailer can purchase**
Gur- 20 Kg. Amla- 5 Kg. Ghee- 4 Kg.	Gur- 10 Quintals Amla-1 Quintal Ghee- 50 Kg.

12. In *G. Giridhar Prabhu & Ors. v. Agricultural Produce Market Committee,* AIR 2001 SC 1363, this Court considered similar provisions under the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966, wherein the Court was concerned with the term "trader" contained therein. After considering earlier judgments of this Court, particularly, in *H.P. Marketing Board & Ors. v. Shankar Trading Co. Pvt. Ltd. & Ors.,* (1997) 2 SCC 496; and *Vijayalaxmi Cashew Co. & Ors. v. Dy. CTO & Anr.,* (1996) 1 SCC 468 etc., the Court held that transaction by a "trader" includes processing, manufacturing and selling. Therefore, a trader who buys a particular agricultural produce, subjects it to selling or manufacturing process and brings into existence a different agricultural produce would cease to be a trader. The Court held as under:

"……The definition of the term "trader" is not a restrictive definition. It is not restricted to a person who only buys. *If a person buys for domestic or personal consumption, then he would not be a trader.* It is only when a person buys for the *purpose of selling or processing or manufacturing that he would become a trader.* Thus a person may buy,

process or manufacture and then sell. When he processes or manufactures notified agricultural produce which he had bought, it may change its character and become *another notified agricultural produce.* Thus, by way of examples, a person may buy milk and through processes make them into butter and/or cheese or a person may buy hides and skins and by a process make it into leather. *However, merely because a distinct and separate notified agricultural produce comes into existence does not mean that the person who bought, processed and sold ceases to be a trader.* The term "trader" encumbrances (sic embraces) not just the purchase transaction but the entire transaction of purchase, processing, manufacturing and selling."

(Emphasis supplied)

13. In *The State of A.P. v. M/s. H. Abdul Bakhi and Bros.,* AIR 1965 SC 531, while dealing with a similar issue, i.e. defining `Dealer' under the provisions of Andhra Pradesh General Sales Tax Act, 1950, held that a person who buys goods for consumption in a process of manufacturing is also a dealer. The Court held that a person who consumes a commodity purchased by him in the course of his trade, or use in manufacturing another commodity for sale, could be regarded as a `Dealer'.

14. In *Krishi Upaj Mandi Samiti & Ors. v. Orient Paper & Industries Ltd.,* (1995) 1 SCC 655, the similar provisions of M.P. Krishi Upaj Mandi Adhiniyam, 1973, were considered by this Court. In the said case, the question arose as to whether the market fee can be levied on agricultural produce brought for sale or sold in the market area in case the mill did not produce the agricultural produce for sale but produce them for use as its raw material for manufacturing the end product. That was a case where the bamboos were purchased for manufacturing of paper. The Court held that once the agricultural

produce is brought in the market area and sold therein, it becomes liable to be levied with market fee, as no person can be permitted for sale or purchase of the agricultural produce within the market area without a licence even a raw material for manufacturing some other product. The Court further held as under:

"…..It is immaterial for this purpose whether the bamboos are purchased by the respondent-Mills for selling them or *for using them as their raw material in the manufacture of paper.* The liability of the respondent-Mills to pay the market fees is in no way negated on that account…."

(Emphasis added)

15. This case stands squarely covered by the judgment of Constitution Bench of this Court in *Ram Chandra Kailash Kumar & Co. & Ors. v. State of U.P. & Anr.,* AIR 1980 SC 1124, wherein the provision of the Act 1964, which is involved in the instant case was considered and the Court held as under:

"If paddy is purchased in a particular market area by a rice miller and the same paddy is converted into rice and sold then the rice miller will be liable to pay market fee on his purchase of paddy from the agriculturist-producer under sub-clause (2) of Section 17 (iii) (b). He cannot be asked to pay market fee over again under sub-clause (3) in relation to the transaction of rice. Nor will it be open to the Market Committee to choose between either of the two n the example just given. Market fee has to be levied and collected in relation to the transaction of paddy alone."

16. In *Virendra Kumar & Ors. v. Krishi Utpadan Mandi Samiti & Ors.,* (1987) 4 SCC 454, this Court considered a case where it was claimed that petitioners had been producers in respect of agricultural produce (khandsari), and thus they were not required to take out any license under Section 9(1) of the Act 1964. This court rejected the argument observing that

Section 9(1) would not be applicable to a producer of agricultural produce only in case the producer processed, reared, or caught for *domestic consumption*. In case the agricultural produce is not for domestic consumption, but for sale thereafter in the market area, such a producer will not come within the exception of Section 9(1) of the Act 1964.

17. In view of the above, we are of the considered opinion that as the retail trader cannot sell the agricultural produce in quantity more than prescribed in the circular and also such retailer himself cannot purchase and store more than prescribed in the circular, therefore, the meaning of "domestic consumption" has to be understood in such restricted sense. Thus, meaning thereby for personal use i.e. for the use of family members of the purchaser and not for any production activity, otherwise prescribing the limits of purchase and storage by the retail trader becomes redundant. The parties could not bring to the notice of the High Court the relevant provisions of the Act 1964 which were necessary to be considered to adjudicate upon the issue in controversy. Purchase of agricultural produce in bulk cannot be termed to have been made for "domestic consumption." The Court cannot travel beyond the pleadings. The meaning of "domestic trade" and "foreign trade", had not been in issue in the instant case. The "domestic consumption" under the Act 1964 has to be given a very restricted and limited meaning i.e. for personal use of the purchaser, i.e. for the consumption by the family and not for commercial and industrial activities.

18. Shri Subramonium Prasad, learned counsel appearing for the respondents, has placed very heavy reliance upon the judgment of this Court in *M/s. Kesarwani Zarda Bhandar v. State of Uttar Pradesh & Ors.,* AIR 2008 SC 2733, wherein it has been held that market fee is leviable on *specified* agricultural produce and not on agricultural produce simplicitor. Zarda, the end product of the manufacturing process is not a specified agricultural produce and it can be subjected to

payment of market fee provided it is held to be "Tobacco". Zafrani Zarda, does not answer the description of *specified agricultural produce* as defined under Section 2(a) of the Act. If it is held that Zafrani Zarda is merely a processed form of "Tobacco", it could be subjected to levy of market fee, but if it is manufactured it would not.

The aforesaid judgment has no application in the instant case for the reason that issue involved in this case is relating to requirement of having a license under Section 9(2) of the Act 1964 for the purchase of a specified agricultural produce from the market area. The appellants have never asked the respondent company to pay market fee on the end product Chawanprash.

19. In view of the above, we are of the considered opinion that as the respondent-company buys specified agricultural produce from the market area and it is not meant for domestic consumption, the company is required to take license under Section 9(2) of the Act 1964.

20. In such a fact-situation, appeal is allowed. The impugned judgment and order dated 14.7.2003 passed by the High Court of Allahabad in Writ Petition No.12372 of 2003 is hereby set aside. No costs.

B.B.B. Appeal allowed.

##NEXT FILE

COROMANDEL INDAG PRODUCTS (P) LTD.

v.

GARUDA CHIT & TRADING CO. P. LTD. & ANR.

(Civil Appeal No. 7021 of 2003)

AUGUST 16, 2011

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

SPECIFIC RELIEF ACT, 1963*: s.16(c) – Specific performance – Respondent-vendor agreed to sell its property to the appellant – In terms of agreement of sale, an advance of Rs.2 lacs was paid and the balance was payable in three short intervals – Respondent was required to furnish the documents of title and income tax clearance certificate – Appellant requested the respondent to furnish solvency certificate and exemption certificate from urban land ceiling authorities which were not furnished by respondent – Suit for specific performance by appellant – Held: It is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract – Respondent explained the urgency and the need to sell the property and dire need of money for their commercial transactions – An advance of Rs. 2 lakhs was made and further sums were paid in short intervals and time for completion of transaction was extended – The payment of money in short intervals and also the extension of time for completion of the transaction within the prescribed period clearly showed that both the parties wanted to complete the transaction as early as possible without further extension and the parties intended to treat the time as essence of the contract – The matter got delayed only due to the non-production of exemption certificate from urban land ceiling authorities – In the Agreement there was no specific reference to the production of an order from the competent authority under the*

Urban Land Ceiling Act with regard to exemption – The lawyers of the appellant had perused all the relevant documents and on their advise, draft sale deed was prepared and that too after proper inspection of the site and building – The information sought for by the appellant was only to delay the transaction – Appellant failed to prove that it was always ready and willing to perform in terms of s.16(c) of the Act – Suit for specific performance liable to be dismissed.

The appellant-company required property for establishing Research and Development Centre. Respondent-company desired to sell its property measuring 12 grounds 33 sq. feet with buildings. The appellant offered a price of Rs.82 lacs which was accepted by the respondent for sale of its property. The agreement of sale was executed between them on 28.8.1981 and an advance of Rs.2 lacs was paid. The appellant called upon the respondents to furnish the documents of title, the details of the encumbrances on the property, if any and also Income Tax Clearance Certificate as provided in the agreement of sale. The respondents furnished the Income Tax Clearance Certificate and promised to furnish the other required documents very soon. They further demanded a further payment of Rs.10 lacs to which the appellant did not agree. As the respondents did not furnish the required documents, the appellant again called upon the respondents to furnish the required documents. Instead of furnishing the documents, the respondents called upon the appellant to expedite the sale. Thereafter, the appellant requested the respondents to furnish the solvency certificate and exemption certificate from urban land ceiling authorities. The respondents did not furnish the documents till the end of 1981 and the appellant filed a suit for specific performance before the High Court.

The Single Judge of the High Court decreed the suit